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**Support Measures for Child Witnesses in  
Criminal Proceedings in Ireland**

**A thesis submitted for the  
Degree of Doctor of Philosophy in Law by**

**Miriam Delahunt BL**

**Research Supervisor: Dr. Liz Heffernan**

**2016**



*phd  
Law*

**THESIS**

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## Summary

Recent constitutional, legislative and cultural changes have encompassed a significant restructuring of the rights framework for the child in Irish society. This thesis explores how this has affected the child witness in criminal proceedings and whether Ireland is fulfilling its constitutional and international rights obligations in this regard. It examines the extent of the protection of the child witness through appropriate support measures in criminal proceedings and the evolution of these protections, particularly over the last century. The thesis also examines the competence and compellability of the child witness as this is a fundamental issue which directly affects the extent to which the child witness is heard in criminal proceedings.

In addition, this thesis explores the practical implementation and use of support measures for child witnesses in criminal proceedings with comparative analysis to other adversarial jurisdictions where appropriate. It focuses on the primary support measures in this jurisdiction – the use of video link and the use of pre-trial recorded testimony. It also examines the support measure of intermediaries and contrasts its virtual non-use in this jurisdiction with the recent intensive development of that support measure in England and Wales. Ultimately, it considers whether the primary legislative provisions work in practice to support the witness. The thesis asserts that Ireland could do significantly more to assist the child witness without infringing the rights of the defendant. It examines the potential for future reform and recommends proposals to facilitate the child witness in the future. The scope of the thesis includes children who may appear in court to give evidence as complainant or witness but not as defendant. As the legislation specifically differentiates between these categories, this is explored in detail.

The research undertaken for this research was doctrinal in nature as well as incorporating a limited empirical element. It was developed through standard library research methods as well as legal research conducted via internet and electronic databases including Westlaw IE, Westlaw UK, Justis and Hein Online. Relevant legislation and case law were identified and downloaded from the official websites of the respective jurisdictional legislatures. Research was also conducted directly by interviewing members of An Garda Síochána, The Bar Council of Ireland, the Law Society, the Office of the Director of Public Prosecutions as well as social workers from St. Louise's Unit (Our Lady's Children's Hospital, Crumlin) and St. Clare's Unit (Children's University Hospital, Temple St). Trials involving the use of support measures were observed and the relevant counsel interviewed regarding the issues concerned.

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## **1.0.0 Chapter I - Introduction**

1.0.1 The evolving rights of the child witness have led to the development of increased support measures in the criminal justice system. This has had a significant effect on the trial process both for the defendant and for the child witness. This thesis will explore the support measures available to him or her and their practical implications in the trial process in terms of child protection within the criminal justice system. This will be balanced against the right of the defendant to a fair trial. It will also examine in detail the primary support measures of video link, intermediaries and recorded testimony which are the central legislative measures available to the child witness in this jurisdiction. The thesis will examine the issue of competence and compellability of the child witness as well as reviewing how ancillary support measures may reinforce principal support measures in this jurisdiction.

1.0.2 The central theme of this thesis is motivated by the need to improve the criminal process in order to reduce attrition in the prosecution of cases involving child complainants and child witnesses. The use of appropriate support measures may provide protection of the child witness from any potential harm as well as maximise the evidence given. The thesis considers whether the primary legislative provisions work in practice to support the witness. The support measures which these legislative provisions provide, form an intrinsic part of the trial process. Their provision should not be confused with a bias towards the child witness and what he or she might need to say on the witness stand in order to secure a conviction. Ideal facilitation of the child witness should mean that child witness will be able to look back on the criminal process and feel that his or her voice was heard, that he or she was supported in an appropriate manner in order to give the best evidence possible and that his or her role in the criminal justice system was respected and acknowledged. These factors may be achieved regardless of whether the defendant is convicted or not. A focus of the thesis is also on the right of the defendant to a fair trial and how the current suite of support measures accord with that right.

### *1.1.0 The Child Witness*

1.1.1 Whether as a complainant or witness, when asked to give testimony in a criminal trial, the child witness is faced with a set of circumstances which, when taken together, are the antithesis of ideal facilitation of the cognitive and behavioural characteristics in giving his or her best evidence. The scope of the thesis includes children under 18 years of age, who may appear in court to give evidence as complainant or witness but not as defendant. The role of the child defendant in the trial process and their ancillary rights and protections are significantly different to that of the child witness and child complainant. It is not within the scope of this thesis to explore and analyse the protections of the child defendant at trial. The legislation for support measures specifically differentiates between the category of child witness and child complainant and so the thesis focuses on these categories. In the witness box, the child is presented with austere surroundings, unfamiliar procedures as well as imposing figures of authority. He or she must deal with complex language structures, strange vocabulary and, in a concentrated and sustained cross-examination, the child must face the challenge of being disbelieved, of being accused of lying, of fantasising and of being prone, due to the frailties of his or her immaturity, of being in error.<sup>1</sup> As Spencer states:

The problems, in brief, are these. First, the child victim, however young, is expected like an adult to tell its embarrassing tale in open court in front of judge, jury, court officials, barristers and the alleged attacker, and submit itself to a possibly bullying cross-

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<sup>1</sup> '..... a deep-seated assumption is embedded in society and reflected in our law that young children are unreliable and incompetent witnesses. This assumption, we are satisfied, is erroneous, and inimical to the constitutional rights of young citizens who, although they may not be endowed with an adult's capacity better to withstand the ordeal of giving evidence, have the same right, under Article 40 of the Constitution, to the defence and vindication of their personal rights. Accordingly, in order to defend and vindicate the rights of all young citizens, the State must ensure that there is no removable obstacle barring their access to the Courts. In order properly to vindicate the right of a child to bodily integrity, our laws should ensure that where it is possible for the child to give evidence for the People in a prosecution of his or her alleged abuser, such evidence should be made available.'  
Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) para.7.02 at p.67.

examination. This is a terrifying ordeal for older children, and in the case of very young children it is impracticable even to consider it.<sup>2</sup>

In addressing support measures for child witnesses, it should be noted that many child witnesses may also have disabilities which may require other protections. Any application for support measures may not just relate to the age of the child but also to alleviate any intellectual disabilities that the child may have. Kilcommins et al note that a prevailing thread through the criminal justice system in this jurisdiction is the principle of orality.<sup>3</sup> This principle is at odds with the characteristics of children and of persons with an intellectual disability. Being able to give an intelligible account of events relating to the original event at one time at one place in a context which is stressful and ill adapted to individual needs is not one that sits well with the child witness nor a child or person with an intellectual disability.

1.1.2 The child witness may be overwhelmed by the process of giving evidence in such surroundings and may give limited evidence or be unable to give any evidence at all.<sup>4</sup> The child may misunderstand the nature of the role of being a witness and feel responsible if he or she believes a mistake has been made. The child witness may be anxious as he or she must give evidence in a formal setting in front of strangers. He or she may be concerned about making a mistake or that he or she will not be believed. The child witness may feel that he or she is being disloyal to the defendant, particularly if the defendant is known to the child witness or a family member. The child witness may fear that the defendant will punish him or her for giving evidence against them. The child witness may also believe that he or she is responsible for the offence and also the outcome of the trial. There are many factors

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<sup>2</sup> J.R. Spencer, *Child Witnesses, Video Technology and the Law of Evidence : Part 1* (Criminal Law Review Feb, 76-83;1987)

<sup>3</sup> Claire Edwards, Gillian Harold, and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (UCC/CCJHR) (February 2012) National Disability Authority. Chapter 4 Accessing Justice Through The Courts Para. 4.3 Giving Evidence in Court at page 76. <http://nda.ie/nda-files/Access-to-Justice-for-People-with-Disabilities-as-Victims-of-Crime-in-Ireland1.pdf> (Accessed 3rd May 2016)

<sup>4</sup> See: *R v Wallwork* [1958] 42 CAR 153 where the child complainant was so overwhelmed by the proceedings that when called, she was unable to testify at all. However, the conviction was upheld as there was independent physical evidence of the offence. The case underscored the judicial notion that very young children should not be called to give evidence.

which place the child witness in a difficult and stressful situation when giving evidence and the child witness may not have the emotional or cognitive resources that an adult has in order to help overcome these issues.<sup>5</sup> If the child is unable to testify effectively, the relevant offence is made more difficult, if not impossible, to prosecute as the child's testimony may form a substantial part of the prosecution case.<sup>6</sup> In cases of child sexual abuse, the testimony of the child may be the only significant prosecution evidence in circumstances where the offence took place in private and where there is inconclusive physical evidence<sup>7</sup> or no physical evidence at all.

1.1.3 The potential for the criminal process to cause psychological harm to the child witness has not yet been fully evaluated in this or neighbouring jurisdictions.<sup>8</sup> What research exists relating to the child in the trial process indicates that giving evidence at trial is an extremely negative experience for the child witness.<sup>9</sup> The use of support measures may assist the child witness in giving the best evidence possible while protecting him or her, in as far as this is possible, from the psychological and emotional effects of the trial. In order to facilitate the child witness in giving evidence and to further enable the prosecution of offences which particularly affect children, the solutions sought include widening the remit under which the child witness may be deemed a competent witness and effecting legislative changes to improve the circumstances for child witnesses in which they can testify.

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<sup>5</sup> See: Rachel Casey, 'The Evidence of Child Witnesses-Where Rules of Evidence and the Constitution Collide' (DPhil Thesis, Trinity College Dublin, 2007)

<sup>6</sup> The importance of the witness in the criminal justice system was highlighted in the research contained in 'No Witness, No Justice'.  
'The No Witness, No Justice (NWNJ) project provides an opportunity to test the hypothesis that improving the care of victims and witnesses and enabling them to attend court is an effective means of narrowing the justice gap and increasing public confidence in the criminal justice system (CJS).'  
Criminal Case Management Programme of the Criminal Justice System in the UK is "No Witness, No Justice". (Avail Consulting, 2004)

<sup>7</sup> See: *DPP v Michael O'Brien* [2010] IECCA 103 where there was physical evidence that sexual abuse had occurred but the evidence was inconclusive as to who had perpetrated the abuse. See also *R v Barker* [2010] EWCA Crim 4.

<sup>8</sup> Calls for an evaluation of the experiences of child witnesses have also been made in England and Wales. See Owen Bowcott 'Call for research into effects on children of giving evidence in abuse cases' The Guardian 20<sup>th</sup> March 2013.  
<http://www.theguardian.com/society/2013/mar/20/research-effects-children-evidence-abuse> (Accessed 21<sup>st</sup> September 2015)

<sup>9</sup> The most recent research is outlined in the article, *Child Sex Abuse and the Irish Criminal Justice System* – Graham Connon, Allan Crooks, Alan Carr, Barbara Dooley, Suzanne Guerin, Derek Deasey, Deirdre O'Shea, Imelda Ryan, Anne O'Flaherty - Child Abuse Review (2011) Vol. 20 Issue 2 (Wiley & Co.) pps.102-119.

1.1.4 The importance of the inclusion of the evidence of child witnesses cannot be overstated. Certain characteristics of the prosecution of child sexual abuse may allow the perpetuation of these offences to continue. Cossins notes:

Like many other developed countries, the crime of sexual assault in Australia and England and Wales is characterised by low reporting rates, high attrition rates and low conviction rates at trial,<sup>10</sup> indicating that a sex offence is one of the most difficult crimes to investigate and prosecute. It is likely that the feedback effect of low conviction rates at trial influences the type of cases that police and prosecutors will investigate and prosecute, as well as the low guilty plea rate for those charged with a sex offence compared to other offences.<sup>11</sup>

1.1.5 These patterns are also a concern in this jurisdiction<sup>12</sup> and a recent report increased doubts as to the veracity of the scale of reported offences against children. Significant reporting errors in this jurisdiction were outlined in the Garda Inspectorate Report, published in 2012.<sup>13</sup> The report stated that there were flaws in record keeping that resulted in 65% of sexual crimes against children being omitted in official crime figures. In respect of offences that actually proceed to trial, the

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<sup>10</sup> J. Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (Office of Crime Statistics and Research, SA: Adelaide, 2003); L. Ellison, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9 E & P 239; L. Kelly, J. Lovett and L. Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases*, Home Office Research Study No. 293 (Home Office: London, 2005); J. Temkin and B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing: Oxford, 2008) 20-1; J. Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System', *Crime and Justice Bulletin* No. 92 (NSW Bureau of Crime Statistics and Research: Sydney, 2006); K. Daly and B. Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' in M. Tonry (ed.), *Crime and Justice: A Review of Research* (University of Chicago Press: Chicago, IL, 2010) 565.

<sup>11</sup> Annie Cossins, *Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England* (International Journal of Evidence & Proof E. & P. 2013, 17(1), 74-113 (2013).

<sup>12</sup> SAVI research confirmed concerns of underreporting in this area with 47% of survivors never revealing the abuse to another person.

The SAVI Report – Sexual Abuse and Violence in Ireland - *A national study of Irish experiences, beliefs and attitudes concerning sexual violence. Disclosure of abuse to others*

Hannah McGee, Rebecca Garavan, Mairead de Barra, Joanne Byrne and Ronan Conroy of the Health Services Research Centre at the Royal College of Surgeons in Ireland. Sponsored by the Dublin Rape Crisis Centre. *The Sexual and Violence in Ireland (SAVI) Report* (Liffey Press, 2002) at p. 120.

<sup>13</sup> See also *Network of Ireland Statistical Report on Crimes of Child Sexual Violence*, (RCNI 2012) at p. 3. Garda Inspectorate Report, *Responding to Child Sexual Abuse*, (An Garda Síochána) February 2012.

report states that while in England and Wales, 10% of child sexual abuse cases get to court<sup>14</sup> in this jurisdiction, the figure is 5.5%.<sup>15</sup>

1.1.6 Other issues may impact on the prosecution of offences involving child sexual abuse. Most abuse is perpetrated by a person known to the complainant<sup>16</sup> and a dysfunctional nexus of loyalty between the perpetrator and the complainant may secure a silence in respect of any offences which have occurred between them. One of the most significant evidential issues which challenge the prosecution of offences involving children is whether the child can 'swear up' in court i.e. be able to be present and testify at trial. It is contended that difficulties in prosecution enable the perpetuation of offences against children in circumstances where the child is unable to swear up. The difficulties encountered by the child witness at trial are a significant contributory factor to the overall difficulties of prosecution of offences involving children in this and other jurisdictions.<sup>17</sup> The use of support measures may alleviate the difficulties for the child witness and allow them to convey to the court a more detailed account of the offences alleged. However, as will be examined, there is considerable scope to reform the nature, provision and availability of support measures in this jurisdiction.

### **1.2.0 Principal Support Measures**

1.2.1 Principal support measures potentially include the use of live video link, intermediaries and recorded testimony as well as dispensations regarding sworn testimony, identification and corroboration evidence. Ancillary measures impact

<sup>14</sup> Prof. Christiane Sanderson. *The Seduction of Children: Empowering Parents and Teachers to Protect Children from Child Sexual Abuse* at p. 307.

<sup>15</sup> Garda Inspectorate Report, *Responding to Child Sexual Abuse*, (An Garda Síochána) February 2012 (fn 137) at p. 48.

<sup>16</sup> 'The majority of perpetrators of sexual violence are known to the person they perpetrate the abuse against (93%).

*A common pattern emerges when all incidents of abuse disclosed to RCCs (Rape Crisis Centres) are examined by survivors relating to the age of the survivor at the time of the violence.*

- *Survivors who were under the age of 13 when the violence took place most commonly disclosed that the abusers were relatives/family members (45%).*

- *Children aged 13 to 17 were more likely to be abused by non-family members, most commonly friends/acquaintances/neighbours (43%).'*

*National Rape Crisis Statistics*, Rape Crisis Network of Ireland (RCNI 2014) at p. 20.

<http://www.rcni.ie/wp-content/uploads/RCNI-National-Stats-2014.pdf> (Accessed 28th September 2015)

<sup>17</sup> See: Graham Connon, Allan Crooks, Alan Carr, Barbara Dooley, Suzanne Guerin, Derek Deasey, Deirdre O'Shea, Imelda Ryan, Anne O'Flaherty *Child Sex Abuse and the Irish Criminal Justice System*, Child Abuse Review (2011) Vol. 20 Issue 2 (Wiley & Co.) pps.102-119.



less directly with court proceedings but still greatly facilitate the child complainant and the child witness. These measures include the use of screens, court accompaniment, court preparation, witness care units, reporting restrictions, the clearing of the court as well as the use of preliminary or pre-trial hearings.

1.2.2 Historically, the courts have invoked their inherent jurisdiction to find the means by which the child witness can be assisted to give evidence without infringing the fundamental right of the defendant to a fair trial. In one English case of *R v Smellie*<sup>18</sup> the complainant, who was 11 years of age, was intimidated at trial by the presence of the defendant, her father. He was accused of ‘assaulting, ill-treating and neglecting her’.<sup>19</sup> At first hearing, the court ordered the defendant to sit on the stairs going out of the dock while the complainant stood near counsel for the prosecution to give her evidence. The Court of Criminal Appeal stated that for good reason a judge may order the removal of a defendant out of the sight though not out of the hearing of a witness giving evidence. Lord Coleridge J observed:

If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.<sup>20</sup>

1.2.3 This ruling provided for the use of screens, a support measure which has not, as yet, been put on a statutory basis in Ireland but which may be in the near future.<sup>21</sup> In this jurisdiction, support measures for child witnesses are principally contained in the *Criminal Evidence Act 1992* as well as the *Criminal Procedure Act 2010*. In certain instances, technological advances have provided greater opportunities to facilitate the child witness. In this jurisdiction, the *Law Reform Commission Report on Child Sexual Abuse*<sup>22</sup> recommended the use of video link evidence for child

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<sup>18</sup> *R v Smellie* (1920)14 Cr App R 128 (CA) at 128.

<sup>19</sup> *R v Smellie* (1920)14 Cr App R 128 (CA).

<sup>20</sup> *R v Smellie* (1920)14 Cr App R 128 (CA) at 130.

<sup>21</sup> As a result of the required implementation by November 2016 of the *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* (14.11.2012 OJ L 315/57) legislation has been drafted, but not published, which, after almost one hundred years after the first use of the provision, will place the use of screens on a statutory basis. See: S.14A *Giving of Evidence Behind Screens, Criminal Justice (Victims of Crime) Bill 2015*.

<sup>22</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990).

witnesses in order that the physical distance it would create would alleviate the stress for the child witness. This support measure was given statutory expression in s.13 of the *Criminal Evidence Act 1992*<sup>23</sup> and was just one of a number of support measures established by that Act.<sup>24</sup> Another support measure it contained also relied on technological advances and the use of recorded testimony is provided for in s.16 of the *Criminal Evidence Act 1992*. The Act also included statutory provision for the use of an intermediary in limited circumstances.<sup>25</sup>

1.2.4 Competence and corroboration issues are dealt with under ss. 27 and 28 of the *Criminal Evidence Act 1992*. These provisions have widened the parameters of the admission of the evidence of witnesses whose competence may be in issue. This has been particularly significant in respect of the taking of the oath by a child witness. Prior to legislative changes in 1885<sup>26</sup> and 1908,<sup>27</sup> a child who was unable to explain what taking the oath meant, was unable to give formal sworn testimony as he or she was deemed to be incompetent. With the legislative changes brought about by the *Criminal Law Amendment Act 1885* and the *Children Act 1908*, a child's unsworn testimony could be admitted in the prosecution of certain offences. The conditions regarding the admission of this evidence were that it must be corroborated by the sworn testimony of another witness and a mandatory corroboration warning given to the jury by the trial judge. The circumstances regarding the admission of unsworn testimony have been extended since the *Children Act 1908*. S.27 of the *Criminal Evidence Act 1992* facilitates the admission of unsworn testimony for child witnesses under 14. Provisions for the relaxation of corroboration requirements are also included under s.28 of the *Criminal Evidence Act 1992* which allows for the unsworn testimony of one witness to corroborate the unsworn testimony of another

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<sup>23</sup> S. 13 *Evidence through television link*, *Criminal Evidence Act 1992*. Although the statutory provision terms the support measure 'television link', it is submitted that the term 'video link' has gained greater currency in common usage. Therefore it is this term which shall be used in this thesis.

<sup>24</sup> The support measures described above are available only in respect of certain offences. S.12 *Criminal Evidence Act 1992* provides that the support measures are only available in respect of certain offences including sexual offences, violent offences and offences contained in the *Child Trafficking and Pornography Act 1998* and the *Criminal Law (Human Trafficking) Act 2008*.

<sup>25</sup> S.14 *Evidence through intermediary*, *Criminal Evidence Act 1992*.

<sup>26</sup> S.4 *Defilement of girl under thirteen years of age* *Criminal Law Amendment Act 1885* allowed for the admission of the unsworn testimony of the victim and for the testimony of a witness of 'tender years'.

<sup>27</sup> S.30 of the *Children Act 1908* widened the accommodation of unsworn testimony to offences under Part 1 of the *Children Act 1908* itself, to certain offences under the *Offences Against the Person Act 1861* as well as to certain offences under the *Criminal Law Amendment Act 1885* if, "in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

witness. This is particularly significant where there are multiple child complainants who may now corroborate each other's testimony. S.28 also provides that any warning to the jury concerning uncorroborated evidence is now discretionary and may take any form that the judge prefers.<sup>28</sup>

1.2.5 Resolving the difficulties which face the child witness in the witness box has serious implications for the right of the defendant to a fair trial. Any legislative development whose goal is that of facilitating the child witness in giving evidence may falter in the face of a serious infringement of the rights of the defendant to a trial in due course of law under Article 38.1 of the Constitution of Ireland 1937. As the provision for, and use of support measures has developed, constitutional challenges have taken place in the High Court<sup>29</sup> and Supreme Court<sup>30</sup> both of which dealt with the use of s.13 *Criminal Evidence Act 1992* and the giving of evidence via video link. Both challenges failed but the cases are extremely important as they have established parameters as to how the courts may facilitate the child witness while protecting the constitutional rights of the defendant. The giving of evidence via video link under s. 13 *Criminal Evidence Act 1992* is now frequently used for child witnesses giving evidence in this jurisdiction.

1.2.6 It is difficult to comprehend the extent of the cultural changes in recent years concerning how the evidence of children is admitted at trial. Legislative and procedural developments in this jurisdiction have reflected advances in England and Wales.<sup>31</sup> Descriptions of these changes by practitioners and commentators there may be relevant for this jurisdiction. Hoyano and Keenan state:

Until the last decade, English law accepted without question that the evidence of all children, and all complainants of sexual assault regardless of age, must be regarded with deep scepticism. The perception has been that children are prone to fantasy, that they are suggestible; and that their evidence is inaccurate, even though these sweeping

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<sup>28</sup> S.28 *Criminal Evidence Act 1992*.

<sup>29</sup> *White v Ireland* [1995] 1 IR 268.

<sup>30</sup> *Donnelly v Ireland* 1 IR 321; [1998] 1 ILRM 402 (SC).

<sup>31</sup> See: *Criminal Justice Act 1988* (as amended by the *Criminal Justice Act 1991*); Also *Youth Justice and Criminal Evidence Act 1999* (as amended by the *Coroners and Justice Act 2009*) which provides a wide range of support measures for vulnerable witnesses.

assumptions have been challenged by empirical psychological studies of children's reliability as witnesses. The equally unfounded assumption that females are prone to fabricate allegations of sexual assault has imposed a double burden of suspicion on female children who disclose sexual abuse.<sup>32</sup>

1.2.7 The development and use of support measures for child witnesses in the criminal justice system appear to have undermined lingering prejudices regarding the reliability of the child witness.<sup>33</sup> With the facilitation of support measures, the stress associated with the trial procedure may be reduced. This may make the circumstances easier for the child to give evidence at trial where child witnesses might have been overwhelmed by the trial environment in the past.<sup>34</sup> It may also allow the testimony of child witnesses to be more coherent and effective, for example, in conveying greater detail regarding the relevant offences. This is extremely significant in cases where children have figured predominantly particularly in relation to offences involving sexual abuse and violence.<sup>35</sup>

<sup>32</sup> Laura Hoyano and Caroline Keenan, *Child Abuse, Law and Policy Across Boundaries* (Oxford University Press 2010) Chapter 6 at p. 530.

<sup>33</sup> Fennell notes that "[T]his particular "exceptional" provision once introduced (the 1992 Act) and sanctioned (*Donnelly v Ireland*) became normalised as the facility to give evidence through a live television link granted to children and other vulnerable witnesses was extended by the *Criminal Justice Act*, s.39, to a person other than the accused with leave of the court."

Caroline Fennell, *The Law of Evidence In Ireland* (3<sup>rd</sup> edn. Bloomsbury Professional 2009) para 5.28 at p. 201.

<sup>34</sup> See: *R v Wallwork* [1958] 42 CAR 153 where the child complainant was so overwhelmed by the proceedings that when called, she was unable to testify at all.

<sup>35</sup> Report of the Ferns Inquiry, "*The Ferns Report*", (October 2005); The Commission to Inquire into Child Abuse, '*The Ryan Report*' (May 2009); Report by Commission of Investigation into Catholic Archdiocese of Dublin "*The Murphy Report*" (November 2009).

In 2002 the SAVI prevalence study found that one in four males (24%) and three in ten females (30%) in Ireland will experience sexual violence of some form in their childhood.

The SAVI Report – Sexual Abuse and Violence in Ireland - *A national study of Irish experiences, beliefs and attitudes concerning sexual violence.*

Hannah McGee, Rebecca Garavan, Mairead de Barra, Joanne Byrne and Ronan Conroy of the Health Services Research Centre at the Royal College of Surgeons in Ireland. Sponsored by the Dublin Rape Crisis Centre. The Sexual and Violence in Ireland (SAVI) Report (Liffey Press, 2002) at p.152.

*In 7 per cent of 286 cases referred to social work teams, domestic violence was the main reason for the referral. In a further 19 per cent of cases, domestic violence was also cited as a child protection concern; this increased to 32% upon investigation.* Fergus Hogan, Marie O'Reilly *Listening to Children: Children's Stories of Domestic Violence* (October 2007) (Office of the Minister for Children) at p.12.

*'In 2013, 17,254 calls were answered by the Women's Aid helpline. Of these 98 per cent were women. There were 3,207 disclosures of direct child abuse. This figure includes 2,836 disclosures of direct emotional abuse and 260 disclosures where children were physically or sexually abused by the perpetrator of their mother's abuse. It also includes 111 disclosures of where children were being abused during access visits.'* *Abuse of Children*, Women's Aid Statistics, Women's Aid Annual Report, (2013) para.1.5 at p. 16.

### *1.3.0 Eligibility for Support Measures*

1.3.1 The support measures which are available in this jurisdiction under the *Criminal Evidence Act 1992* do not extend to all children nor to any offence. The eligibility for the primary support measures of video link, intermediaries and recorded testimony is dependent on three factors: the age of the witness, the nature of the offence and/or whether the child is a victim of the offence or a witness to the offence. The original focus of the use of support measures in this jurisdiction was on the prosecution of sexual offences and violent offences<sup>36</sup> and it is clear from an examination of the relevant Dáil debates that the objective of the legislation was to make it easier for children to give evidence in cases of physical and sexual abuse.<sup>37</sup>

1.3.2 There is no mention as to why support measures were not legislatively eligible for all children in all proceedings. It may be due in part to the constitutional right of a defendant to a trial in due course of law which involves the right to cross-examine the witness<sup>38</sup> and the implications which accommodating the evidence of children may have on the exercise of these rights. This will be explored below particularly in relation to the relevant case law.<sup>39</sup>

### *1.4.0 Age Eligibility*

1.4.1 The eligibility of the child complainant and the child witness to avail of the appropriate support measures will be dependent on the age outlined by the provision.

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<sup>36</sup> *Criminal Evidence Act 1992* (as originally enacted)

S.12.—This Part applies to—

(a) a sexual offence,

(b) an offence involving violence or the threat of violence to a person, or

(c) an offence consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a) or (b).

<sup>37</sup> *'The Bill .... makes it easier for children and persons with mental handicap to give evidence in cases of physical or sexual abuse.....At present there are serious difficulties where children are required as prosecution witnesses in cases of physical or sexual abuse. The child may be too young to give evidence at all and no prosecution can be taken. Even where the child can give evidence the court appearance may be disturbing and harmful. It involves facing the accused again in the atmosphere of a crowded courtroom. It involves the ordeal of examination and cross-examination. There is sometimes the need to denounce a loved relative and also, perhaps, the possibility of a future threat from the accused. Understandably, there is a desire to shield children from such an experience, often leading to a failure to report or prosecute the crime. That situation encourages further abuse.'*

Padraig Flynn, Minister for Justice, *Criminal Evidence Bill*, Dáil Debates, Tuesday, 3 March 1992. Vol. 416 No. 6 Col.1284.

<sup>38</sup> *The State (Healy) v Donoghue* [1976] 1IR 325; *In re Haughey* [1971] I.R. 217.

<sup>39</sup> See Chapter II – *The Protection of the Child Witness within the Criminal Justice System* at para 2.0.0.

The majority of the support measures outlined under the *Criminal Evidence Act 1992* are available to children under 18 years of age at time of trial. At commencement, the age requirement for the majority of offences in the Act was 17, mirroring the recommendations of the *Law Reform Commission Consultation Paper and Report on Child Sexual Abuse*<sup>40</sup> as well as the legislative provisions in England and Wales<sup>41</sup> However, s.257 of the *Children Act 2001* has since amended the appropriate sections, raising the age requirement from under 17 to under 18.<sup>42</sup>

1.4.2 In general terms, the definition of a child in criminal law is a person under 18 as outlined in *The Children Act 2001*.<sup>43</sup> The sections requiring the age requirement of below 18 years of age<sup>44</sup> at trial are s. 13 (1) (a) for the giving of evidence via video link, s.14 (1) (b) in respect of the giving of evidence via an intermediary, s. 15 (1) (b), concerning the disclosure of video recordings of deposition testimony and s16 (1) (a), involving the admission of recorded deposition testimony. However, for s.16(1)(b) of the *Criminal Evidence Act 1992*, the recording of evidence in chief testimony, the age eligibility of the section is that the complaint is under 14 years of age at the time of interview.<sup>45</sup> This aligns with the provision of s.27 *Criminal Evidence Act 1992* which includes the significant facility of the admission of unsworn evidence of children under 14 years of age.

1.4.3 The age eligibility for each provision will be examined separately in relation to each support measure. While the age requirements of the provision provide for age eligibility, age is not an automatic qualifying requirement for use of the support measure. Application must be made for the support measure to be used at trial and an admissibility ruling may only be made after consideration of the evidence in light

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<sup>40</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990).  
<sup>41</sup> S.32 *Criminal Justice Act 1988* (England and Wales), which provided for the giving of evidence via video link for children under 17.

<sup>42</sup> 'The said Part III and section 22 (which relates to compellability of spouses to give evidence at instance of prosecution in certain cases) of the Act of 1992 are hereby amended by the deletion of "17 years" wherever it occurs and the substitution of "18 years".'  
S.257 (3) *Children Act 2001*.

<sup>43</sup> 'Interpretation (General)'  
S.3 *The Children Act 2001*.

<sup>44</sup> Provisions which were previously available to persons under 17 in the *Criminal Act 1992* were amended from the age of 17 to the age of 18 under s.257(3) *Children Act 2001*.

<sup>45</sup> See *The People (DPP) v JPR* Bill No. CC0057/12 (ex temp.) O'Malley J Central Criminal Court (1st May, 2013) in which O'Malley J confirmed that the eligibility requirement applies at the time of the recording of the statement rather than at the time of the trial. See Garnet Orange BL, *Police Powers In Ireland* (Bloomsbury Press 2013) para 7.38 at p.121.

of the relevant parameters of the appropriate section. These parameters will be examined separately.

### 1.5.0 Offence Eligibility

1.5.1 One of the most significant aspects of the support measures available to the child complainant and the child witness is that they may be limited to the offences outlined in the relevant legislation. Since the legislation for support measures was introduced, offence eligibility has been extended to include child trafficking and pornography offences. The support measures now available under Part III of the *Criminal Evidence Act 1992*, apply to sexual offences, violent offences as well as offences under the *Child Trafficking and Pornography Act 1998* and the *Criminal Law (Human Trafficking) Act 2008*.<sup>46</sup> The categories of sexual offences, for which support measures may be used under the Act, are detailed under s.2 of the Act and encompass legislative changes in other Acts.<sup>47</sup>

1.5.2 The definition of ‘offences involving violence or the threat of violence’ under s. 12(b) is not defined within the Act and unlike the category of ‘sexual offences’ has not been amended. There is wide provision for the use of the support measures

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<sup>46</sup> Part III, s. 12 of the *Criminal Evidence Act 1992* states that the eligible offences comprise:  
(a) a sexual offence,  
(b) an offence involving violence or the threat of violence to a person,  
(c) an offence under section 3, 4, 5 or 6 of the *Child Trafficking and Pornography Act 1998*,  
(d) an offence under section 2, 4 or 7 of the *Criminal Law (Human Trafficking) Act 2008*, or  
(e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c) or (d).  
S.12 *Criminal Evidence Act 1992*.

<sup>47</sup> “Sexual offence” means rape, an offence under section 3 of the *Criminal Law (Sexual Offences) Act, 1993*, sexual assault (within the meaning of section 2 of the *Criminal Law (Rape) (Amendment) Act, 1990*), aggravated assault (within the meaning of section 3 of that Act), rape under section 4 of the *Criminal Law (Rape) (Amendment) Act, 1990*, or an offence under —  
(a) section 3 (as amended by section 8 of the Act of 1935) or 6 (as amended by section 9 of the Act of 1935) of the *Criminal Law Act, 1885*,  
(aa) section 6 (inserted by section 2 of the *Criminal Law (Sexual Offences) (Amendment) Act 2007*) of the *Criminal Law (Sexual Offences) Act 1993*;  
(b) section 4 of the *Criminal Law (Sexual Offences) Act, 1993*,  
(c) section 1 (as amended by section 12 of the *Criminal Justice Act, 1993* and section 5 of the *Criminal Law (Incest Proceedings) Act, 1995*) or 2 (as amended by section 12 of the Act of 1935) of the *Punishment of Incest Act, 1908*,  
(d) section 17 (as amended by section 11 of the Act of 1935) of the *Children Act, 1908*,  
(e) the *Criminal Law (Sexual Offences) Act 2006*;  
(f) section 5 of the *Criminal Law (Sexual Offences) Act, 1993*, excluding an attempt to commit any such offence;  
S.2(1) *Criminal Evidence Act 1992*

within the Act in respect of inchoate offences under S. 12(e) which states that the Act also applies to ‘an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c) or (d).’

1.5.3 The support measures contained in the Act can therefore be termed ‘offence eligible’ in relation to the parameters outlined by s.2 and s.12 of the *Criminal Evidence Act 1992*. While the offences outlined are, arguably, the predominant offences from which a child complainant should be protected, they exclude certain offences such as neglect or psychological abuse or any offence which contains no element of violence or threat of violence, as a particular offence, such as theft or fraud.

1.5.4 There has been no major revision of the law in relation to how children give evidence since the *Criminal Evidence Act 1992*. The *EU Directive on Establishing Minimum Standards on the Rights, Support and Protection and Victims of Crime* was enacted in October 2012, came into force in November 2012 and domestic legislation was due to be implemented in Ireland by the 16<sup>th</sup> November 2015.<sup>48</sup> The *Criminal Evidence Act 1992* will be amended if the *Criminal Justice (Victims of Crime) Bill 2015* and the *Criminal Law (Sexual Offences) Bill 2015* are commenced as currently drafted. These Bills include proposals to include the use of screens, extend the removal of wigs and gowns<sup>49</sup> and extend the current offence and age eligibility for the use of recorded testimony under s. 16(1)(b) of the *Criminal Evidence Act 1992*.

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<sup>48</sup> ‘Chapter 6 Final Provisions Article 27, Transposition’

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 16 November 2015.

EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 14.11.2012 OJ L 315/57.

The *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015* has been drafted but was not commenced by the deadline and until domestic legislation is enacted, the Directive thereby takes direct effect.

<sup>49</sup> This provision is currently only provided for in tandem with the use of video link under s.13 *Criminal Evidence Act 1992*.



### ***1.6.0 Child Complainant and Child Witness Eligibility***

1.6.1 One characteristic of the legislative provisions for support measures in this jurisdiction is the fact that while certain provisions are available to child witnesses in general, such as the support measures of video link<sup>50</sup> or intermediaries,<sup>51</sup> certain provisions such as the recording of evidence in chief testimony under s.16(1)(b) of the *Criminal Evidence Act 1992* are only available to the complainant of the offence i.e. the child victim of the alleged offence. In addition, provisions such as s.13 and s.14 in respect of video link and intermediaries, expressly exclude the child defendant from the ambit of eligibility.<sup>52</sup>

1.6.2 It follows that for the purposes of the examination of support measures the use of the terms ‘child complainant’ and ‘child witnesses’ have different meanings. A child complainant, the alleged victim of the proceedings, will be included in the category of eligible child witnesses. However, the converse is not invariably true; not all child witnesses are eligible for the same support measures to which ‘child complainants’ are entitled. The general term ‘child witnesses’ will be used and where necessary, specific references will be made to ‘child complainants.’

### ***1.7.0 Other support measures***

1.7.1 In the course of the thesis other support measures will be referred to but these will not be its focus as they do not significantly impact the traditional court procedures or the interaction between the court and the child witness while he or she is giving evidence. At present, in this jurisdiction, a child witness who is under 14 years of age may give his or her evidence unsworn.<sup>53</sup> That evidence does not require corroboration<sup>54</sup> and may corroborate other unsworn evidence.<sup>55</sup> There is no obligation on the trial judge to give a warning to the jury in the event that the evidence is uncorroborated.<sup>56</sup> The court may dispense with the usual identification

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<sup>50</sup> S.13 *Criminal Evidence Act 1992*.

<sup>51</sup> S.14 *Criminal Evidence Act 1992*.

<sup>52</sup> The term used in both provisions is ‘other than the accused’. See ‘*Appendices*’ for the relevant provisions.

<sup>53</sup> S.27 (1) *Criminal Evidence Act 1992*.

<sup>54</sup> S.28 (1) *Criminal Evidence Act 1992*.

<sup>55</sup> S.28 (3) *Criminal Evidence Act 1992*.

<sup>56</sup> S.28 (2) *Criminal Evidence Act 1992*.

requirements where the witness is testifying via video link and where other evidence can be presented at court to show that the accused is known to the witness or has been identified at an identity parade.<sup>57</sup> In cases involving child complainants, the court may, in certain circumstances, order the entire case to be heard ‘*in camera*’ so that persons who are not connected with the case are excluded from the courtroom.<sup>58</sup> The trial judge may clear the court of persons not connected with a case when a child is giving evidence.<sup>59</sup> The court may also order that reporting restrictions will apply where a child is a witness or a complainant in any proceedings.<sup>60</sup> A child witness may have access to court accompaniment which will provide for support within the court environment<sup>61</sup> and a pre-trial court visit may be arranged so that he or she will be familiar with the court environment before giving evidence. Post-conviction, a child witness giving a victim impact statement may give it through an intermediary and/or through video link.<sup>62</sup> These support measures may not be as prominent as the primary support measures but create a benevolent framework in which the child witness may operate within the criminal justice system more effectively.

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<sup>57</sup> S.18 Criminal Evidence Act 1992.

<sup>58</sup> See Section ‘In Camera Hearings, Exclusion of the Public, Clearing of the Court while giving Evidence’ at para.8.2.0.

<sup>59</sup> S.257 Children Act 2001. See also ‘In Camera Hearings, Exclusion of the Public, Clearing of the Court while giving Evidence’ at para.8.2.0.

<sup>60</sup> S.252 Children Act 2001. See also ‘In Camera Hearings, Exclusion of the Public, Clearing of the Court while giving Evidence’ at para.8.2.0.

<sup>61</sup> See: *Victims Charter and Guide to the Criminal Justice System*. Victims of Crime Office, Dept. of Justice, Equality and Law Reform at p. 5.

<http://www.victimsofcrimeoffice.ie/en/vco/Entire%20Charter.pdf/Files/Entire%20Charter.pdf>. (Accessed 21<sup>st</sup> September 2015).

Court Accompaniment Court Services (CASS), Children at Risk in Ireland.

<http://www.cari.ie/our-services/cass-court-accompaniament-support-service> (Accessed 21st September 2015).

<sup>62</sup> ss.5 and 6 of the Criminal Procedure Act 2010.

## 2.0.0 Chapter II – The Protection of the Child Witness within the Criminal Justice System

### 2.1.0 Introduction

2.1.1 It is now recognised that, within the criminal justice system, the investigative and trial process may cause serious harm to the child witness. This increasing awareness of the dangers of secondary victimisation, where the investigative and trial process may cause as much if not more harm to the child witness than that caused by the original incident, has led to calls<sup>63</sup> for enhanced levels of child protection within the criminal justice system.<sup>64</sup>

There needs to be awareness that we ask a great deal of children who have been victims of or witnesses to crime to participate in what I believe is a very adversarial system. It is a system designed for adults, not for children. We expect young children and adolescents to take part in a process that many adults find complex, confusing and intimidating. . . . It is important that the criminal justice system adapts its practice to recognise the developmental stages and the needs of child witnesses so as to ensure they are sensitively treated throughout both the investigative and the trial process. In order to do this, the system must operate from an understanding of children and child development.<sup>65</sup>

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<sup>63</sup> See *Final Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children* at p.12.

[http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports\\_2008/FinalReport2010.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/FinalReport2010.pdf) (Accessed 28th September 2015).

*J. Doak, Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publishing, 2008), pp.52–53, relies upon empirical studies between 1991 and 2004, including studies from the US and elsewhere with different advocacy styles, to criticise the 'secondary victimisation' inflicted by the English adversarial system as referenced by Laura Hoyano *Reforming the adversarial trial for vulnerable witnesses and defendants*, *Criminal Law Review* Crim. L.R. 2015, 2, 107-129;

<sup>64</sup> Laura Hoyano *Reforming the adversarial trial for vulnerable witnesses and defendants*, *Criminal Law Review* Crim. L.R. 2015, 2, 107-129;

<sup>65</sup> Dr Imelda Ryan, Consultant Child and Adolescent Psychiatrist, Director of St Louise's Child Sexual Abuse Assessment and Treatment Unit at Our Lady's Hospital for Sick Children, Crumlin. See *Final Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children* at p.12.

2.1.2 The *Joint Oireachtas Committee on Child Protection Report*<sup>66</sup> has clearly outlined the difficulties in protecting the child within the criminal justice system in Ireland particularly in respect of cross-examination which can be particularly difficult for children who may not understand and be able to detach from the obligation of the defence counsel to challenge his or her testimony.

The concern is, naturally, that, if appropriate limits are not set on the necessary right of cross-examination, the making of complaints of child sexual abuse will be discouraged. It appears to the Committee that, to some extent, that is already happening. Questioned by Deputy John Curran, Dr Imelda Ryan told the committee that “[a]part from decisions of the DPP, many cases do not go forward because parents absolutely refuse to allow children to go before the criminal justice system to give evidence. The reason they give is that they do not want to put the child through a process which they perceive will be hostile and alien.”<sup>67</sup>

2.1.3 The difficulties within the criminal justice system may then dissuade those responsible for making the decision from allowing the child to give evidence. Alternatively, if a complaint is made to An Garda Síochána and it becomes apparent that the process is negatively affecting the child, the family may withdraw the child from the process. These decisions result in a false picture of reporting of child sexual abuse as well as a high attrition rate within the process. In addition, the recent issues with data retention within An Garda Síochána may give a false picture of levels of offences against or witnessed by children in this jurisdiction.<sup>68</sup>

2.1.4. The Report observed that if this refusal to allow children to participate in the criminal justice system was already very prevalent prior to the recent changes in the

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[http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports\\_2008/FinalReport2010.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/FinalReport2010.pdf) (Accessed 30<sup>th</sup> April 2016).

<sup>66</sup> *Joint Oireachtas Committee Report on Child Protection (November 2006) Chapter 11 at page 66.*

<sup>67</sup> *Joint Oireachtas Committee Report on Child Protection (November 2006) Chapter 11 at page 66.*

<sup>68</sup> Garda Inspectorate Report, *Responding to Child Sexual Abuse*, (An Garda Síochána) February 2012. See above at para. 1.1.5

law, it becomes necessary to examine those changes to see how they may have made the situation worse and, if so, to consider how that can be remedied.<sup>69</sup>

2.1.5 In the aftermath of the decision in *CC v Ireland*,<sup>70</sup> the Report noted the observations of Micheal McDowell. Speaking at the Second Stage of the passage of the Criminal Justice Act 2006 Bill, the Minister for Justice, Equality and Law Reform, Deputy Michael McDowell, noted that allowing the defence of honest belief would necessitate a far rigorous challenge to the testimony of the child witness.

On all these issues their truthfulness and credibility will be rigorously tested by skilled lawyers acting for perpetrators and alleged perpetrators with a view to creating a reasonable doubt about the private state of knowledge or belief of the accused. That is the consequence of the Supreme Court decision.”<sup>71</sup>

2.1.6 The final *Report of the Joint Oireachtas Committee on Child Protection*<sup>72</sup> observes the progress that has been made in terms of protecting the child within the trial process<sup>73</sup> but also proposes certain measures which would better protect the child witness.

A number of submissions recommended the prohibition of personal cross-examination by the accused (to be effected by removing the right of an accused in such cases to represent himself). It was also suggested that the scope of cross-examination be limited in different ways, in particular in a number of cases by preventing cross-examination as to previous sexual history. It was also suggested that good-practice guidelines for cross-examination be introduced. There was one suggestion that the *Criminal Law*

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<sup>69</sup> *Joint Oireachtas Committee Report on Child Protection (November 2006) Chapter 11 at page 66.*

<sup>70</sup> *CC v Ireland*, [2006] 4 IR 1.

<sup>71</sup> Dáil Debates, 2nd June, 2006 (Vol. 621, No. 1) col. 3

<sup>72</sup> *Joint Oireachtas Committee Report on Child Protection (November 2006) Chapter 11 at page 66.*

<sup>73</sup> *Joint Oireachtas Committee Report on Child Protection (November 2006) Chapter 11 at page 66.*

(*Sexual Offences*) Act, 2006 be reviewed and that safeguards be added to avoid inappropriate cross-examination.<sup>74</sup>

2.1.7. In light of this, it is noteworthy that the *Criminal Law (Sexual Offences) Bill 2015* contains a proposal to prohibit or restrict the personal cross-examination of child witnesses by the accused,<sup>75</sup> along with other protections for child witnesses at trial.<sup>76</sup> It is clear that The Final Reports of the *Joint Oireachtas Committee on Child Protection*<sup>77</sup> and the *Joint Oireachtas Committee on the Constitutional Amendment on Children*<sup>78</sup> have influenced and strengthened the protections for child witnesses being developed through statute. In particular, the explanatory memorandum to the *Criminal Law (Sexual Offences) Bill 2015* states that one of the main purposes of the Bill is:

To give effect to recommendations made by two Oireachtas committees – the Joint Committee on Child Protection and the Joint Committee on the Constitutional Amendment on Children;<sup>79</sup>

2.1.8 In addition to this, *The EU Directive on Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*<sup>80</sup> has necessitated the drafting of the *Criminal Justice (Victims of Crime) Bill 2015* which will, if and when enacted, develop further the protections for the child within the trial process. However, it is important to note that these Reports were written within an enhanced protective framework for the child, a framework which has seen significant changes over the last fifty years. Ultimately, with the use of recorded testimony under s.16(1)(b) *Criminal Evidence Act 1992*, there appears to be a recognition that the traditional trial environment is not conducive for the child witness to give his or her best evidence. It could be foreseen in this jurisdiction that at some point in the future the ‘live’ child

<sup>74</sup> Joint Oireachtas Committee Report on Child Protection (November 2006) Chapter 11.9.1 at page 72.

<sup>75</sup> S.33 Criminal Law (Sexual Offences) Bill 2015.

<sup>76</sup> S.35 Criminal Law (Sexual Offences) Bill 2015, which will amend the Criminal Evidence Act 1992.

<sup>77</sup> Joint Oireachtas Committee Report on Child Protection (November 2006)

<sup>78</sup> Joint Oireachtas Committee Report on the Constitutional Amendment on Children (February 2010)

<sup>79</sup> Explanatory Memorandum, Criminal Law (Sexual Offences) Bill 2015.

<sup>80</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029> (Accessed 28th September 2015)

witness could be taken out of the trial process entirely through the taking of full pre-recorded evidence. This development is currently being piloted in England and Wales under s.29 *Youth Justice and Criminal Evidence Act 1999* but at time of writing had not been rolled out on a national basis, as results from the pilot areas of Liverpool, Leeds and Kingston on Thames are still being evaluated.<sup>81</sup> No draft legislation in this jurisdiction includes such a proposal, but it could be seen as a logical development in the interests of child protection and in order to reduce attrition rates in the prosecution of cases involving child witnesses, particularly in light of the very serious issue of long delays which may occur in such cases coming on for trial – an issue which is discussed below.<sup>82</sup>

## 2.2.0 Constitutional Rights: Pre- Constitutional Amendment

2.2.1 The evolution of the child from the position of a vulnerable chattel in need of protection to an inherent constitutional rights holder within the State is not an easy one. Carolan notes that, prior to the Children’s Right Referendum, the rights of the child were solely exercised through the parents of the child.<sup>83</sup> Children were recognised only as products of a marital family unit instead of citizens in their own right. The Constitution, regarding Articles 41<sup>84</sup> and 42<sup>85</sup>, characterised the family as the primary unit of society and the child as an entity to be cared for and educated by the family. Hogan and White have noted the difficulty of the courts in balancing the rights of the child within the constitutional rights of the family.<sup>86</sup> Parents have a higher level of rights accorded to them. This has given rise to difficulties, as

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<sup>81</sup> See below at Para 6.10.4

<sup>82</sup> For trial waiting times see The Courts Services Annual Report (Courts Services 2014) ‘Waiting times as at 31st December 2014’ at p. 61. See Observed Proceedings, Chapter 3 below at 3.0.0.

<sup>83</sup> Gene Carolan, *Their Day in Court : The Right of Children to be heard in Judicial Matters affecting them – Part I*, Irish Law Times, 2013,31,103-106 at p. 103.

<sup>84</sup> Article 41, (*The Family*), *The Constitution of Ireland*, 1937.

<sup>85</sup> Article 42, (*Education*), *The Constitution of Ireland*, 1937.

<sup>86</sup> ‘The constitutional rights of a child under the age of reason are exercised by the choice of its parent or legally recognised guardian, subject, however, to the power of the courts by appropriate proceedings to overrule that choice in the dominant interest of the welfare of the child.’  
J M Kelly *The Irish Constitution*, Eds. GW Hogan, GF Whyte 4th Edition (Tottel Publishing 2006) para 7.1.52 at p. 1268.

reflected in certain child abuse cases such as the Kilkenny incest case,<sup>87</sup> the report of which states:

We feel that the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children.<sup>88</sup>

2.2.2 Carolan notes that the evolution of the legal status of the child from property of the father, to property of the marital family, to the present idea of children as individuals in their own sense with rights of their own has been slow<sup>89</sup> and cites Blake in noting that this evolution still poses a 'challenge to the legal systems of many societies'.<sup>90</sup>

2.2.3 The development of children's rights in constitutional terms in this jurisdiction predominantly attaches itself to the area of family law. The wishes of the child in terms of custody arrangements are particularly significant with regards to court proceedings. While the courts outlined the rights of the child in the adoption case of *G. v An Bórd Uchtala and Others*,<sup>91</sup> it has also emphasised that these rights are executed under the auspices of the parents. This was echoed in *The State (at the Prosecution of KM and RD) v The Minister for Foreign Affairs, Marie Burke and The Attorney General*.<sup>92</sup> Considering the unenumerated right to travel regarding the custody of a child, Finlay P stated that where the court was dealing with a child who was under the age of reason, such a personal right, as under Article 40.3.2,<sup>93</sup> must be

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<sup>87</sup> 'On March 1st, 1993, at the Central Criminal Court, a forty-eight year old County Kilkenny father of two was given a seven year jail sentence, having pleaded guilty at an earlier court hearing to six charges of rape, incest and assault from a total of fifty six charges covering the period 1976 to 1991. The case received considerable media interest due to the fact that the physical and sexual abuse which had been ongoing for a fifteen year period. At the court hearing on the 1st March, it emerged that the victim had had a number of hospital admissions over the years for the treatment of serious physical injuries and had been in contact with health professionals including general practitioners, social workers and public health nurses.'

*Kilkenny Incest Investigation Report*, (Dublin: Government Stationary Office, 1993) at p. 9.

<sup>88</sup> *Kilkenny Incest Investigation Report*, (Dublin: Government Stationary Office, 1993) at p. 96.

<sup>89</sup> Gene Carolan, *Their Day in Court: The Right of Children to be heard in Judicial Matters affecting them - Part I*, *Irish Law Times*, 2013,31,103-106 at p. 104.

<sup>90</sup> Teresa Blake, 'The United Nations Convention on the Rights of the Child' (1999) 9 I.L.T. 114.

<sup>91</sup> *G. v An Bórd Uchtala and Others*, [1979] 113 I.L.T.R 25 at 48.

<sup>92</sup> *The State (at the Prosecution of K. M. and R.D.) v The Minister for Foreign Affairs, Marie Burke and The Attorney General* [1979]1IR 73.

<sup>93</sup> Article 40.3 1° states:



construed in the light of the exercise of that right by the choice of his or her parent, parents or legal guardians 'subject always to the right of the Courts by appropriate proceedings to deny that choice in the dominant interest of the welfare of the child.'<sup>94</sup> Furthermore, Ellis J held in *PW and AW*,<sup>95</sup> that the child has the personal right, under Article 40.3 to have his or her welfare regarded as the paramount consideration in any dispute as to its custody, a right which additionally arises from 'the Christian and democratic nature of the State.'<sup>96</sup>

2.2.4 Parkes notes that, traditionally, family proceedings did not include the views of the child in order that he or she should be sheltered from parental conflict. It was also presumed that children lacked the capacity to participate in these decisions and thus, as a result, it was felt that they were best kept out of the decision-making process.<sup>97</sup> Parkes concludes that Ireland now has a responsibility under Article 12 of the *Convention on the Rights of the Child* (CRC) to ensure that children have a voice in family law decisions which concern them and advocates legislative provisions for mediation which would comply with Article 12 of the CRC.<sup>98</sup>

2.2.5 In criminal proceedings, the balance of rights, in the context of this thesis, is between those of the accused, the child witness and society at large. In this jurisdiction, the balancing of the rights of the accused against the rights of the child witness was examined in *White v Ireland*.<sup>99</sup> Kinlen J held that an accused did not have a constitutional right to require a witness who was giving evidence against him or her to be physically present in court but went on to state that if he was wrong on this point, any such right had to yield to the rights of young child witnesses to be protected.<sup>100</sup> However, it was clearly stated in the Supreme Court judgment of

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'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'

The Constitution of Ireland 1937.

<sup>94</sup> *The State (at the Prosecution of K. M. and R.D.) v The Minister for Foreign Affairs, Marie Burke and The Attorney General* [1979]1IR 73 at p. 81.

<sup>95</sup> *PW v AW* (21 April 1980) HC.

<sup>96</sup> *PW v AW* (21 April 1980) HC.

<sup>97</sup> Dr. Aisling Parkes, *Beyond the Courtroom: Enhancing Family Law Mediation using the Voice of the Child*, [2013]1 I JFL, 4-11 at p. 7.

<sup>98</sup> Dr. Aisling Parkes, *Beyond the Courtroom: Enhancing Family Law Mediation using the Voice of the Child*, [2013]1 I JFL, 4-11 at p. 13.

<sup>99</sup> *White v Ireland* [1995] I IR 268.

<sup>100</sup> JM Kelly *The Irish Constitution*, Eds. GW Hogan, GF Whyte 4th Edition (Tottel Publishing 2006) para 7.1.93 at p. 1289.

*Donnelly v Ireland*<sup>101</sup> that were a hierarchy of constitutional rights to exist, the right of an accused person to a fair trial is a superior right.<sup>102</sup> The implication of this is that where the any particular facilitation of the evidence of a child witness infringes the right of the defendant to a fair trial, that facilitation is unconstitutional.

2.2.6 Any right that a child witness be heard in criminal proceedings and for his or her best interests to be protected in these proceedings, will have to be asserted in the courts under Article 42A and international documents such as the *UN Convention on the Rights of the Child*. How these rights may be asserted procedurally is discussed below.

### **2.3.0 Constitutional Rights: Post –Constitutional Amendment**

2.3.1 The Children’s Rights Referendum was held on the 10<sup>th</sup> November 2012 and it was passed with a low turnout and a small majority.<sup>103</sup> A challenge was taken by Ms. Joanna Jordan regarding the biased nature of the government literature which, she asserted, resulted in the passing of the Referendum. The challenge having failed both in the High Court<sup>104</sup> and the Supreme Court,<sup>105</sup> Article 42A has now been inserted into the Constitution. The main focus of the new article is on the rights of children in custody cases and it does not address the specific rights of children in criminal and immigration contexts. It does outline a general underpinning of children’s rights in the Constitution. Article 42A.1 states:

<sup>101</sup> *Donnelly v Ireland* 1 IR 321; [1998] 1 IRLM 402 (SC);

<sup>102</sup> *Donnelly v Ireland* 1 IR 321 as per Hamilton CJ at p. 348.

<sup>103</sup> Fionnan Sheehan, ‘*Children’s Referendum passed by thin margin of 58pc to 42pc*’, *The Irish Independent* 3rd December 2012; Harry McGee ‘*Why the referendum was closer than predicted*’, *The Irish Times*, 13<sup>th</sup> November, 2012. Stephen Collins ‘*Turnout third lowest on record at just over 33%*’ *The Irish Times* 12<sup>th</sup> November 2012.

<sup>104</sup> *Jordan v Attorney General* [2013] IEHC 625.

<sup>105</sup> ‘*Supreme Court rejects appeal on Children’s Referendum*’

*The Irish Times*, Friday 24th April 2015.

<http://www.irishtimes.com/news/crime-and-law/supreme-court-rejects-appeal-on-children-s-referendum-1.2187741> (Accessed 27th April 2015)

The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.<sup>106</sup>

2.3.2 The focus of Article 42A is on custody and care proceedings. It includes provision to be made by law for the State, in exceptional circumstances, to take the place of the parents and to allow for the adoption of children where the parents have failed in their duty to the child.<sup>107</sup> Although included in initial drafts of preliminary wordings,<sup>108</sup> the constitutional amendment ultimately refrained from giving the child a voice in all proceedings affecting him or her. As an acknowledgement of children's rights in this jurisdiction, the constitutional amendment is hugely significant. However, the actual rights of the child are not defined within the amendment. It is submitted that to recognise and affirm 'the natural and imprescriptible rights' of all children does not delineate, in any practical manner, what those rights encompass. Forde and Leonard mention the limitations of the envisaged Article 42A stating that what children's 'natural and imprescriptible rights' comprise, is not indicated. They state that laws to safeguard those rights, whatever they may be, are required only 'as far as is practicable' and that there is no truly enforceable obligation to enact such laws.<sup>109</sup>

2.3.3 The wording of the new Article indicates that the best interests of the child will only be given paramount consideration with regard to custody and adoption proceedings. The views of the child shall also be ascertained and given due weight having regard to the age and maturity of the child.<sup>110</sup> There is no equivalent provision for criminal proceedings included in the constitutional text.<sup>111</sup> However, even in respect of the rights of children in custody proceedings, Carolan notes that certain provisions, set out in the amendment, equate to little more than sub-

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<sup>106</sup> Article 42A of the *Constitution of Ireland 1937*.

<sup>107</sup> Article 42A of the *Constitution of Ireland 1937*.

<sup>108</sup> See *Final Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children* at p.12.

[http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports\\_2008/FinalReport2010.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/FinalReport2010.pdf) (Accessed 28th September 2015).

<sup>109</sup> Michael Forde and David Leonard, *Constitutional Law of Ireland*, (3rd Ed.) Bloomsbury Professional 2013) para 4.14 at p. 702.

<sup>110</sup> Article 42A, *Constitution of Ireland 1937*.

<sup>111</sup> See: Dr Liz Heffernan with Úna Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) para. 4.80 at p. 152.

constitutional legislative change.<sup>112</sup> He cites O'Mahony, who has commented that in allowing provision to be made by law, the child will not have a constitutional right to be heard but will instead have a legislative right at a sub-constitutional level.<sup>113</sup>

2.3.4 Ultimately, the issues in relation to children in criminal proceedings are not resolved by the Constitution and the insertion of Article 42A. There may be more practical help available through sources of rights such as the *European Charter on Fundamental Rights*. Heffernan notes that criminal trials are noticeably distinct from a practical standpoint in that children are required to give their evidence directly. She states that the trend is in the opposite direction i.e. through video recorded statements but observes that the right to be heard is multi-dimensional and necessitates consideration of all aspects of the way in which children give their evidence. Heffernan states that this is an evolving issue and the right to be heard may have some impact on future developments.<sup>114</sup>

## 2.4.0 National Legislation

2.4.1 The background to the current legislation concerning the rights, entitlements and obligations of child witnesses lies in pre-1922 legislation. The *Children Act 1908* greatly facilitated the child witness giving evidence by allowing the court to take and admit depositions as evidence<sup>115</sup> and by widening the accommodation of unsworn testimony to offences under Part 1 of the Act itself as well as to certain offences under the *Offences Against the Person Act 1861* and under the *Criminal Law Amendment Act 1885*. This was subject to the proviso:

<sup>112</sup> Gene Carolan, *Their Day in Court: The Right of Children to be heard in Judicial Matters affecting them – Part III*, [2013] 31 Irish Law Times, 135-137.

<sup>113</sup> Recording of Conor O'Mahony as reported by Tom Tuite, "Children's Referendum will change nothing" The Irish Examiner, 5<sup>th</sup> October 2012.  
<http://www.irishexaminer.com/archives/2012/1005/ireland/aposchildrenaposs-referendum-will-change-nothingapos-209924.html> (Accessed 28th September 2015)

<sup>114</sup> Dr Liz Heffernan with Una Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) para. 4.80 at p. 152.

<sup>115</sup> ss 28 and 29 of *Children Act 1908*.

....if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.<sup>116</sup>

2.4.2 The enactment of The *Children Act 1908*, as well as The *Criminal Law (Amendment) Act 1935*, (which provided for offences of strict liability in respect of defilement of girls under 15 and 17),<sup>117</sup> indicated that offences against children were of such importance that specific legislation was required which contained provisions making it easier to prosecute those offences.

2.4.3 However, various policy reports<sup>118</sup> in the late 1980s, indicated that further substantial change was necessary. The *Criminal Evidence Act 1992*, contained drastic changes to the form and manner by which a child could give evidence in criminal proceedings. The provisions of the *Criminal Evidence Act 1992* regarding video link evidence,<sup>119</sup> the use of intermediaries,<sup>120</sup> recorded testimony<sup>121</sup> as well as greater facilitation regarding unsworn testimony are examined in detail elsewhere. The application of competency provisions under s.27 of the *Criminal Evidence Act 1992* is also examined in more detail elsewhere.<sup>122</sup>

2.4.4 While the *Criminal Evidence Act 1992* brought about radical changes in how children gave testimony in court, it remains a fact that there has been minimal reform of the legislative provisions for child witnesses in the interval since the Act was commenced. Although not drafted with child witnesses in mind, certain legislative enactments may be used to facilitate the giving of evidence by children. For example, s.16 of the *Criminal Justice Act 2006*, a provision allowing for the tendering into evidence of pre-trial statements where the witness refused to give

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<sup>116</sup> s.30 of the *Children Act 1908*.

<sup>117</sup> Ss.1 and 2 *Criminal Law (Amendment) Act 1935*.

<sup>118</sup> *The Advisory Group on Video Evidence 'The Pigot Report'* (Home Office UK 1989); *Speaking Up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1988) Para. 11.25 at p. 87; Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August 1989) Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990); The Law Reform Commission Report on Sexual Offences against the Mentally Handicapped. (LRC 33-1990);

<sup>119</sup> s. 13 *Criminal Evidence Act 1992*.

<sup>120</sup> s. 14 *Criminal Evidence Act 1992*.

<sup>121</sup> s. 16 *Criminal Evidence Act 1992*.

<sup>122</sup> See *Chapter IV – Competence, Compellability and Corroboration* at para.4.0.0.

evidence at trial, was successfully invoked by the prosecution where a child complainant was involved. In *DPP v Michael O'Brien*,<sup>123</sup> a child witness refused to give testimony at trial but a video of a pre-trial interview was admitted as evidence at trial under the section and the conviction was upheld on appeal. In addition, the *Criminal Procedure Act 2010* extends the entitlements of the child witness by allowing him or her to give a victim impact statement via video link as well as through an intermediary.<sup>124</sup>

2.4.5 Draft legislation to enhance the protection of child witnesses within the trial process is contained in the *Criminal Law (Sexual Offences) Bill 2015* which amends the *Criminal Evidence Act 1992*, referred to in section 2.1.0. The entry into force of the *EU Directive on Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*<sup>125</sup> will necessitate legislative reform. The current relevant draft legislation is the *Criminal Justice (Victims of Crime) Bill 2015* which will amend and widen the provisions of Part III of the *Criminal Evidence Act 1992*. It remains to be seen what form these draft legislation provisions will take in practice if and when they are commenced.

## 2.5.0 European Union

### 2.6.0 Charter of Fundamental Rights of the European Union.<sup>126</sup>

2.6.1 Specific rights pertaining to the child are outlined in Article 24 of the *Charter of Fundamental Rights of the European Union* ('the Charter').<sup>127</sup> The Charter itself was drafted by the European Convention of the European Union and was proclaimed in 2000 by the European Commission, the Council of Ministers and the European Convention. It sets out a range of rights and obligations to which Member States must adhere. The legal status of the Charter was confirmed under Article 6 of the Treaty of Lisbon which came into force on the 1<sup>st</sup> December 2009. European Union

<sup>123</sup> *DPP v Michael O'Brien* [2010] IECCA 103.

<sup>124</sup> SS.5 and 6 of the *Criminal Procedure Act 2010*.

<sup>125</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*  
<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>. (Accessed 28<sup>th</sup> September 2015).

<sup>126</sup> Article 24 'The Rights of the Child', *The Charter of Fundamental Rights of the European Union*. (2000/C 364/01).

<sup>127</sup> *Charter of Fundamental Rights of the European Union* (2000/C 364/01).

legislation must be compatible with the Charter and where a Member State's legislation is incompatible with the Charter, the European Court of Justice may strike that legislation down.

2.6.2 As to the specific rights delineated for the child under the Charter, there is a general right to protection and wellbeing under Art. 24.1. The same provision also contains the right of the free expression of the child's views. The Article states that the views of the child shall be taken into consideration 'on matters which concern them'. It is interesting to note that the verb 'shall' rather than 'may' is used thereby placing an obligation on the Member States to ensure that this occurs. What these 'matters' involve is not defined within the Charter. However, Article 24.2 of the Charter states that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. The meaning of the term 'best interests' and who defines it, is not outlined within the Charter. It is contended that the use of the word 'primary' limits the effectiveness of the best interests principle as it is only required that it become an important consideration within a range of factors.

2.6.3 In addition to these restrictions within Article 24, the issue as to the weight of the protections under the Charter is in doubt in this jurisdiction. This is because many of the protections already exist in other forms. Donnelly has noted that the Irish courts have stated that they regard the Charter as codifying pre-existing rights rather than creating new ones.<sup>128</sup> She cites the case of *J McB v LE*<sup>129</sup> in the High Court, where McMenamin J observed that he was unable to find any provision of the Charter that carries with it any radical change to the existing sources of law in this area. He also noted that the Preamble to the Charter specifically stated that the rights contained are 'reaffirmed' and that the European Community, as it was at the time, had not yet acceded to the *European Convention on Human Rights* ('*The Convention*').<sup>130</sup>

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<sup>128</sup> Prof. Catherine Donnelly, *The Impact of the Charter of Fundamental Rights of the European Union*, Paper given at Irish Criminal Bar Association conference - 5<sup>th</sup> June 2013 at p. 7.

<sup>129</sup> *J McB v LE* [2010] IEHC 123. For the ruling of the CJEU in this case, see Case C-400/10 PPU *McB v LE* [2011] Fam 364, noted by Prof. Catherine Donnelly, *The Impact of the Charter of Fundamental Rights of the European Union*, Paper given at Irish Criminal Bar Association conference - 5<sup>th</sup> June 2013 at p. 7.

<sup>130</sup> *J McB v LE* [2010] IEHC 123 at 141.

2.6.4 Undoubtedly the incorporation in this jurisdiction of the Convention through the European Convention on Human Rights Act 2003 creates an overlap of rights sourced from both the European Union and the Council of Europe. Donnelly notes that in the Supreme Court, Fennelly J held that the rights guaranteed by the ECHR Article 7 of the Charter corresponded with the rights guaranteed by Article 8 of the Convention and that, in accordance with Article 52.3 of the Charter, the meaning and scope of those rights were the same as those laid down by the Convention.<sup>131</sup> Article 24 of the Charter does specifically give the child explicit rights but a significant difference is that the Convention has been incorporated into domestic legislation through the *European Convention on Human Rights Act 2003*.

2.6.5 Since the establishment of *Council Framework Decision on the Rights of Victims 2001*<sup>132</sup> there has been an advance by the EU towards a specific rights based framework for children. This is clear from a number of recent rights based documents that have emanated from the European Union. The Commission Communication ‘*Towards an EU Strategy on the Rights of the Child*’ was published on the 4<sup>th</sup> July 2006 and its purpose was:

to establish a comprehensive EU strategy to effectively promote and safeguard the rights of the child in the European Union's internal and external policies and to support Member States' efforts in this field.<sup>133</sup>

2.6.6 The EU *Guidelines for the Promotion and Protection of the Rights of the Child* was approved by the Council on 10 December 2007. It includes the objectives of combatting and discouraging violations of children's rights by prohibiting violations of the rights of children and ill-treatment of children, in law, (including criminal law), and by “condemning at the highest level all forms of violations of children's rights, including through their inclusion as offences in criminal law.”<sup>134</sup>

<sup>131</sup> *J McB v LE* [2010] IESC. It should be noted that this case was considered by the Court of Justice in a preliminary reference case: Case C-400/10, 5 October 2010.

<sup>132</sup> Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)

<sup>133</sup> Communication from the Commission Towards an EU Strategy on the Rights of the Child Brussels, 4.7.2006 COM(2006) 367 final {SEC(2006) 888} {SEC(2006) 889} Paragraph 1. *Issues at Stake* at p. 2.

<sup>134</sup> *EU Guidelines for the Promotion and Protection of the Rights of the Child 2007* at para f.



2.6.7 The *EU Agenda for the Rights of the Child*<sup>135</sup> was published on the 15<sup>th</sup> February 2011 and is a commitment by the European Union to ‘to promote, protect and fulfil the rights of the child in all relevant EU policies and actions.’<sup>136</sup> The Agenda notes ‘that when children are involved with justice systems that are not child-friendly, they can be subject to manifold restrictions or violations of their rights.’<sup>137</sup> It also validates the testimony of child witness by stating that ‘child victims should be given the opportunity to play an active part in criminal proceedings so as to have their testimony taken into account.’ It suggests that the ‘use of Information and Communication Technology (ICT) tools, and especially video-conferencing, can allow child victims to take an active part in the proceedings while not being put in direct contact with the accused persons.’<sup>138</sup>

2.6.8 Two recent Directives have direct implications for children in this jurisdiction. These are the *EU Directives on Preventing and Combating Trafficking in Human Beings and Protecting its Victims*<sup>139</sup> and the *EU Directive Combating the Sexual Abuse and Sexual exploitation of Children and Child Pornography*.<sup>140</sup> The *EU Directive on Combating the Sexual Abuse and Sexual exploitation of Children and Child Pornography* is highly significant in that it specifies specific offences and precise minimum penalties for certain child pornography and child exploitation offences. Article 20 relates to the ‘Protection of child victims in criminal investigations and proceedings’ concerning the prosecution of these offences. The provisions set out minimum standards which must be complied with by Member

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<sup>135</sup> *EU Agenda for the Rights of the Child*, (15<sup>th</sup> February 2011) [http://ec.europa.eu/justice/policies/children/docs/com\\_2011\\_60\\_en.pdf](http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf) (Accessed 28th September 2015).

<sup>136</sup> *EU Agenda for the Rights of the Child* (15<sup>th</sup> February 2011). [http://ec.europa.eu/justice/policies/children/docs/com\\_2011\\_60\\_en.pdf](http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf) (Accessed 28th September 2015).

<sup>137</sup> *EU Agenda for the Rights of the Child* (15<sup>th</sup> February 2011) para. 2.1 at p.6. [http://ec.europa.eu/justice/policies/children/docs/com\\_2011\\_60\\_en.pdf](http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf) (Accessed 28th September 2015).

<sup>138</sup> *EU Agenda for the Rights of the Child* (15<sup>th</sup> February 2011) para. 2.1 at p.7. [http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index_en.htm) (Accessed 28th September 2015).

<sup>139</sup> *EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA*. 15.4.2011 OJ L101/1.

<sup>140</sup> *EU Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography*. 17.12.2011 OJ L 335/1.

States in relation to these offences. It has led to amendments to domestic legislation through the *Criminal Law (Human Trafficking) (Amendment) Act 2013*.

2.6.9 Section 16(1)(b) of the *Criminal Evidence Act 1992* allows for the recording of examination in chief evidence for complainants under 14 ( or for complainants who have an intellectual disability who have reached that age). This provision was not commenced until 2008 and was not used at trial until 2010.<sup>141</sup> While there has been no assessment of how effective the provision is in practice, it was given some legitimacy in August 2013 when the parameters of s.16(1)(b) were extended by the *Criminal Law (Human Trafficking) (Amendment) Act 2013*. The provision is now available to witnesses (not only complainants) under 18 in relation to certain offences under the *Child Trafficking and Pornography Act 1998* and the *Criminal Law (Human Trafficking) Act 2008*.

2.6.10 The *EU Directive for establishing Minimum Rights, Supports and Protection for Victims of Crime* was adopted on the 25<sup>th</sup> October 2012 and domestic legislation to implement the Directive should have been brought into force by the 16<sup>th</sup> November 2015. It should be noted that this legislation only pertains to victims and not witnesses in general. The parameters of State obligations in relation to child witnesses are therefore narrowed. Article 24 of the Directive contains specific areas of protection for child victims although the provisions contain caveats. For example, Article 24(a) states that ‘interviews may be recorded’. The use of the word ‘may’ indicates that the Member State could, with sufficient reason, demur from this position. In addition, if a Member State does comply there is no compulsion for it to legislate that all interviews be recorded or that all examination in chief or all cross-examination be recorded. However, there is still a substantial move towards a rights based doctrine for child witnesses through the entry into force of EU legislation which has already been reflected in the relevant legislation such as with recorded testimony and which may influence future legislation concerning child victims.

2.6.11 It remains to be seen how the legislation will be revised in light of the *EU Directive for establishing Minimum Rights, Supports and Protection for Victims of*

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<sup>141</sup> Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act*, *The Bar Review* 2011, 16(1), 2-6.

*Crime* but early draft legislation indicates that the *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015* will amend the *Criminal Evidence Act 1992* widening the provisions for recorded testimony. It appears that Part III of the *Criminal Evidence Act 1992* will be amended piecemeal. It is submitted that the *Criminal Evidence Act 1992* and relevant provisions within other legislation (such as the *Criminal Procedure Act 1967*, *Criminal Procedure Act 2010*, the *Child Trafficking and Pornography Act 1998* and the *Criminal Law (Human Trafficking) Act 2008*) are inadequate at present to uphold the obligations placed on it by EU legislation as they provide insufficient protections for the child witness. *The Criminal Law (Sexual Offences) Bill 2015* does propose further legislative change but the focus in this draft legislation is the widening of sexual offences and the penalties involved.

## 2.7.0 United Nations

### 2.8.0 Universal Declaration of Human Rights

2.8.1 *The Universal Declaration of Human Rights* ('the UDHR') was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 and it offers a broad range of rights to all countries who have adopted the Declaration. The provisions include the right to life,<sup>142</sup> education,<sup>143</sup> freedom of thought and religion<sup>144</sup> and freedom from torture.<sup>145</sup> Children benefit from the overall rights set out in the document but are not its focus. Children are only mentioned specifically in relation to a) the need for special care and assistance during childhood and b) concerning the right of the parents/guardians to choose the form of education for their children.<sup>146</sup>

2.8.2 The UDHR is a resolution of the United Nations General Assembly and therefore is non-binding on its signatories. However, some of the principal rights

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<sup>142</sup> Article 3, *Universal Declaration of Human Rights* (1948).

<sup>143</sup> Article 26, *Universal Declaration of Human Rights* (1948).

<sup>144</sup> Article 18, *Universal Declaration of Human Rights* (1948).

<sup>145</sup> Article 5, *Universal Declaration of Human Rights* (1948).

<sup>146</sup> Article 25(2) states that 'Motherhood and childhood are entitled to special care and assistance' and that 'All children, whether born in or out of wedlock, shall enjoy the same social protection.'

In addition, under Article 26, parents are given the right to choose the education for their children. *Universal Declaration of Human Rights*, (1948).

have been rendered into law through treaties, regional agreements, domestic law and customary international law. It is through these means that human rights can be expressed and guaranteed.<sup>147</sup> To supervise that these rights are upheld, Ireland, as with all countries who have adopted the Declaration, is subject to a Universal Periodic Review (UPR).<sup>148</sup> The UPR Working Group was established by the Human Rights Council in order to safeguard the rights set out by the Universal Declaration of Human Rights and it administers the UPR. In March 2014, Ireland presented a National Interim Report to the Human Rights Council.<sup>149</sup> The report mentions specific provisions which Ireland has established for the protection of the child victim from sexual exploitation and abuse. The Interim Report notes that in December 2013, the Government announced that the *General Scheme of the Criminal Law (Sexual Offences) Bill* would be published in 2014. As outlined by the report, the purpose of the Bill is to improve current legislation concerning the sexual exploitation and abuse of children with provision to include the strengthening the rights of the child giving evidence. Draft legislation such as the *Criminal Law (Sexual Offences) Bill 2015* which was published in 2015 and the *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*, do contain significant provisions both to prevent the sexual exploitation of children and to facilitate the giving of evidence at trial.

2.8.3 Ireland's last review took place in January 2016 and the Report was published on the 9<sup>th</sup> February 2016.<sup>150</sup> It notes the draft legislation which will further protect

<sup>147</sup> The Foundation of International Human Rights Law, *The Universal Declaration of Human Rights*. (1948)

[http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml) (Accessed 21st September 2015).

<sup>148</sup> 'The Universal Periodic Review (UPR) is a unique process which involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council which is based on equal treatment for all countries. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe. Currently, no other mechanism of this kind exists.'

<http://www.ohchr.org/en/hrbodies/upr/p.s/BasicFacts.aspx> (Accessed 21st September 2015).

<sup>149</sup> Universal Periodic Review Ireland: *National Interim Report* (February 2014).

<http://www.upr.ie/> (Accessed 28<sup>th</sup> September 2015).

<sup>150</sup> Universal Periodic Review Ireland (February 2016)[http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/\\$file/National%20Report%20IE%20Cycle%202.pdf](http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/$file/National%20Report%20IE%20Cycle%202.pdf) (Accessed 20<sup>th</sup> May 2016)

the rights of victims under the *Criminal Justice (Victims of Crime) Bill 2015*<sup>151</sup> and the *Criminal Law (Sexual Offences) Bill 2015*.<sup>152</sup>

2.8.4 In terms of enforcing the provisions of the Declaration, the Human Rights Council decides which measures to take if there is consistent non co-operation with the UPR by a Member State. For example, in 2013, the UPR took action in relation to the non co-operation of Israel.<sup>153</sup> It pursued direct engagement with the State with an appeal to it to resume its co-operation.<sup>154</sup> West notes that China devised a National Human Rights Plan while subject to the UPR and observes that while this might not entail implementation of everything advocated for by other States and activists in the course of China's UPR, it represents a positive outcome and demonstrates that the process may exert a tangible impact upon States.<sup>155</sup>

## 2.9.0 UN International Covenant on Civil and Political Rights 1966

2.9.1 *The UN International Covenant on Civil and Political Rights (ICCPR)* was opened for signature on the 16<sup>th</sup> December 1966 and came into force on the 23<sup>rd</sup> March 1976. 168 countries have ratified the Covenant. Ireland signed the Covenant on 1<sup>st</sup> October 1973 and ratified it on the 8<sup>th</sup> December 1989. However, the Covenant has not been incorporated into Irish law. The preamble to the Covenant states:

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political

<sup>151</sup> See paras. 27-29 of the Report. Universal Periodic Review Ireland (February 2016) [http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/\\$file/National%20Report%20IE%20Cycle%202.pdf](http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/$file/National%20Report%20IE%20Cycle%202.pdf) (Accessed 20<sup>th</sup> May 2016).

<sup>152</sup> See paras. 63-66 of the Report. Universal Periodic Review Ireland (February 2016) [http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/\\$file/National%20Report%20IE%20Cycle%202.pdf](http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/$file/National%20Report%20IE%20Cycle%202.pdf) (Accessed 20<sup>th</sup> May 2016).

<sup>153</sup> See: *Report of the Human Rights Council on its Seventh Organizational Meeting* published on the 4<sup>th</sup> January 2013 concerning the non-cooperation of Member State, Israel. [http://ap.ohchr.org/documents/dp\\_e.aspx?si=A/HRC/OM/7/1](http://ap.ohchr.org/documents/dp_e.aspx?si=A/HRC/OM/7/1) (Accessed 21<sup>st</sup> September 2015).

<sup>154</sup> See: *Presentation of the report of the President of Human Rights Council* submitted in accordance with Council decision OM/7/1 of 29 January which outlines the steps taken by the Human Rights Council in relation to its engagement with Israel. 2013 <http://www.ohchr.org/EN/HRBodies/HRC/P.s/Presentation.aspx> (Accessed 21<sup>st</sup> September 2015).

<sup>155</sup> Rebecca West, *Human Rights, Piercing the Veil of State Sovereignty – the role of the Universal Periodic Review in the enforcement of Human Rights*. (2014) 32 I.L.T. 73-76 at p.74.

freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

2.9.2 The ICCPR can be compared to the ECHR as it provides a catalogue of rights which are subject to the supervision of the Human Rights Commissioner. Article 14 states that “All persons shall be equal before the courts and tribunals” thus strengthening the rights of the child witness in a tribunal setting. The ICCPR acts in harmony with the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which was adopted and opened for signature, ratification and accession by the General Assembly on 16th December 1966. It entered into force on the 3rd January 1976. Article 10(3) states that children and young persons should be protected from economic and social exploitation. The Covenant is enforced through a system of State reporting and the Articles are elucidated through the Committee’s General Comments.<sup>156</sup>

### 2.10.0 UN Convention on the Rights of the Child 1989

2.10.1 The Convention is a ground-breaking international treaty which places legal obligations on Member States to act in accordance with the articles of the Convention.<sup>157</sup> To date 194 countries have ratified the Convention.<sup>158</sup> The manner of compliance with the Convention is set out under Article 44<sup>159</sup> and the *Committee on*

<sup>156</sup> The draft *General Comment on Public Spending on the Right of the Child* (11<sup>th</sup> June 2015) is the most recent General Comment.

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11) (Accessed 21<sup>st</sup> September 2015)

<sup>157</sup> There are two optional protocols to the Convention itself which were adopted on 25 May 2000. The First Optional Protocol is the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*. The Second Optional Protocol is the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*. This prohibits the sale of children, child prostitution and child pornography. Both protocols have been ratified by more than 150 states.

See: [http://www.unicef.org/publications/files/option\\_protocol\\_conflict.pdf](http://www.unicef.org/publications/files/option_protocol_conflict.pdf) and [http://www.unicef-irc.org/publications/pdf/optional\\_protocol\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf) (Accessed 21<sup>st</sup> September 2015).

<sup>158</sup> The United States of America has signed the Convention but has not ratified it. <http://indicators.ohchr.org/> (Accessed 21<sup>st</sup> September 2015). Somalia who was the other remaining country not to have ratified the Convention has now ratified it.

‘*Government of Somalia signs instrument of ratification of UN Convention on the Rights of the Child*’ Unicef Press Release, 20<sup>th</sup> January 2015.

<sup>159</sup> Article 44 of the *Convention on the Rights of Children* sets out the time parameters for the submission of State Party reports to the Secretary General of the United Nations. It also outlines what the Report should contain e.g. in relation to the difficulties that the State Party is facing which may affect the fulfilment of

*the Convention of the Rights of the Child*<sup>160</sup> monitors observance of the Convention by State Signatories.

2.10.2 The CRC includes survival rights, development rights, protection rights and participation rights. Children do have certain absolute rights, such as the right not to be subject to capital punishment or torture.<sup>161</sup> A significant right is Article 12(1)<sup>162</sup> which provides that States Parties shall allow the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child. The Article also states that the views of the child be given due weight in accordance with the age and maturity of the child. It states that the child, in particular, should be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>163</sup>

2.10.3 In terms of its relevance to child witnesses, the first report by Ireland to the *Committee on the Convention on the Rights of the Child* was submitted in 1996.<sup>164</sup> It described the positive developments in assisting child witnesses to give evidence in criminal proceedings i.e. via video link.<sup>165</sup> It also outlined the legislative changes which provided for the giving of evidence otherwise than on oath or affirmation for

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the obligations under the Convention. In addition, the report should contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned. Article 44 also states that the report should be made freely available with the State Party itself.

<sup>160</sup> Ireland's first progress report was submitted to the *UN Committee on the Rights of the Child* in 1996. The second progress report was submitted in 2005. Following the establishment of the *Department of Children and Youth Affairs* in June 2011, the Minister directed that a substantial progress report, combining the 3rd and 4th reports, to cover the period 2006 to 2011 inclusive should be submitted to the UN Committee on the Rights of the Child.

<sup>161</sup> Both provisions are contained in Article 37 of the Convention on the Rights of the Child.

<sup>162</sup> Article 12, The Convention on the Right of the Child (1989).

<http://www.ohchr.org/en/professionalinterest/p.s/crc.aspx> (Accessed 21st September 2015).

<sup>163</sup> Article 12, The Convention on the Right of the Child (1989).

<http://www.ohchr.org/en/professionalinterest/p.s/crc.aspx> (Accessed 21st September 2015).

<sup>164</sup> Initial Report to the Committee on the Convention on the Rights of the Child Para. (17<sup>th</sup> June 1996)

[http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/UNrightsofchild/First\\_Report\\_of\\_Ireland1.pdf](http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/UNrightsofchild/First_Report_of_Ireland1.pdf).

(Accessed 21<sup>st</sup> September 2015).

<sup>165</sup> Initial Report to the Committee on the Convention on the Rights of the Child (17<sup>th</sup> June 1996).

Para.125 at p. 34.

[http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/UNrightsofchild/First\\_Report\\_of\\_Ireland1.pdf](http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/UNrightsofchild/First_Report_of_Ireland1.pdf)

(Accessed 21st September 2015)

children under 14<sup>166</sup>. The conditions for child witnesses giving evidence are not directly addressed in the second report, which was submitted in 2005.<sup>167</sup> However, it does describe certain initiatives in relation to the protection of victims of child sexual abuse by An Garda Síochána and the HSE<sup>168</sup>

2.10.4 On the 23rd July, 2013, the Government approved submission of the State's Consolidated 3rd and 4th Reports to the United Nations Committee on the Rights of the Child.<sup>169</sup> The consolidated report includes references to child witnesses and child victims. These are mentioned in two sections i.e., "Measures to promote physical and psychological recovery and reintegration of child victims"<sup>170</sup> and "Children in conflict with the law, victims and witnesses."<sup>171</sup> The first section describes general initiatives regarding the care and treatment of child victims. The latter section predominantly describes developments concerning juvenile justice rather than child witnesses. It also refers to a previous section within the report which describes pertinent legislative developments for the child.<sup>172</sup> The *Criminal Procedure Act 2010* is referred to in this section as it provides for the giving of victim impact statements for children through video link and intermediary. The report however, does not mention any initiatives for the child witness in a criminal hearing.

<sup>166</sup> Initial Report to the Committee on the Convention on the Rights of the Child. (17<sup>th</sup> June 1996) Para. 75 at p. 23.

[http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/UNrightsofchild/First\\_Report\\_of\\_Ireland1.pdf](http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/UNrightsofchild/First_Report_of_Ireland1.pdf) (Accessed 21st September 2015).

<sup>167</sup> Second Report to the UN Committee on the Convention on the Rights of the Child (July 2005).

[http://www.dcy.gov.ie/documents/unrightsofchild/final\\_pdf\\_UNCRC\\_Oct\\_2005.pdf](http://www.dcy.gov.ie/documents/unrightsofchild/final_pdf_UNCRC_Oct_2005.pdf) (Accessed 21st September 2015).

<sup>168</sup> Para 478 of the second report refers to the Special Units of An Garda Síochána which have been put in place for the investigation of sexual abuse. These are in operation in the major centres of population around the country. Para 795 describes the Domestic Violence and Sexual Assault Investigation Unit (DVSAIU) of An Garda Síochána and developments regarding the investigation of sexual offences.

Second Report to the UN Committee on the Convention on the Rights of the Child (July 2005).

[http://www.dcy.gov.ie/documents/unrightsofchild/final\\_pdf\\_UNCRC\\_Oct\\_2005.pdf](http://www.dcy.gov.ie/documents/unrightsofchild/final_pdf_UNCRC_Oct_2005.pdf) (Accessed 21st September 2015)

<sup>169</sup> Ireland's Consolidated 3rd and 4th Reports to the United Nations Committee on the Rights of the Child.

[http://www.dcy.gov.ie/documents/publications/UNCRC\\_2013.pdf](http://www.dcy.gov.ie/documents/publications/UNCRC_2013.pdf) (Accessed 21<sup>st</sup> September 2015).

<sup>170</sup> Section 41 of Ireland's Consolidated 3rd and 4th Reports to the United Nations Committee on the Rights of the Child at p.74. (23<sup>rd</sup> July 2013).

([http://www.dcy.gov.ie/documents/publications/UNCRC\\_2013.pdf](http://www.dcy.gov.ie/documents/publications/UNCRC_2013.pdf)) (Accessed 21<sup>st</sup> September 2015)

<sup>171</sup> Section 8E of Ireland's Consolidated 3rd and 4th Reports to the United Nations Committee on the Rights of the Child at p. 142. ([http://www.dcy.gov.ie/documents/publications/UNCRC\\_2013.pdf](http://www.dcy.gov.ie/documents/publications/UNCRC_2013.pdf)) (Accessed 21<sup>st</sup> September 2015)

<sup>172</sup> Section 8E, Para. 309 referring to Para. 203 *National Legislative Updates*, Ireland's Consolidated 3rd and 4th Reports to the United Nations Committee on the Rights of the Child at p. 36. ([http://www.dcy.gov.ie/documents/publications/UNCRC\\_2013.pdf](http://www.dcy.gov.ie/documents/publications/UNCRC_2013.pdf)) (Accessed 21<sup>st</sup> September 2015).



2.10.5 Concluding Observations<sup>173</sup> concerning Ireland's performance under the Convention,<sup>174</sup> were adopted by the *Committee on the Convention on the Rights of the Child* on the 4<sup>th</sup> February 1998, 29<sup>th</sup> September 2006 and the 14<sup>th</sup> February 2008.<sup>175</sup> The reports give overall feedback in relation to the protection of children's rights under the Convention in Ireland. The Concluding Observations adopted in 2006 are the most relevant in relation to the child witness.<sup>176</sup> They note a lack of consistent data gathering regarding children<sup>177</sup> and it was felt that this deficiency hindered the analysis of the abuse of children. The Concluding Observations also recommended that Ireland ensure that all allegations of child abuse are adequately investigated and prosecuted.<sup>178</sup>

2.10.6 The Convention imposes legal obligations on Member States. However, its policing mechanism is such that a violation of its articles will not impose financial penalties on the offending Member State nor will a violation cause a direct obligation for legislative change. Nevertheless, the cultural change that it has evoked is extremely significant.<sup>179</sup> It is submitted that it has set a standard beneath which any State Party will be embarrassed to fall on a public level.

<sup>173</sup> Concluding Observations from the Committee identify areas of positive and negative issues in relation to the Member State. They also contains recommendations for future action by the Member State. [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRL&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRL&Lang=EN) (Accessed 21<sup>st</sup> September 2015).

<sup>174</sup> Concluding Observations from the Committee identify areas of positive and negative issues in relation to the Member State. They also contains recommendations for future action by the Member State. [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRL&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRL&Lang=EN) (Accessed 21<sup>st</sup> September 2015).

<sup>175</sup> 'Consideration of Reports submitted by State Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict Concluding observations: Ireland'

This report deals with Ireland's adoption of the Optional Protocol in relation to the involvement of children in armed conflict. CRC/C/OPAC/IRL/CO/1 (14 February 2008).

<sup>176</sup> Consideration of Reports submitted by States Parties under Article 44 of the Convention Concluding observations: Ireland' CRC/C/IRL/CO/2 (29 September 2006) Para. 16 at p. 4. [http://www.dcy.gov.ie/documents/unrightsofchild/Concluding\\_Obs\\_by\\_UNCRC\\_on\\_Irelands\\_Second\\_Report.pdf](http://www.dcy.gov.ie/documents/unrightsofchild/Concluding_Obs_by_UNCRC_on_Irelands_Second_Report.pdf). (Accessed 21st September 2015).

<sup>177</sup> Consideration of Reports submitted by States Parties under Article 44 of the Convention Concluding observations: Ireland' CRC/C/IRL/CO/2 (29 September 2006) Para. 16 at p. 4. [http://www.dcy.gov.ie/documents/unrightsofchild/Concluding\\_Obs\\_by\\_UNCRC\\_on\\_Irelands\\_Second\\_Report.pdf](http://www.dcy.gov.ie/documents/unrightsofchild/Concluding_Obs_by_UNCRC_on_Irelands_Second_Report.pdf). (Accessed 21st September 2015).

<sup>178</sup> Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Ireland' CRC/C/IRL/CO/2 (29 September 2006) Para. 37 at p. 8. [http://www.dcy.gov.ie/documents/unrightsofchild/Concluding\\_Obs\\_by\\_UNCRC\\_on\\_Irelands\\_Second\\_Report.pdf](http://www.dcy.gov.ie/documents/unrightsofchild/Concluding_Obs_by_UNCRC_on_Irelands_Second_Report.pdf). (Accessed 21st September 2015).

<sup>179</sup> As Hoyano and Keenan note:

'These international human rights instruments provide persuasive reasons, and at times legal obligations, for initiatives in common law jurisdictions to mitigate the rigours of the adversarial trial'

2.10.7 Certain articles of the Convention, while bolstering the rights of the child in general, may not wholly serve to protect the child in the witness box. This is due to the fact that once a child becomes a witness in judicial or administrative proceedings, there is a significant shift in function which may limit the protections offered by the Convention. For example, Article 12<sup>180</sup> appears to offer definite protection to the child witness in terms of giving the child the right to the expression of his or her views in all matters affecting him or her. This would appear to strengthen the rights of the child in the witness box and give the child the right to give evidence. Yet, in relation to protection of the child witness under Article 12, several questions arise. Firstly, under Article 12.2, the relevant fora for the views of the child to be heard include judicial and administrative proceedings but it is questionable if Article 12 applies in criminal proceedings. Secondly, Article 12.1 states that in all matters ‘affecting the child’, the views of the child are to be given due weight. If Article 12.2 does include criminal proceedings, can the criminal process be truly said to ‘affect’ the child witness? Finally, can the term ‘views of the child’ be correctly said to relate to the evidence of the child?

2.10.8 In parsing these questions, it is useful to look at guidance concerning the Convention. Periodically, the Committee publishes General Comments and these act as general guidance to the Member States in terms of raising and discussing matters which are pertinent to a specific Article. The General Comments are essential in clarifying the Article.

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*process for child and other vulnerable witnesses. They acknowledge that children are not just ‘people in the making’. They are rights holders in their own right. They are not passive participants in society, not should they be perceived as such in the criminal justice system. They are not just forensic problems.’*

Laura Hoyano and Caroline Keenan – *Child Abuse, Law and Policy Across Boundaries* (Oxford University Press 2010) Chapter 8 at p. 617.

Art.12 Convention on the Rights of the Child (1989).

<http://www.ohchr.org/en/professionalinterest/p.s/crc.aspx> (Accessed 21st September 2015).

## 2.11.0 General Comment No. 12 –The Right of the Child to be Heard

2.11.1 Guidance on Article 12 and the right to be heard is contained in General Comment No. 12.<sup>181</sup> In relation to whether judicial and administrative proceedings include criminal proceedings, General Comment No. 12 is clear on this point. It states that:

The Committee emphasises that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies.<sup>182</sup>

2.11.2 Therefore, there is little doubt that judicial and administrative proceedings do, indeed, include criminal proceedings. In relation to the question as to whether the criminal trial could be said to affect the child, this is extremely problematic. While there is no doubt that the child may be emotionally affected by the criminal process, the function of the criminal trial is to determine the guilt or innocence of the accused. Whatever incident has occurred, the actual judicial or administrative criminal proceedings do not directly affect the child in the same way as they might affect a party to the proceedings. The role of the witness in a criminal trial is essentially that of a functionary within the proceedings.<sup>183</sup> The person who will be primarily affected by

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<sup>181</sup> General Comment No.12, The Right of the Child to be heard. (2009) Committee on the Convention on the Rights of the Child.  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11) (Accessed 21<sup>st</sup> September 2015).

<sup>182</sup> General Comment No.12, The Right of the Child to be heard. (2009) Committee on the Convention on the Rights of the Child.  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11) (Accessed 21<sup>st</sup> September 2015).

<sup>183</sup> Hoyano and Keenan note:  
*'The prevailing judicial view is that children are citizens owing duties to society as a whole (including other children), which are appropriate to their years and understanding and are under the same duty as adults to testify in court.'*  
Laura Hoyano and Caroline Keenan– Child Abuse, Law and Policy Across Boundaries (Oxford University Press 2010) Chapter 8 at p. 606.

those proceedings is the accused. While not underestimating how a child witness might be affected by his or her involvement in a criminal trial, the outcome of that trial does not alter the position of the child in a formal or institutional sense.

2.11.3 General Comment No.12 states that the right of the child to freely express views in ‘all matters affecting him or her’ has “to be respected and understood broadly”.<sup>184</sup> The General Comment goes on to state that that it was decided not to define the matters which affect the child by a list that might limit consideration of a child’s or children’s views.<sup>185</sup> It also noted that the child’s views should be heard in accordance with his or her age and maturity and states that the views of the child should not only be listened to but that the question as to whether or not the child is capable of forming these views should be “seriously considered”.<sup>186</sup>

2.11.4 The issue as to whether the child’s views are to be considered in matters affecting him or her is more easily contemplated in custody proceedings. In this jurisdiction, there is no reported case law regarding a reference to Article 12 in criminal proceedings but it has been mentioned in custody proceedings. The courts in *RP v SD*<sup>187</sup> and *MN v. RN*<sup>188</sup> (the principles of which were approved by the Supreme Court in *Bu v Be*<sup>189</sup>) referred to the fact that Article 11(2) of Council Regulation,<sup>190</sup> which provides that the child should be given an opportunity to be heard during proceedings, should be applied having regard, indirectly, to Article 12 of the CRC.<sup>191</sup>

<sup>184</sup> General Comment, No. 12 (2009) Right of the Child to be Heard, Committee on the Rights of the Child at Para 26 at p. 10.

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11) (Accessed 21<sup>st</sup> September 2015).

<sup>185</sup> General Comment, No. 12 (2009) Right of the Child to be Heard, Committee on the Rights of the Child at Para 27 at p. 10.

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11) (Accessed 21<sup>st</sup> September 2015).

<sup>186</sup> General Comment, No. 12 (2009) Right of the Child to be Heard, Committee on the Rights of the Child at Para 28 at p. 11.

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11) (Accessed 21<sup>st</sup> September 2015).

<sup>187</sup> *RP v SD* [2012] IEHC 188; [2012] 5 JIC 0902.

<sup>188</sup> *MN v RN* [2009] 1 I.R. 388, [2012] 5 JIC 0902.

<sup>189</sup> *Bu v Be* [2010] 3 I.R. 737.

<sup>190</sup> Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. (27 November 2003). 23.12.2003 OJ L 338/1.

<sup>191</sup> *RP v SD* [2012] IEHC 188; [2012] 5 JIC 0902 as per Finlay Geoghegan J at p. 4.

2.11.5 While General Comment No. 12 states that the condition of the proceedings should be construed widely, it is submitted that, in fact, it cannot apply to criminal proceedings as the child is not directly affected by the trial. Furthermore, the issue remains as to whether Article 12 recognises in the child witness any rights to give evidence. Article 12 specifically states that the child has a right to freely express his or her views. However, the views of the child are not relevant in terms of the right to give evidence. Under s.27 of the *Criminal Evidence Act 1992*,<sup>192</sup> the issue before the court is whether the witness can give ‘an intelligible account of events material to the proceedings’. The rules of evidence also prevent the admission of opinion evidence.<sup>193</sup> The child must be able to report the events rather than give an expression of his or her views. It is therefore submitted that Article 12 does not give any rights to the child to give his or her evidence in court.

2.11.6 Article 12 does give the child witnesses certain rights in relation to the issues surrounding the giving of his or her evidence. The areas outlined in paragraphs 63 and 64 of General Comment No. 12 relate to aspects of the criminal process for the child victim or witness. They state that the Member State should guarantee that ‘every effort has been made to ensure that a child victim or/and witness is consulted’ on relevant matters and ‘enabled to express freely and in her or his own manner, views and concerns regarding her or his involvement in the judicial process.’<sup>194</sup> In addition, General Comment No. 12 states that the right of the child victim and witness to freely express his or her views is also linked to the right to be informed about relevant issues such as the availability of health, psychological and social services and the availability of protective measures.<sup>195</sup>

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<sup>192</sup> S. 27 of the *Criminal Evidence Act 1992*.

<sup>193</sup> ‘As a general rule, witnesses must limit their testimony to facts within their personal knowledge or perception and are permitted neither to express opinions nor to draw inferences from the facts which form the basis of their testimony.’

Dr Liz Heffernan with Ūna Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) para. 2.39 at p. 27.

General Comment, No. 12 (2009) Right of the Child to be Heard, Committee on the Rights of the Child at Para 63 at p.14.

<sup>195</sup> General Comment, No. 12 (2009) Right of the Child to be Heard, Committee on the Rights of the Child at Para 32 at p.9.

2.11.7 Article 12 is also linked to other Articles contained in the Convention. The child's right to freedom of expression is found in Article 13.1. Under Article 13.2, the exercise of that right may be subject to certain restrictions as provided by law and which are deemed necessary for the respect and reputation of others or for the protection of national security or of public order, public health or morals. A child witness has a general right of expression, and as with all witnesses, he or she does not have an absolute right to appear at trial to give his or her testimony. If not called to give evidence, the child witness will not testify at trial. In addition, the child witness is restricted by the rules of evidence and therefore does not have the benefit of full freedom of expression. It is contended equally that if the child has a right to freedom of expression, then he or she has an equal right not to exercise that freedom. Regarding the right to be heard, General Comment No. 12 states that the child has the right not to exercise this right as the expression of views is a choice for the child, not an obligation.<sup>196</sup>

2.11.8 How and when a child should give evidence is a difficult matter and the best interests of the child must be taken into account. The consideration of the best interests of the child is included in the Convention under Article 3.1 which states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be 'a primary consideration'.<sup>197</sup> General Comment No. 14 *on the Right of the child to have his or her best interests taken as a primary consideration* is very clear that this principle applies in all criminal proceedings.<sup>198</sup> This is not expressly reflected in relevant domestic legislation such as the *Criminal Evidence Act 1992*.<sup>199</sup>

<sup>196</sup> General Comment No. 12 Para 16 at p.6.

<sup>197</sup> Art. 3, Convention on the Rights of the Child. (1989)

<http://www.ohchr.org/en/professionalinterest/p.s/crc.aspx> (Accessed 21st September 2015).

<sup>198</sup> '27. The Committee underlines that "courts" refer to all judicial proceedings, in all instances – whether staffed by professional judges or lay persons – and all relevant procedures concerning children, without restriction. This includes conciliation, mediation and arbitration processes.

28. In criminal cases, the best interests principle applies to children in conflict (i.e. alleged, accused or recognized as having infringed) or in contact (as victims or witnesses) with the law, as well as children affected by the situation of their parents in conflict with the law. The Committee underlines that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.'

General Comment No. 14 *on the Right of the child to have his or her best interests taken as a primary consideration* (29<sup>th</sup> May 2013) at paras. 2(b) 27 and 2(b)28 at p. 8.

2.11.9 While legally binding, it is submitted that in reality the *Convention on the Rights of the Child* is perhaps more of a persuasive document in this jurisdiction. Yet, the cultural change that it has evoked on a widescale level is fundamental. It has set a standard beneath which any State Party will be embarrassed to fall on a public level and infractions will be included in the report to the Committee of the Convention. It is noteworthy that it came into being at a time of significant legislative change for the child witness with the advent of video link evidence in England and Wales through the *Criminal Justice Act 1988* and at the same time as the publication of Report of the Advisory Group on Video Evidence also known as the ‘Pigot Report’, a seminal document in terms of cultural and legislative change on behalf of the child witness.<sup>200</sup> In this jurisdiction, the *Criminal Evidence Act 1992* was inspired, in part, by the *Law Reform Commission Report on Child Sexual Abuse*<sup>201</sup> which contained significant mention of the Pigot Report.<sup>202</sup>

2.11.10 Further guidance was issue by the United Nations through the UN *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* which were published in 2005 by the Economic and Social Council.<sup>203</sup> They outline specific rights for child witnesses. These include the right be protected from hardship during the justice process, the right to be heard and to express views and concerns, the right to effective assistance, and the right to special preventative measures.

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11) (Accessed 28<sup>th</sup> September 2015).

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For further discussion of this principle see below at para.2.25.15.

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*The Advisory Group on Video Evidence ‘The Pigot Report’* (Home Office UK 1989). The Pigot Report made a number of recommendations on behalf of the child witness in certain criminal proceedings including the recording of the child’s evidence in its entirety, the use of child examiners to question the child witness, the admission of unsworn evidence for children under 14 and the prohibition of personal cross-examination by the defendant. These recommendations were revolutionary at the time but have had a significant influence in common law jurisdictions such as Australia, New Zealand and Ireland.

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Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990);

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*The Advisory Group on Video Evidence ‘The Pigot Report’* (Home Office UK 1989).

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*Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*

ECOSOC Resolution 2002/20 of 22 July 2005.

<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf> (Accessed 21<sup>st</sup> September 2015).

## 2.12.0 *The European Convention on Human Rights*

2.12.1 The *European Convention on Human Rights*<sup>204</sup> (ECHR) is highly significant in terms of the reinforcement of rights across State Parties. As with the *Declaration of Human Rights*, the *ECHR* sets out civil and political rights such as the right to life,<sup>205</sup> right to liberty and security,<sup>206</sup> the right to a fair trial<sup>207</sup>, the right to freedom of expression<sup>208</sup> and the right to an effective remedy<sup>209</sup>. But it does not set out specific rights for children. Additional protocols which States may choose to ratify, provide additional protection that affects children in certain ways.<sup>210</sup>

2.12.2 While the ECHR has fortified the rights of the citizens of its Member States, the rights of the child witness have been strengthened predominantly by the judgments of the European Court of Human Rights ('the ECtHR'). These judgments have been instigated mainly where the rights of the defendant have been infringed in circumstances where the defendant has either not been given an opportunity to examine a child witness or asserts that he or she has had insufficient opportunity to examine the witness. The ECtHR has been faced with the difficult task of squaring the rights to a fair trial outlined in Article 6<sup>211</sup> of the ECHR with the State's procedural rules. This is particularly difficult as the ECtHR deals with cases which originate in States with significantly different legal systems, stemming from either a common law or civil law tradition. The manner of treatment of witnesses within the inquisitorial system is wholly different to the adversarial system. In common law trials, the adversarial nature of the proceedings between the prosecution and the defence may give rise to a more combative environment than that of an inquisitorial

<sup>204</sup> *European Convention on Human Rights* (1953).

<sup>205</sup> Article 2, *European Convention on Human Rights* (1953).

<sup>206</sup> Article 5, *European Convention on Human Rights* (1953).

<sup>207</sup> Article 6, *European Convention on Human Rights* (1953).

<sup>208</sup> Article 10, *European Convention on Human Rights* (1953).

<sup>209</sup> Article 13, *European Convention on Human Rights* (1953).

<sup>210</sup> For a complete list of Protocols to the Convention, see

<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG> (Accessed 21<sup>st</sup> September 2015)

<sup>211</sup> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Article 6.1 of the *European Convention on Human Rights* (1953).



system where the judge has greater responsibility for conducting the investigation and questioning witnesses.

2.12.3 The challenge facing the ECtHR with regard to the child witness is that it must harmonise domestic trial procedures in certain State Parties with the precepts of Article 6 of the ECHR which obliges Member States to provide a fair trial for its accused persons. This does not mean that the procedural obligations across the State Parties will be homogenised but rather that essential components of a fair trial procedure will be consistently observed during proceedings. These include giving the defendant the opportunity to challenge the evidence of the complainant or witness even if this is only conducted at a pre-trial stage.

2.12.4 The ECtHR case law which deals with the evidence of child witnesses generally involves an alleged violation of the rights of the defendant Article 6 of the Convention which protects the right to a fair trial in criminal and civil proceedings.<sup>212</sup> One of the most significant aspects of the case law is the margin of appreciation given to the national courts in how they provide for and administer the rules of evidence.<sup>213</sup> A guiding principle is that of the 'Fourth Instance Doctrine'.<sup>214</sup> It is not appropriate for the ECtHR to act as a court of appeal or 'fourth instance' and therefore, there is a wide latitude as to how the national courts may rule on the issues pertaining to the admissibility of evidence.

2.12.5 There is a considerable difficulty in harmonising an approach to the adversarial system and the inquisitorial. In the adversarial system, the witnesses are examined and cross-examined by the parties or their representatives at trial, although additional questions may be put by the judge, while in the inquisitorial system witnesses are

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<sup>212</sup> Article 6.1 of the European Convention on Human Rights (1953).

<sup>213</sup> Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Hart Publishing 2001) para 4.1.3 at p. 235.

<sup>214</sup> 'Fourth instance' applications refer to manifestly ill-founded applications under Article 35(3) of the Convention which provides that "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application;" Fourth instance applications is a term coined by the Court involving applications which regard the Court as an appeal court. The Court has emphasised that it is not a Court of Appeal. See *Garcia Ruiz* (Application no. 30544/96) (ECtHR 21st January 1999).

generally examined by the court.<sup>215</sup> Article 6(3)(d) is intended to ensure, under each system, that the accused is placed on an equal footing with the prosecution as regards the calling and examination of witnesses<sup>216</sup> but it does not give defendants a right to call witnesses without restriction.<sup>217</sup> The ECtHR has set out the parameters in the case of *Doorson v the Netherlands*,<sup>218</sup> which involved the testimony of an anonymous witness, in relation to how it will facilitate the examination of certain witness while ensuring the rights of the accused. In *Doorson*,<sup>219</sup> the ECtHR stated that in exceptional circumstances a criminal conviction may rest on the hearsay statement of a witness whose evidence has not been tested in cross-examination. Since *Doorson*,<sup>220</sup> there has been significant case law which further delineate the principles of that judgment in relation to the evidence of child witnesses.

2.12.6 In criminal proceedings concerning accusations of sexual abuse, where the complainant is a child, the ECtHR has held that certain measures may be taken to protect the child, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.<sup>221</sup> For example in *SN v Sweden*,<sup>222</sup> the ECtHR found no violation of Article 6 (1) and 6(3)(d). In that case, a schoolteacher had been convicted of sexually assaulting her ten-year-old pupil on the evidence recorded in a videotaped interview of the boy conducted by a specially trained police officer. The defendant challenged the conviction on the basis that defence counsel had not attended an interview with M (the complainant). At the time of the proposed meeting, prosecution counsel had been unable to attend and so the meeting had not taken place. The ECtHR held that there was no breach of Article 6 as the meeting could have been rescheduled for a future time and so an opportunity for the defendant to question the child could have been made available. Under Swedish law, child complainants are rarely called to give evidence in court because of the traumatising effect that this might have on them. The ECtHR found that it was sufficient, for the

<sup>215</sup> Bernadette Rainey, Elizabeth Wicks, Clare Ovey in Jacobs, White and Ovey (eds), *The European Convention on Human Rights* (6th edn, Oxford University Press, 2014) at p. 296.

<sup>216</sup> *Bönisch v Austria* (App. 10857/84), (ECtHR) 7 July 1989, Series A No 158,(1990) 12 EHRR 217.

<sup>217</sup> Bernadette Rainey, Elizabeth Wicks, Clare Ovey, (eds), *The European Convention on Human Rights* (6th edn, Oxford University Press, 2014) at p. 294.

<sup>218</sup> *Doorson v Netherlands* (App.20524/92), 26 March 1996, (1996) 22 EHRR 330.

<sup>219</sup> *Doorson v Netherlands* (App.20524/92), 26 March 1996, (1996) 22 EHRR 330.

<sup>220</sup> *Doorson v Netherlands* (App.20524/92), 26 March 1996, (1996) 22 EHRR 330.

<sup>221</sup> *SN v Sweden* (2002) 39 EHRR 13; *AS v Finland* App no. 40156/07 (ECtHR 28 December 2012; *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06. (ECtHR 15 December 2011).

<sup>222</sup> *SN v Sweden* (2002) 39 EHRR 13

purposes of Article 6, that the applicant's counsel could have attended at interview or given any questions to the police officer which the defence wanted to be put to the boy.<sup>223</sup>

2.12.7 In *AS v Finland*,<sup>224</sup> the ECtHR set out the minimum parameters in challenging witness testimony. The ECtHR stated that the suspected person must be informed that the child is to be questioned in a hearing, he or she must be given an opportunity to observe that hearing, either as it is being conducted or later from an audiovisual recording, and to have the opportunity to put questions to the child, either directly or indirectly, in the course of the first hearing or on a later occasion.<sup>225</sup>

2.12.8 The ECtHR has also referred to the special care needed for child witnesses in *Al-Khawaja and Tahery v UK*<sup>226</sup> which involved the admission of evidence where the complainant had made a statement before trial. Although it did not involve the evidence of a child witness, the Court referred to child witnesses in general, stating that the Court should avoid dealing with the cases in a 'one-size-fits-all fashion'. It noted:

The protection of child witnesses from further trauma, for instance, requires special care. Even in such cases it should be possible for the defence to have questions put to the witness during a pre-trial hearing or preliminary investigation.<sup>227</sup>

2.12.9 The ECtHR warned that, in general, any restrictions on the rights of the defence should be treated with extreme care.<sup>228</sup> The judgment reiterates the ECtHR's previous rulings that while there may be flexibility in relation to the means of the admission of evidence, there must be an opportunity for the evidence to be tested.<sup>229</sup>

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<sup>223</sup> Jacobs, White and Ovey (eds), *The European Convention on Human Rights* (6th edn, Oxford University Press, 2014) at p. 296.

<sup>224</sup> *AS v Finland* App no. 40156/07 (EctHR 28 December 2012)

<sup>225</sup> *AS v Finland* App no. 40156/07 (EctHR 28 December 2012) para. 56 at p. 13

<sup>226</sup> *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06. (ECtHR 15 December 2011).

<sup>227</sup> *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06. (ECtHR 15 December 2011) at p. 67.

<sup>228</sup> *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06. (ECtHR 15 December 2011) at p. 67.

<sup>229</sup> It is noteworthy that in this case, the Court was referred to the Irish Law Reform Commission's *Consultation Paper on Hearsay* and in a partly dissenting and partly concurring opinion stated that '*The Commission also found that (subject to possible reservations concerning the ultimate outcome in the*

2.12.10 The case of *Vronchenko v Estonia*<sup>230</sup> underlines the principle that support measures may be used where there is no risk to the rights of the accused. The applicant, who was the stepfather of the complainant, had been convicted of sexually abusing her. He alleged that he had not been given an opportunity to have questions put to the alleged victim and his conviction was based on video-recorded interview conducted during pre-trial proceedings. The wish of the authorities to prevent further trauma to the child witness may result in an unfairness to the defendant. In *Vronchenko*,<sup>231</sup> the complainant had been interviewed on three occasions. The complainant had been told by an investigator that the interview was being recorded so they would not have to talk again about what had happened. Based on this and on the opinion of a psychiatrist that it would not be possible to examine the complainant remotely, the prosecution did not request that the complainant be summoned to the court as a prosecution witness. The Defendant stated that this constituted a violation of his right to a fair trial under Article 6 of the Convention.

2.12.11 Ultimately, the ECtHR did rule that there had been a violation of Article 6. It accepted that in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, 'provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.'<sup>232</sup> The ECtHR emphasised that it was not stating that the authorities were obliged to facilitate a confrontation between the complainant and the applicant or to ensure the complainant's cross-examination at trial. The ECtHR deemed that what was in issue was whether it was possible to put questions to the witness, for example through the defendant's lawyer, police investigator or psychologist in an environment under the control of the investigating authorities and in a manner that would not need to substantially differ from the interview which had been carried out by these authorities.

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*present cases), the case law of this Court appeared broadly in line with the approach taken in Irish law.'* *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06. (ECtHR 15 December 2011) pps 25- 26 at paras 69-74. See also Joint partly dissenting and partly concurring opinion of Judges Sajo and Karakas at p. 66.

<sup>230</sup> *Vronchenko v Estonia* App no 59632/09 (ECtHR 18 October 2013).

<sup>231</sup> *Vronchenko v Estonia* App. 59632 /09 (ECHR, 18 July 2013).

<sup>232</sup> *Vronchenko v Estonia* App no 59632/09 (ECtHR 18 October 2013) Para. 56 at p. 17.

2.12.12 Ireland constitutionally protects the right of the defendant to challenge the testimony of child witnesses. A detailed examination of this was seen in *White v Ireland*<sup>233</sup> and *Donnelly v Ireland*.<sup>234</sup> The challenge to testimony predominantly takes place at trial although means do exist whereby pre-trial depositions can be taken and admitted at trial.<sup>235</sup> It is submitted that in order for there to be a breach of Article 6 of the *European Convention on Human Rights*, Ireland would have to modify its support measures to an extraordinary extent such as refusing or restricting the right of the defence to cross-examine the complainant. Failing that, there would have to be major breach of criminal procedure which had not resolved by judicial review or by domestic courts of appeal.

### 2.13.0 *European Convention on Human Rights Act 2003*

2.13.1 Ireland incorporated the *European Convention on Human Rights* into Irish legislation through the *European Convention on Human Rights Act 2003*. The Act obliges the organs of the State to act in accordance with the provisions of the ECHR. O'Connell notes that the 'incorporation of international human rights instruments into domestic law is largely of symbolic importance.'<sup>236</sup> This is due to the fact that Ireland can ratify only those instruments that are fully compatible with the provisions of the *Constitution of Ireland 1937* and O'Connell states that 'it goes without saying that multilateral human rights treaties are, in no sense, viewed or used as surrogate constitutional instruments.'<sup>237</sup>

2.13.2 Donnelly states that 'certain areas of Irish law have been identified as particularly ready for the Convention's influence and the broad area of family and child law is one such category.'<sup>238</sup> While the sphere of influence may be small, the

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<sup>233</sup> *White v Ireland* [1995] 2 IR 268.

<sup>234</sup> *Donnelly v Ireland* [1998] 1 IR 321.

<sup>235</sup> S.4 *Criminal Procedure Act 1967*; See *Chapter VI - The Support Measure of Recorded Testimony* at para. 6.0.0.

<sup>236</sup> Donncha O'Connell, *The ECHR Act 2003: A Critical Perspective*, Ursula Kilkelly(ed), *The ECHR and Irish Law* (2nd edn, Jordans 2009) para.1.1 at p. 1.

<sup>237</sup> Donncha O'Connell, *The ECHR Act 2003: A Critical Perspective*, Ursula Kilkelly(ed), *The ECHR and Irish Law* (2nd edn, Jordans 2009) para.1.1 at p. 1.

<sup>238</sup> Ursula Kilkelly *Child and Family Law* in Ursula Kilkelly(ed), *The ECHR and Irish Law* (2nd edn, Jordans 2009) para.5.1 at p. 111.

ECHR Act 2003 is significant in highlighting where change is needed. Donnelly notes:

At the same time, any expectation that the ECHR Act will transform Irish child or family law into a previously unrecognisable state is arguably misplaced. What it has the potential to do in a wholly positive manner, however, is to expose the legal process to Convention standards and to enhance the way justice is done and seen to be done for children and their families in the Irish courts.<sup>239</sup>

2.13.3 In relation to using the ECHR Act 2003 to challenge the treatment by the courts themselves of child witnesses there is limited scope for action. Section 3 of the European Convention on Human Rights Act 2003 states that ‘every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.’<sup>240</sup> However, the Irish courts are themselves immune from challenge under the ECHR Act 2003. Nonetheless, a criminal procedure system which fails to protect the child witness from a brutalising process could be challenged in the European Court of Human Rights particularly in the light of the *O’Keeffe v Ireland*.<sup>241</sup> The interpretation section of the Act states that ‘organs of the state’, including a court, are excluded from the scope of the Act. The Act does allow the Court of Appeal or the Supreme Court to make a declaration of incompatibility and make an *ex gratia* payment<sup>242</sup> in circumstances where ‘a

<sup>239</sup> Ursula Kilkelly, in *Child and Family Law* Ursula Kilkelly(ed), The ECHR and Irish Law (2nd edn, Jordans 2009) para.5.1 at p. 111.

<sup>240</sup> S.3 *European Convention on Human Rights Act 2003*.

<sup>241</sup> In January 2014, Louise O’ Keeffe won judgment in the European Court of Human Rights against Ireland concerning a lack of protection provided by the school she attended which allowed her to be abused by her teacher. The judgment indicated there is an obligation on the State to protect citizens where they are on notice that abuse can or has occurred within their purview of responsibility.

See *O’Keeffe v Ireland* (App. No. 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>242</sup> ‘(4) Where—

(a) a declaration of incompatibility is made,

(b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and

(c) the Government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment of compensation to that party (“a payment”),

the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.’

S.5(4)*European Court of Human Rights 2003*.

statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.’<sup>243</sup>

### **2.14.0 Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice**

2.14.1 Specific guidance in relation to the child witness is contained in the *Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice*<sup>244</sup> which was adopted by the Council of Europe on the 17<sup>th</sup> November 2010.<sup>245</sup> While the Guidelines deal with specific aspects of the giving of evidence for child witnesses, they are not binding and the language it contains is aspirational. In relation to evidence and statements made by children, the Guidelines state that “Interviews of, and the gathering of statements from children should, as far as possible, be carried out by trained professionals”<sup>246</sup> and that “Every effort should be made for children to give evidence in the most favourable settings...”<sup>247</sup> In relation to audiovisual statements, these “should be encouraged, while respecting the right of other parties to contest the content of such statements.” The impact the Guidelines may have on the position of the child witness in an Irish court is undetermined although they may be of persuasive value in criminal proceedings. The Guidelines do underline the importance of the child witness in the criminal justice system as well as outlining minimum safeguards for the welfare of the child in such proceedings.

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<sup>243</sup> S.5(1) *European Court of Human Rights 2003*.

<sup>244</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*. The Council of Europe programme “*Building a Europe for and with children*”

<sup>245</sup> *In relation to the evidence and statements of children, the Guidelines also state that where more than one interview is to be carried out, it should preferably (emphasis added) be carried out by the same person and that the number of interview should be as limited as possible (emphasis added). They also state that contact between a child victim or witness with the alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.*

*Part V - Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice 17<sup>th</sup> November 2010.*

<sup>246</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (17<sup>th</sup> November 2010) 6. Evidence/statements by children* at para. 64.

<sup>247</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (17<sup>th</sup> November 2010) 6. Evidence/statements by children* at para. 64.

## 2.15.0 *The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.*<sup>248</sup>

2.15.1 *The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*<sup>249</sup> was opened for signature on the 25th October 2007. Ireland has signed but not ratified the Convention and so it has not come into force in this jurisdiction. To a great extent, Ireland has already fulfilled any obligations it might have to the child witness under the Convention and many of the procedural aspects have already been fulfilled under the obligations of European Union law. For example, in relation to Article 31 which outlines general measures of protection, Ireland already has a necessary legislative framework 'to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings'<sup>250</sup> The preamble to the Convention highlights the legislation which has already been enacted including the *Council of the European Union Framework Decision on combating the sexual exploitation of children and child pornography*,<sup>251</sup> the *Council of the European Union Framework Decision on the standing of victims in criminal proceedings*,<sup>252</sup> and the *Council of the European Union Framework Decision on combating trafficking in human beings*.<sup>253</sup>

2.15.2 Many of the goals of the Convention have been achieved through these legislative measures. However, it is important to acknowledge the importance of the principles of the Convention in other terms: the respect to be afforded to the child in the investigation; and the enunciation of the 'best interests' principle which is included in Article 30 of the Convention.<sup>254</sup> Moreover, another of the principles of

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<sup>248</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, (CETS No.: 201).

<sup>249</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, (CETS No.: 201).

<sup>250</sup> *Article 31 – General Measure of Protection.* Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.: 201)

<sup>251</sup> Council of the European Union Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA).

<sup>252</sup> *Council of the European Union Framework Decision on the standing of victims in criminal proceedings* (2001/220/JHA).

<sup>253</sup> *Council of the European Union Framework Decision on combating trafficking in human beings* (2002/629/JHA).

<sup>254</sup> Article 30, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (CETS No.: 201)



the Convention is to ensure that the investigations and proceedings do not aggravate the trauma already caused to the victim.<sup>255</sup> This type of language and the priorities contained in this Convention are vital in creating guiding principles and as such may have practical value for future domestic legislation.

## 2.16.0 *Developing Protections for the Child Witness*

2.16.1 Starmer notes that the main characteristics of the adversarial criminal trial were in place as long as 1790 in England and Wales. Nevertheless, it took another 200 years before measures to support and protect the victim in the criminal process were introduced.<sup>256</sup> While there have been many recent changes in how victims are treated within the criminal justice system,<sup>257</sup> certain groups would say that the changes have not been far reaching enough.<sup>258</sup>

2.16.2 Reform is especially difficult as the adversarial system does not readily facilitate the victim given its emphasis on party contest. Substantial modification to cross-examination must be limited as it is a right that is constitutionally protected under Art. 38.1 of the Constitution of Ireland.<sup>259</sup> Nonetheless, there is some consideration for alteration to the methods of examination in chief and cross-

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<sup>255</sup> Article 2. *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.: 201)*.

<sup>256</sup> Keir Starmer, 'Human Rights, Victims and the Prosecution of Crime in the 21<sup>st</sup> Century' 11 (2014) *Crim.L.R.* 785.

<sup>257</sup> Victim focused changes include s. 3 of the *Criminal Law (Rape) Act 1981*, as amended by *s.13 Criminal Law (Rape) (Amendment) Act 1990*, which allows for the application for legal representation in trials involving rape where the defence intends to cross-examine the complainant on previous sexual experience. Also, the submission of victim impact statements under s.5 of the *Criminal Justice Act 1993* has allowed the victim a voice in the sentencing of a criminal offence. Ss. 5 and 6 of the *Criminal Procedure Act 2010* allows for the giving of victim impact statements through video link and intermediary. In terms of guidance for the victim, An Garda Síochána has published a *Victims Charter* (June 2010) outlining how their officers will handle a complaint where a criminal offence has been committed. Current contact information is given, should expectations not be met. The Victims of Crime Office /Dept of Justice, Equality and Law Reform (2010) has also published the *Victims Charter and Guide to the Criminal Justice System* which also sets out the standard of procedures

<sup>258</sup> AdVic is a campaigning groups for the families of victims of homicide set up in 2005. Their policy document states:

*'Our aim is to advocate for changes that will bring about a re-balancing of the Criminal Justice System, and recognition of the status of families of Homicide victims within that system. Families of Homicide victims, having experienced the Criminal Justice system, have found it lacking in fairness and balance. We aim to ensure that a comprehensive and co-ordinated inter-agency support service is offered to all families.'*

<sup>259</sup> [http://www.advic.ie/policies/policies\\_default.asp](http://www.advic.ie/policies/policies_default.asp) (Accessed 9th March 2015.)

*The State (Healy) v Donoghue* [1976] 1IR 325. *In re Haughey* [1971] I.R.

examination as well as the circumstances in which such evidence is taken and admitted at trial. Any alterations will have to be balanced those rights which Article 38.1 of the Constitution encapsulates. Insightful developments may be learned from the recent experience in other common law jurisdictions.

### 2.17.0 *Developments in England and Wales*

2.17.1 The significance of the change in procedural aspects of the criminal justice system in England and Wales concerning child witnesses cannot be overestimated. It has influenced many of the changes in this jurisdiction and current developments may have a direct impact on how legislative changes will occur. Continual research has underpinned legislative change.<sup>260</sup> The principles of the *Pigot Report*<sup>261</sup> highlighted a need to further facilitate the child witness in criminal proceedings and suggested that a recording of the child's evidence be taken in its entirety removing the child from the trial itself. The *Criminal Justice Act 1988* as amended by the *Criminal Justice Act 1991* allowed for the use of video link and video recorded evidence in court. The Pigot Report also recommended that a trusted party who has the child's confidence would be able to put the advocate's questions to the child.<sup>262</sup> The *Youth Justice And Criminal Evidence Act 1999* as amended by the *Coroners and Justice Act 2009* outlined a range of support measures which included the use of the recording of examination in chief evidence prior to trial for vulnerable witnesses. A further legislative advance was the provision for the use of an intermediary in the trial process.<sup>263</sup> The effect of this is examined elsewhere<sup>264</sup> but it is fair to say that the impact of the support measure goes far beyond the actual role and use within the

<sup>260</sup> Joyce Plotnikoff and Richard Woolfson, *The Go-Between Report* (Office of Criminal Justice Reform 2005), Plotnikoff, Joyce and Woolfson, Richard – *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* – (Lexicon Limited; The Nuffield Foundations – July 2009); *Young Witnesses in criminal proceedings - A progress report to Measuring Up?* Joyce Plotnikoff and Richard Woolfson, (NSPCC, The Nuffield Foundation) (June 2010) ([www.nspcc.org.uk/inform](http://www.nspcc.org.uk/inform)).

<sup>261</sup> The Pigot Report made a number of recommendations on behalf of the child witness in certain criminal proceedings including the recording of the child's evidence in its entirety Recommendations 1- 3, *The Advisory Group on Video Evidence 'The Pigot Report'* (Home Office UK 1989) at p. 69.

<sup>262</sup> *The Advisory Group on Video Evidence 'The Pigot Report'* (Home Office UK 1989) para. 2.32 at p. 24.

<sup>263</sup> S.29 *Youth Justice and Criminal Evidence Act 1999*.

<sup>264</sup> See: Chapter VI – The Support Measure of Intermediaries at para. 6.0.0.

trial itself. It appears that it has been the catalyst for the modification of the manner and length of cross-examination.<sup>265</sup>

2.17.2 Recent revisions of the *Criminal Practice Directions*<sup>266</sup> and *Criminal Procedure Rules*<sup>267</sup> highlight the fragility of the vulnerable witness within the criminal justice system and the need for courts and practitioners to make every effort to facilitate the giving of evidence of vulnerable witnesses. They oblige practitioners within the system to desist from using procedural tactics and advocacy techniques that may be harmful to the witness to gain an advantage at trial. The ‘overriding objective’ of the *Criminal Procedure Rules*<sup>268</sup> is expressed in Rule 1.1 as ensuring that criminal cases are ‘dealt with justly.’ Part 29 outlines in considerable detail the means and procedures whereby witnesses (or defendants) may be assisted in giving evidence.<sup>269</sup>

2.17.3 The implementation of the provision for intermediaries is interesting in terms of the additional procedural rights it may give the child witness. Cooper, Backen and Merchant<sup>270</sup> note the significance of the ‘Ground Rules Hearing’, (GRH) a hearing where feedback from the intermediary’s assessment of the child witness or child defendant is discussed prior to trial. At this hearing, the judge and the prosecution and defence advocates establish, in the absence of the child witness, the parameters of the proceedings. The matters addressed the length of questioning, the appropriate vocabulary for the child witness and the manner in which the need for breaks will be signalled to the court.

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<sup>265</sup> See: *R v Wills* [2011] EWCA Crim 1938. [2012] 1 Cr.App.R.2. *R v Lumbeba and JP* [2014] EWCA Crim 2064.

<sup>266</sup> Criminal Practice Directions [2014] EWCA Crim 1569

<sup>267</sup> Criminal Procedure Rules 2014 (SI 2014 No. 1610) (L. 26)  
(Revised 6<sup>th</sup> October 2014).

<http://www.legislation.gov.uk/uksi/2014/1610/contents/made>  
(Accessed 28<sup>th</sup> September 2015).

<sup>268</sup> Criminal Procedure Rules 2014 ( revised 6<sup>th</sup> October 2014).  
<http://www.legislation.gov.uk/uksi/2014/1610/contents/made>  
(Accessed 28<sup>th</sup> September 2015).

<sup>269</sup> Part 29, Criminal Procedure Rules 2014 (revised 6<sup>th</sup> October 2014).  
<http://www.legislation.gov.uk/uksi/2014/1610/contents/made>  
(Accessed 28<sup>th</sup> September 2015).

<sup>270</sup> Penny Cooper, Paula Backen, Ruth Marchant *Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court*. Crim L.R. 2015, 6, 420 – 435.

2.17.4 The concept of a Ground Rules Hearing was initially devised during registered intermediary training and was not included either in the original legislation nor the Criminal Procedure Rules nor the Criminal Practice Directions. In 2005 the first Intermediary Procedural Guidance Manual<sup>271</sup> noted that Registered Intermediaries should “request a meeting with the Crown Prosecution Solicitor and advocates to discuss and agree ground rules for trial.”<sup>272</sup> Cooper *et al* stated that there was initial resistance in the court room to the idea but this gradually changed. They observe:

These GRHs moved from theory to practice when RIs began to insist on what was in effect a judge-advocate-intermediary meeting where the judge would chair a discussion with the intermediary’s report recommendations acting as a suggested agenda.<sup>273</sup>

2.17.5 Although the intermediary’s report had the benefit of informing the court of the characteristics of the vulnerable witness which may affect the giving of evidence, the sense emerged that there would be value in having a hearing where all parties participated in devising procedures for the giving of the evidence throughout the trial. Cooper *et al* observe that in *R v Wills*,<sup>274</sup> the Court of Appeal endorsed the good sense of there being a ‘practice note/trial protocol’ recording the court’s directions about how the advocate should question the vulnerable witness.<sup>275</sup>

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<sup>271</sup> Penny Cooper, David Wurtzel. *Home Office Intermediary Procedural Guidance Manual* (2005). The manual has now been updated and the last revised version was published in 2012 by the Ministry of Justice Victims and Witnesses Unit, Ministry of Justice. It sets out the Ground Rules Hearing as follows: *In accordance with the Application for a Special Measures Direction (part 29, Criminal Procedure Rules 2010), ground rules hearings for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, to establish (a) how questions should be put to help the witness understand them, and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break.* *An overview of the Registered Intermediary’s involvement in a criminal case*, para. 1.24(n), Fn 13, at p. 13

<sup>272</sup> *Home Office Intermediary Procedural Guidance Manual* (2005) at para. 8 at p. 8.

<sup>273</sup> Penny Cooper, Paula Backen, Ruth Marchant *Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court*. Crim L.R. 2015, 6, 420 – 435 at p. 424.

<sup>274</sup> *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr.App.R.2 at para 22 at p. 16; The Court of Appeal endorsed a recommendation of the Advocacy Training Council report, *Raising The Bar* (2011).

<sup>275</sup> Penny Cooper; Paula Backen, Ruth Marchant *Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court*. Crim L.R. 2015, 6, 420 – 435 at p. 424.

2.17.6 The Ground Rules Hearing was included in the Criminal Practice Directions<sup>276</sup> in 2013. It states:

Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary before the witness gives evidence.<sup>277</sup>

2.17.7 The evolution from good practice to mandatory practice is a significant step. It indicates that where there is a high level of engagement by trainers, practitioners and the judiciary a significant procedural change can occur. Recognition of the needs of vulnerable witnesses is further incorporated within the *Criminal Practice Directions*<sup>278</sup> and the court is required to take every reasonable step to facilitate the witness to give 'their best evidence'.<sup>279</sup> The revision of the *Criminal Practice Directions*<sup>280</sup> in England and Wales reflects a broader cultural change in terms of attitudes to the child witness. One of the most recent significant changes is the allocation of judges who have specific training to deal with 'sex cases'.<sup>281</sup> This means that experienced and trained judges in the area will deal with cases involving vulnerable witnesses.

2.17.8 The objectives of the Criminal Procedure Rules and the Criminal Practice Directions have been endorsed in the courts. In 2010, in *R v B*,<sup>282</sup> the Court of Appeal in England and Wales found a witness of 4 and half years of age to be

<sup>276</sup> Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters) [2013] EWCA Crim 1631; [2013] 1 WLR 3164 (CPD) in particular at 'General Matters 3E: Ground Rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant'.

<sup>277</sup> Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters) [2013] EWCA Crim 1631; [2013] 1 WLR 3164 (CPD) in particular at 'General Matters 3E: Ground Rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant'.

<sup>278</sup> CPD I General matters 3D: *Vulnerable People in the Courts*, Criminal Practice Directions [2014] EWCA Crim 1569.

<sup>279</sup> Para. 3D.2, *Criminal Practice Directions* [2014] EWCA Crim 1569.

<sup>280</sup> *Criminal Practice Directions* [2013] EWCA Crim 1631.

<sup>281</sup> 'A significant change is the introduction of the requirement that all Judges dealing with sex cases in the Crown Court will have to be authorised to hear such cases. Before they can sit on such cases they will have attended the Judicial College Serious Sex Offences Seminar. There is a requirement that this training should be maintained and updated by attending the seminar at least once every three years.' CPD XIII Listing and Allocation Practice Direction, Criminal Practice Directions, [2014] EWCA Crim 1569.

<http://www.judiciary.gov.uk/announcements/the-criminal-practice-directions-revised-october-2014-summary-of-key-changes-and-additions/>  
(accessed 12th January 2015)

<sup>282</sup> *R v Barker* [2010] EWCA Crim 4.

competent and upheld a conviction for anal rape where the prosecution's case was predominantly based on her testimony. In 2013, in *R v Wills*<sup>283</sup> and in 2014, in *R v Lumbeba and JP*,<sup>284</sup> the Court of Appeal upheld the decisions of trial judges where steps were taken to modify the length and manner in which vulnerable witnesses were cross-examined. These modifications were made on the basis of an intermediary's assessment of the child witness. It appears that the judiciary have responded to the difficulties faced by child witnesses by interpreting the legislation and procedural rules in a manner that facilitates the giving of evidence but without diminishing the right of the defendant to a fair trial. The fact that Ireland has a written Constitution may mean that similar attempts to modify cross-examination will invite challenges under Article 38.1. Yet it is submitted that some alteration to cross-examination may be possible on the basis of submission by an intermediary if better evidence could be achieved in the overall context of the trial process.

2.17.9 In 2013, the Ministry of Justice in the United Kingdom commenced a piece of legislation that had been on the statute books since 1999. Section 28 of the *Youth Justice and Criminal Evidence Act 1999* allows for the recording of cross-examination of vulnerable witnesses. Following its commencement, pilot projects were commenced in Crown Courts in Leeds, Liverpool and Kingston upon Thames but there has been no final announcement as to when this will be rolled out on a national basis.

2.17.10 The catalyst for these changes may have been certain high profile cases where vulnerable witnesses were ill-served by the trial process. Francis Andrade, an adult witness committed suicide having given evidence in a rape trial in early 2013.<sup>285</sup> There was widespread criticism of the manner in which she had been treated by the defence at trial and more generally by the court system. In May 2013, media reports on the trial of a child abuse ring described multiple complainants

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<sup>283</sup> *R v Wills* [2011] EWCA Crim 1938. [2012] 1 Cr.App.R.2.

<sup>284</sup> *R v Lumbeba and JP* [2014] EWCA Crim 2064

<sup>285</sup> Peter Walker, *Frances Andrade killed herself after being accused of lying, says husband*

*Death of violinist sparks debate on how courts handle abuse cases after barrister questioned whether she was telling truth*, The Guardian 10<sup>th</sup> February 2013

<http://www.theguardian.com/uk/2013/feb/10/frances-andrade-killed-herself-lying>

being repeatedly cross-examined by several defence counsel.<sup>286</sup> While this manner of cross-examination is permissible it may be extremely stressful for the complainant. The difficulties in prosecuting these offences were highlighted in situations where complainants withdrew their complaints during the investigation or were treated in an aggressive manner when giving evidence. It was in the light of these cases that the then Director of Public Prosecutions in the United Kingdom, Sir Keir Starmer, launched a new set of guidelines by the Crown Prosecution Service to protect the most vulnerable witnesses within the criminal justice system.<sup>287</sup>

2.17.11 In the more recent case of *R v Pipe*<sup>288</sup> the Court of Appeal (Criminal Division) upheld the conviction of the defendant where the cross-examination of the complainant had been curtailed due to her distress. The majority of her evidence had been taken and the trial judge had determined that remaining evidential issues concerning psychiatric reports could be admitted via agreement of counsel. The Court of Appeal determined that the trial judge had conducted the trial fairly particularly in light of the fact that it would be unlikely that a retrial would be possible given the emotional and psychiatric issues of the complainant. It seems apparent that, while protecting the right of the defendant to a fair trial, the Court of Appeal in this and other judgements is giving wide latitude to the difficulties of vulnerable complainants in the criminal trial process. The jurisdiction of England and Wales has taken action to avoid the loss of essential evidence and to circumvent future witnesses suffering unnecessary stress in court by implementing appropriate measures such as intermediaries and full recorded testimony.

2.17.12 Ticketing of the judiciary has commenced in England and Wales in relation to sexual offences:<sup>289</sup>

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<sup>286</sup> Louise Tickle, 'Lawyers' treatment of gang grooming victims prompts call for reform Campaigners demand urgent shake-up of court procedure after seven barristers cross-examined a girl every day for three weeks in child-grooming case.' *The Guardian*, 19<sup>th</sup> May 2013.  
<http://www.theguardian.com/law/2013/may/19/lawyers-oxford-abuse-ring> (accessed 12<sup>th</sup> January 2015)

<sup>287</sup> Owen Bowcott, *Child sex abuse victims' vulnerability must not be barrier to justice, says DPP Keir Starmer QC unveils new guidelines for handling abuse after series of high-profile grooming cases* *The Guardian* 11<sup>th</sup> June 2013.  
<http://www.theguardian.com/law/2013/jun/11/child-sex-abuse-victims-justice>

<sup>288</sup> *R v Pipe* [2014] EWCA 2570 (CA(Crim Div)).

<sup>289</sup> *CPD XIII Listing D: Authorisation of Judges, Criminal Practice Directions September 2015* [2015] EWCA Crim 1567.

*Judges (other than High Court Judges) to hear sexual offences cases in Class 1C or any case within Class 2B must be authorised to hear such cases. Any judge previously granted a 'Class 2' or 'serious sex offences' authorisation is authorised to hear sexual offences cases in Class 1C or 2B. It is a condition of the authorisation that it does not take effect until the judge has attended the relevant Judicial College course; the Resident Judge should check in the case of newly authorised judges that they have attended the course. Judges who have been previously authorised to try such cases should make every effort to ensure their training is up-to-date and maintained by attending the Serious Sexual Offences Seminar at least once every three years. See CPD XIII Annex 2 for guidance in dealing with sexual offences in the youth court.*<sup>290</sup>

There are proposals to extend the ticketing of practitioners to all publicly funded counsel<sup>291</sup> and it is submitted that similar initiatives would ensure higher standards of practice in this jurisdiction. The use of prosecution counsel who would be familiar with the issues pertaining to the testimony of child witnesses could ensure that the trial process will run more smoothly. If the *Criminal Evidence Act 1992* is amended as proposed under the *General Scheme of the Victims of Crime Bill 2015* and the *Criminal Law (Sexual Offences) Bill 2015* the use of support measures will be extended widely to a greater number of witnesses. In addition, if preliminary hearings are placed on a statutory footing as is currently proposed under the Revised General Scheme of the Criminal Proceedings Bill 2015, the court and legal practitioners will need to be familiar with all of the ramifications of the needs of the child witness and the support measures which are available to support him or her.

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<sup>290</sup> CPD XIII Listing D.3: Authorisation of Judges, *Criminal Practice Directions* September 2015 [2015] EWCA Crim 1567

<sup>291</sup> Catherine Baksi 'Advocates to have specialist training for sex cases' *Law Society Gazette*. 15 September 2014. P Cooper (2014) 'Ticketing talk gets serious' *Counsel Magazine* November 2014, 24-25  
'By March 2015 we will devise a requirement that to be instructed in cases involving serious sexual offences, publicly-funded advocates must have undertaken approved specialist training on working with vulnerable victims and witnesses.'  
Ministry of Justice 'Our Commitment to Victims' September 2014.  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/354723/commitment-to-victims.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354723/commitment-to-victims.pdf) (Accessed 2nd May 2016).



The training and use of prosecution counsel in these cases will go some way to ensure that any issues or problems may be dealt with quickly and efficiently. It also follows that having designated judges to deal with certain cases will ensure that this is also the case and that the child witness will not suffer unnecessary issues and delays within the trial process. The recommendation for specialist training of relevant legal practitioners was included in the Final Report of the Joint Oireachtas Committee for Child Protection.

The Committee recommends that all lawyers involved in the prosecution or defence of cases of child sexual abuse or sexual offences against children, and all judges hearing such cases, should be required to undergo a specialist programme of training to enable them to perform their respective functions in the manner least traumatic for a child complainants and witnesses.

The Committee recommends that consideration be given to the development of an on-going training programme for all lawyers involved in the prosecution or defence of cases of child sexual abuse or sexual offences against children, and all judges hearing such cases, to take account of developments in knowledge relating to child development and children's responses to the criminal justice system.<sup>292</sup>

This recommendation has not seen legislative form in the current draft legislation of the *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*, the *Revised General Scheme of the Criminal Procedure Bill 2015* or the *Criminal Justice (Sexual Offences) Bill 2015*.

### **2.18.0 Protection of the child witness through separate legal representation**

2.18.1 While the use of court supporters and intermediaries are discussed elsewhere,<sup>293</sup> a method whereby the protection of a child's interests could be enhanced would be the

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<sup>292</sup> *Joint Oireachtas Committee Report on Child Protection* (November 2006) Chapter 11, para 11.9.10 at page 75.

<sup>293</sup> See Chapter VI - The Support Measure of Intermediaries at para 6.0.0.

provision of separate legal representation. This could take a form similar to that of the provision for separate legal representation in rape trials where there is an application to cross-examine the complainant on previous sexual history under *S.4A Criminal Law (Rape) Act 1981* (as amended by *s.34 Sex Offenders Act 2001*), which allows for the complainant, in a case of rape or sexual assault, to be afforded legal representation where the defence wish to cross-examine him or her on previous sexual history.<sup>294</sup> An appropriate legal representative could inform the child of the available support measures, assess the child's needs and preference and submit a report to the court. Applications for the appropriate support measures could be made well in advance of the trial during the preliminary trial hearings.<sup>295</sup>

2.18.2 While the legal representative would owe his or her duty to the court, he or she would provide a communicative channel between the child witness and the court and safeguard the child witness' needs within the trial process. As he or she would be familiar with the rules of evidence, he or she would be best able to inform the court of the particular needs of the witness as well as advise on any editing of recorded evidence and inform the witness and family of the reasons why this may be necessary. In observing the witness giving evidence, an independently appointed legal practitioner would be able to ensure that the child witness is protected throughout the criminal trial but would not incur concomitant accusations of prejudice within the trial process.

## **2.19.0      *Developing protections for the child witness in Ireland***

2.19.1 While the legislation for support measures has been amended periodically over the years, it appears that two recently published bills, referred to previously, will make significant changes to the eligibility for, and availability of, support measures for child witnesses in criminal trials. The *Criminal Law (Sexual Offences) Bill 2015* was published in September 2015 and includes modifications to support measures in Part III of the *Criminal Evidence Act 1992*. The Bill proposes placing

<sup>294</sup>

*S.4 Criminal Law (Rape) Act 1981* (as amended by *s.34 Sex Offenders Act 2001*.)

<sup>295</sup>

Preliminary hearings currently take place under Circuit Court Rules. '*Circuit Court Practice Directions, CC12 Pre-Trial Procedure*'. (*CC13-Midland; CC14-South Eastern Circuits*)

The proposal to place preliminary hearings on a statutory basis is currently contained in the current *General Scheme of the Criminal Procedure Bill (2015)*.

the use of screens on a statutory basis<sup>296</sup> as recommended by the final Report of the *Joint Oireachtas Committee on Child Protection*.<sup>297</sup> It should be noted that the court already has an inherent jurisdiction to allow the use of screens.<sup>298</sup> The Bill also includes a widening of the statutory provision for the removal of wigs and gowns<sup>299</sup> another recommendation of the *Joint Oireachtas Committee on Child Protection*<sup>300</sup> while this is currently only provided for when evidence is given via video link.<sup>301</sup>

2.19.2 The Bill also contains a proposal to prohibit the personal cross-examination of the witness by the accused.<sup>302</sup> Where the witness is under 14 the provision states that the judge *shall* direct that the accused may not personally cross-examine the witness but where the witness is under 18 the provision states that the judge *may* direct that the accused shall not personally cross-examine the witness. Where such a direction is given the judge may invite the accused to choose a legal representative

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<sup>296</sup> Criminal Law (Sexual Offences) Bill 2015  
S.35 Amendment of Act of 1992

<sup>297</sup> *Giving evidence from behind a screen* S14A Criminal Evidence Act 1992.  
See Para 11.8.3. of the Final Report of the *Joint Oireachtas Committee Report on Child Protection* (November 2006)

*'One additional special protective measure for child witnesses provided for in other jurisdictions is the use of a screen to enable the complainant to give evidence out of sight of the accused. At first glance such a measure may seem unnecessary when the law provides for evidence being given by live television link. There will, however, be cases where the complainant would prefer to give evidence in court in the presence of the jury, but may be reluctant to do so if this means giving evidence in sight of the accused. Although, as stated, such a measure is not provided for in the Criminal Evidence Act, 1992, Irish law does provide, in strictly limited circumstances, for "the giving of evidence in the hearing but not the sight of any person"*

*Such a measure would be a useful addition to the existing range of options open to child complainants. The Committee recommends that consideration be given to amending the Criminal Evidence Act, 1992 to introduce the possibility of giving evidence behind a screen or with the benefit of another mechanism to enable witnesses entitled to the protections of Part III of that Act to give evidence in the hearing but not the sight of the accused.'*

<sup>298</sup> In *R v Smellie* (1920)14 Cr App R 128 (CA), the court allowed the complainant to give evidence out of sight of her father, the defendant, by requesting him to remain in a stairwell within ear shot but out of sight, while she testified.

<sup>299</sup> Criminal Law (Sexual Offences) Bill 2015  
S.35 Amendment of Act of 1992

<sup>300</sup> *Removal of wigs and gowns, expanding S14B Criminal Evidence Act 1992*  
See Para 11.8.3 Final Report of the *Joint Oireachtas Committee Report on Child Protection* (November 2006)

*The Committee recommends that consideration be given to requiring the removal of wigs and gowns by counsel in the event of any child victim or witness giving evidence, regardless of whether or not they do so by live television link.*

<sup>301</sup> s.13(3)Criminal Evidence Act 1992

s.13(3)*'While evidence is being given through a live television link pursuant to subsection (1) (except through an intermediary pursuant to section 14 (1)), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.'*

<sup>302</sup> Criminal Law (Sexual Offences) Bill 2015  
S.35 Amendment of Act of 1992

S. 14C Protection against cross-examination by accused.

to cross-examine the witness or, in the event that the accused does not choose one, the court may appoint one. Where such a direction is made in a jury trial, the judge shall give such a warning to the jury as he or she considers necessary to ensure that the accused person is not prejudiced by any inferences that might be drawn from the fact that the accused has been prevented from cross-examining the witness in person.

303

2.19.3 The Bill also proposes an amendment to the interpretation of ‘sexual offences’ in the interpretation section of the *Criminal Evidence Act 1992*.<sup>304</sup> The amendment of the definition of ‘sexual offences’ would extend eligibility regarding existing support measures for children, the mentally impaired and trafficked persons to include the following offences: s.249 of the *Children Act 2001* (‘causing or encouraging sexual offences upon a child’); an amended version of s. 5 of the *Criminal Law (Sexual Offences) Act 1993* (‘protection of mentally impaired persons’)<sup>305</sup> and new offences under the proposed *Criminal Law (Sexual Offences) Bill 2015* which will include offences of sexual exploitation of children.<sup>306</sup> The *Criminal Law (Sexual Offence) Bill 2015*, if enacted as drafted, would also allow for the admission at trial of recorded testimony of witnesses under 18 in matters involving sexual offences under the existing provision of s.16(1)(b) *Criminal Evidence Act 1992*.<sup>307</sup> At present, complainants under 14 concerning certain offences are eligible to have their evidence recorded and admitted at trial as well as, more recently, witnesses under 18 in respect of particular offences under the *Child Trafficking and Pornography Act 1998* and the *Criminal Law (Human Trafficking) Act 2008*.<sup>308</sup>

<sup>303</sup> See Charleton, McDermott and Bolger, *Criminal Law*, (1999) Para 8.82 at p. 600. The authors cite the case of *The People (DPP) v JT* (1988) 3 Frewen 141 in which case the accused insisted on representing himself at the trial stage and which they say was a strategy which “backfired when his daughter’s testimony became stronger and more emphatic under his cross-examination.”

<sup>304</sup> *Criminal Law (Sexual Offences) Bill 2015*

<sup>305</sup> *Criminal Law (Sexual Offences) Bill 2015*

<sup>306</sup> Part 3 Sexual Act with Protected Persons,  
*Criminal Law (Sexual Offences) Bill 2015*

<sup>306</sup> Part 2 Sexual Exploitation of Children

<sup>307</sup> ss 3,4,5,6,7, and 8, *Criminal law (Sexual Offences) Act 2016*

<sup>307</sup> *Criminal Law (Sexual Offences) Bill 2015*

<sup>308</sup> s.36 Amendment of section 16 of Act of 1992

<sup>308</sup> *Criminal Evidence Act 1992* (as amended)

<sup>308</sup> (1) Subject to subsection (2)

2.19.4 In comparison to recent developments in England and Wales, the amendments do not make significant changes to the current situation of the child giving testimony in the witness box. It remains to be seen what the provisions will include when enacted.

2.19.5 The *EU Directive on Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*<sup>309</sup> will necessitate legislative reform implementation in Ireland. The *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015* has been drafted and was published in July 2015. It closely mirrors the Directive particularly in terms of the following requirements: to provide information and support to the victim,<sup>310</sup> to facilitate the victim's participation in criminal proceedings,<sup>311</sup> to recognise and provide protection to victims with specific

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(a) a videorecording of any evidence given, in relation to an offence to which this Part applies, by a person under 18 years of age through a live television link in proceedings under Part IA of the Criminal Procedure Act, 1967, and]

shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video recording mentioned in paragraph (b), the person whose statement was video recorded is available at the trial for cross-examination.]

(b) a videorecording of any statement made during an interview with a member of the Garda Síochána or any other person who is competent for the purpose—

(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed), or

(ii) by a person under 18 years of age (being a person other than the accused) in relation to an offence under—

(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or

(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008

<sup>309</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>.

<sup>310</sup> *Chapter 2 Provision of Information and Support Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>

<sup>311</sup> *Chapter 3, Participation in Criminal Proceedings Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>

needs<sup>312</sup> and provisions relating to the training of practitioners and coordination of support services.<sup>313</sup>

2.19.6 In terms of support measures for vulnerable witnesses, the draft legislation amends the current provisions of the *Criminal Evidence Act 1992*.<sup>314</sup> Heads 15 and 16 of the *Victims of Crime Bill* allows for special measures to be made available for witnesses who have been assessed as ‘a person who would, during the investigation and trial, benefit from any of the measures provided for in this subsection.’<sup>315</sup> Part 6 provides for Special Measures for Child Complainants making them automatically eligible for the special measures set out in Section 15 and Section 16 of the Act. Part 6, Head 17 (Child complainants) states: ‘A complainant who is a child shall be presumed to require the special measures set out in section 15 and section 16 of this Act.’<sup>316</sup> As a presumption may be rebutted, the eligibility is not automatic. The proposal also incorporates the ‘best interests’ principle stating:

(2) Whether, and the extent to which, the measures are required shall be determined, in the best interests of the child, having regard to his or her age, level of maturity and needs as identified in the assessment carried out under section 6.<sup>317</sup>

2.19.7 Head 26 outlines modifications to Part III of the Criminal Evidence Act 1992. Certain legislative provisions which overlap with proposals contained in the *Criminal Law (Sexual Offences) Act Bill 2015*. A proposal to insert a new s.14A

<sup>312</sup> Chapter 4, *Protection of Victims and Recognition of Victims with Specific Protection Needs Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>

<sup>313</sup> Chapter 5, *Other Provisions Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>

<sup>314</sup> *Part 5, Special measures for certain complainants, General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*.

<sup>315</sup> *Head 15, Special measures during investigation and Head 16 Special measures during trial. Part 5 Special Measures for certain complainants. General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*.

<sup>316</sup> *Head 17(1) Child complainants Part 6 Special measures for child complainants General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*.

<sup>317</sup> *Head 17 (2) Child complainants Part 6 Special measures for child complainants General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*.

into *Criminal Evidence Act 1992* which would allow for the giving of evidence from behind a screen is contained in both the *Criminal Justice (Victims of Crime) Bill 2015*<sup>318</sup> and *Criminal Law (Sexual Offences) Bill 2015*.<sup>319</sup> It is further proposed to extend the provisions for the taking of recorded testimony under both Bills. *The Criminal Law (Sexual Offences) Act Bill 2015* addresses the taking of recorded testimony for witnesses under 18 in respect of sexual offences<sup>320</sup> i.e. it does not

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Amendment of Criminal Evidence Act 1992

*The Criminal Evidence Act 1992 is amended [ ... ]*

(c) by the insertion of the following section after section 14;

*14A. Giving of evidence from behind screen*

(1) In any proceedings (including proceedings under section 4E or 4F of the *Criminal Procedure Act, 1967*) for an offence or the giving of evidence to which this Part applies the court, if it has not made an order under section 13 in relation to a witness, direct that while giving testimony in court, (a) in the case of a victim where the court so directs under Head 16 of the *Criminal Justice (Victims of Crime) Bill*, or (b) in any other case, with the leave of the court the witness shall be prevented by means of a screen or other arrangement from seeing the accused, (2) the screen or other arrangement referred to in (1) must not prevent the witness from being able to see, and to be seen by—(a) the judge and, where there is one, the jury, and (b) legal representatives acting in the proceedings, and (c) such other persons as the court may direct.

319

*Criminal Law (Sexual Offences) Bill 2015*

*New section 14A in Act of 1992*

*(Giving evidence from behind a screen)*

*Provide that –*

*The following section is inserted after section 14:*

*“Giving evidence from behind a screen etc.*

*14A. – (1) Where –*

*(a) a person is accused of an offence to which this Part applies, and*

*(b) a person under 18 years of age/a child is to give evidence in*

*circumstances where, for any reason, a live television link is not used, the judge may direct that the evidence be given in the courtroom from behind a screen or other device that allows the witness not to see the accused, provided the judge is satisfied that such a direction is necessary in the interests of justice.*

*(2) A direction under subsection (1) shall ensure that the witness can see and hear, and be seen and heard by,*

*(a) the judge and the jury, where there is a jury,*

*(b) legal representatives acting in the proceedings, and*

*(c) any interpreter, intermediary appointed under section 14, or other person appointed to assist the witness, and can be seen and heard by the accused.*

320

Amendment of section 16 of Act of 1992

(Video recording as evidence at trial)

Provide that –

Paragraph (b) of subsection (1) (as substituted by section 4 of the *Criminal Law (Human Trafficking) (Amendment) Act 2013*) is substituted by the following:

“(b) a videorecording of any statement made during an interview with a a member of the Garda Síochána or any other person who is competent for the purpose –

(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed), or

(ii) by a person under 18 years of age (being a person other than the accused) in relation to –

(I) a sexual offence, or

(II) an offence under section 3(1), (2) or (3) of the *Child Trafficking and Pornography Act 1998*, or

(III) section 2, 4 or 7 of the *Criminal Law (Human Trafficking)*

provide for a violent offence eligibility and there is a significant extension of the interpretation of 'sexual offences' under that Bill.<sup>321</sup> The *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015* contains a significantly broader provision than is currently provided for under s.16 (1) (b) *Criminal Evidence Act 1992*. It extends the eligibility from complainants under 14 to witnesses under 18. The new provision states:

A video recording of any statement made during an interview with a member of the Garda Síochána or any other person who is competent for the purpose by a person under 18 year of age being a person other than the accused.

2.19.8 However, in terms of the offence eligibility there is a certain uncertainty in the Bill. Application of the Bill to child witnesses is contained in Head 17 (where a child is presumed to be eligible for the support measures under Heads 15 and 16 of the Bill). Heads 15 and 16 *Criminal Justice (Victims of Crime) Bill 2015* (eligibility of special measures during investigation and trial respectively), provide that the victim may benefit of the support measures 'in any proceedings' which are contained in Part III *Criminal Evidence Act 1992*. Thus, it is possible that the support measures may be available in any proceedings unless the legislation is to be interpreted as eligible under Part III of the Act which would limit the eligibility to

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(Amendment) Act 2008,".

321 S.33 Criminal Law (Sexual Offence) Bill 2015

Amendment of section 2 of Act of 1992 (Interpretation) Provides that - Section 2 of the Act of 1992 (as amended) is amended by the substitution of the following for the definition of "sexual offence": "sexual offence" means rape, sexual assault (within the meaning of section 2 of the Act of 1990), aggravated sexual assault (within the meaning of section 3 of the Act of 1990), rape under section 4 of the Act of 1990 or an offence under -

(a) section 3 (as amended by section 8 of the Act of 1935) or 6 (as amended by section 9 of the Act of 1935) of the Criminal Law Amendment Act 1885,

(b) section 5 of the Criminal Law (Sexual Offences) Act 1993,

(c) section 1 (as amended by section 12 of the Criminal Justice Act 1993 and section 5 of the Criminal Law (Incest Proceedings) Act 1995) or 2 (as amended by section 12 of the Act of 1935) of the Punishment of Incest Act 1908,

(d) sections 4A or 4B of the Act of 1998 (as inserted by sections 11 and 12 of the Criminal Law (Sexual Offences) Act 2014)

(e) section 249 of the Children Act 2001,

(f) the Criminal Law (Sexual Offences) Act 2006, or

(g) section 3, 4, 5, 6, 7, 8, 14, 15, 58 or 59 of the Criminal Law (Sexual Offences) Act 2014,

excluding an attempt to commit any such offence."



the offences set out in s.12. One interpretation of the amendments contained in Head 26 of the Bill to Part III *Criminal Evidence Act 1992* indicates that, indeed, the offence eligibility is limited to that contained in s.12 of the *Criminal Evidence Act 1992*. Head 26 of the *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015* proposes to insert a new s.12(f) into the *Criminal Evidence Act 1992* which will extend the eligibility for support measures during investigation and trial for all victims. It allows the support measures under Part III of the Act to be provided for a victim in respect of whom a court has made a direction under Head 16 of the *Criminal Justice (Victims of Crime) Bill*.

2.19.9 The new proposals contained in Heads 6, 15, 16 and 17 of the *Criminal Justice (Victims of Crime) Bill 2015* are extremely complex in how they extend the eligibility of support measures. In amending Part III *Criminal Evidence Act 1992*, Head 26 of the Bill may also cause considerable confusion. As presently written, the Bill is also at times contradictory.<sup>322</sup> However, the extension of eligibility of child witnesses under 18 for the support measures contained in the *Criminal Evidence Act 1992* is a welcome proposal.

2.19.10 There are no provisions within the Bills which deal with the issues of training of practitioners and the judiciary as set out in Article 25 of the EU Directive. This contrasts greatly to the case in England and Wales. In September 2014, Chris Grayling, Secretary of State for Justice in England and Wales, announced that new reforms to protect victims would include provisions that publicly funded lawyers are

<sup>322</sup>

*'Head 16 Special measures during trial*

*Provide that: (1) In any proceedings for an offence where a victim is required to give evidence, the Court may, on the application of the prosecutor, where it is satisfied that the victim by reason of any of the following: (a) his or her personal characteristics (b) the type and nature of the offence alleged (c) the degree of harm suffered by him or her as a result of the offence alleged (d) the relationship, if any, between him or her and the accused (e) The nature of the evidence he or she is to give (f) any behaviour towards him or her on the part of – (i) the accused (ii) members of the family of or associates of the accused should be permitted to give evidence other than viva voce in open court and, if it is further satisfied that no injustice would thereby be caused to the defendant, shall direct that the evidence be given under such provision as it considers appropriate of Part III of the Criminal Evidence Act 1992, as amended. (2) A court may, if it does not make a direction under (1), if it is satisfied that by reason of any of the matters referred to in (1) (a) to (f) it is appropriate to do so, exclude from the court while the victim is giving his or her testimony all persons except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the media and such other persons (if any) as the court may in its discretion permit.'*

*Criminal Justice (Victims of Crime) Bill 2015.*

to be barred from taking on serious sex offence cases unless they have undergone specialist training.<sup>323</sup>

2.19.11 It appears from the draft legislation that the provision for the use of intermediaries will not be amended. Nor are there any proposals for the use of full recorded testimony i.e. the pre-trial recording of both examination in chief and cross-examination testimony of child witnesses. If the draft legislation is enacted and commenced as presently outlined,<sup>324</sup> it is submitted that an opportunity for meaningful reform will be lost. This is extremely disappointing particularly in the light of the legislative and cultural changes that have occurred in England and Wales particularly with regard to the use of intermediaries.<sup>325</sup> It remains the case that the legislation which deals with the child witness is piecemeal and complex and it is submitted that revised consolidated legislation should be drafted to deal with all aspects concerning the child witness.

2.19.12 In asserting the specific rights for the child witness, it is submitted that the drafting of clear and consolidated legislation, the minimisation of delay, the full pre-trial recording of all evidence, the training of practitioners and the implementation of consistent review of practice are the main concerns. Much of recent EU legislation is concerned with protecting the vulnerable child and it is clear that a move towards making the child a rights holder is a clear objective of the European Union.<sup>326</sup>

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<sup>323</sup> 'Chris Grayling unveils victims' rights reforms  
Right of victims of crime to directly confront offenders in court is to be enshrined in law.' The Guardian, 14<sup>th</sup> September 2014.  
<http://www.theguardian.com/law/2014/sep/14/chris-grayling-victims-rights-law> (Accessed 28th September 2015)

<sup>324</sup> *Criminal Law (Sexual Offences) Bill 2015; General Scheme of the Criminal Law (Victims of Crime) Bill 2015.*

<sup>325</sup> See *Chapter VI – The Support Measure of Intermediaries* at para. 6.0.0.

<sup>326</sup> 'Making the justice system more child-friendly in Europe is a key action item under the EU Agenda for the Rights of the Child. It is an area of high practical relevance where the EU has, under the Treaties, competences to turn the rights of the child into reality by means of EU legislation.'  
Towards concrete EU action for children - Child Friendly Justice' *An EU Agenda for the Rights of the Child* (Brussels, 15.2.2011) at para. 2.1 at p. 6.

2.19.13 The phrases “best interests” and the ‘views’ of the child are referred to in the Victim’s Directive<sup>327</sup> and are now reflected in the *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*.<sup>328</sup> However, it is difficult to legislate for the child as rights holder and also extremely challenging to implement particular rights in a meaningful way. Article 1.2 of the ‘Victim’s Directive’ states that Member States shall ensure that in the application of the Directive, where the victim is a child, the child’s best interests shall be a primary consideration and shall be assessed on an individual basis. The draft legislation to implement the EU Directive allows for the best interests of the child witness to be considered where the use of special measures is required.<sup>329</sup> Head 6 of the *Criminal Justice (Victims of Crime) Bill 2015* provides that the member of An Garda Síochána who records a complaint shall assess the special measures which may be required to support the complainant. The assessment shall have regard to the personal characteristics of the complainant, the type and nature of the offence alleged, the severity of the offence, the degree of harm suffered by the complainant, and the circumstances of the commission of the offence alleged the relationship, if any, between the complainant and the alleged offender.<sup>330</sup> This places a huge responsibility on the Garda taking the complaint to be aware of the special measures available to the child witness and to implement the legislation appropriately. Considerable resources and training will be necessary to put the provision into operation correctly.

<sup>327</sup> ‘Preamble(14) In applying this Directive, children’s best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child adopted on 20 November 1989. Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their own views. ;

Article 1(2) Member States shall ensure that in the application of this Directive, where the victim is a child, the child’s best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child’s age, maturity, views, needs and concerns, shall prevail. The child and the holder of parental responsibility or other legal representative, if any, shall be informed of any measures or rights specifically focused on the child.’

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>

<sup>328</sup> Preamble Criminal Justice (Victims of Crime) Bill 2015; Head 17(2) *Criminal Justice (Victims of Crime) Bill 2015*.

Head 9 *Victim Personal Statements Criminal Justice (Victims of Crime) Bill 2015*

<sup>329</sup> Preamble; and Part 6, *Special measures for child complainants* , Head 17 (2) *Child complainants Criminal Justice (Victims of Crime) Bill 2015*.

<sup>330</sup> Head 6 *Assessment of Complainant Criminal Justice (Victims of Crime) Bill 2015*.

2.19.14 Article 10 of the Victim's Directive outlines the right of victims to be heard in criminal proceedings.<sup>331</sup> This is a ground breaking step but the manner of transposition is challenging. The right to be heard in criminal proceedings is transposed through Head 9 of the Bill and the giving of 'victim personal statements' under that section.<sup>332</sup> It is contended that this is a very different interpretation of the right to be heard in criminal proceedings as provided for in s. 9 of the Bill. Article 10.1 of the 'Victim's Directive' states that Member States shall ensure that victims may be heard and that where the victim is a child, due account shall be taken of the child's age and maturity. Article 10.2 goes on to state that the procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law. This latter provision allows the Member State considerable discretion in the transposition of the right effectively allowing it to be narrowly drawn. It is submitted that the proposed provision within the General Scheme of the *Criminal Justice (Victims of Crime) Bill 2015* is overly limiting in relation to the child victim's right to be heard in criminal proceedings.

2.19.15 In this jurisdiction, the principles of the 'best interests' of the child and the 'views' of the child are predominantly associated with a family law setting. In *State (Nicolaou) v An Bord Uchtála*,<sup>333</sup> the Supreme Court held that the position of married parents takes priority over unmarried parents in the context of the concept of the family as protected by Article 41 of the Constitution. In *Re JH*,<sup>334</sup> the Supreme Court indicated that notwithstanding the legislative direction that courts are required to treat the welfare of the child as the first and paramount consideration,<sup>335</sup> the constitutional rights of the family under Articles 41 and 42 of the Constitution are of overriding importance. The constitutional primacy of rights accorded to the parents

<sup>331</sup> Article 10 Right to be heard Chapter 3 Participation in Criminal Proceedings Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>.

<sup>332</sup> Head 9 'Victim Personal Statement' *Criminal Justice (Victims of Crime) Bill 2015*.

<sup>333</sup> *State (Nicolaou) v. An Bord Uchtála* [1966] IR 567.

<sup>334</sup> *Re JH* [1985] I.R. 375.

<sup>335</sup> S.3 *Guardianship of Infants Act*, 1964, provides that in any proceedings where the custody, guardianship or upbringing of a child is in question the court "shall regard the welfare of the infant as the first and paramount consideration."

was affirmed in *North-Western Health Board v. H.W.*<sup>336</sup> and in *N v HSE*,<sup>337</sup> a case similar to *Re JH*,<sup>338</sup> in which the rights of the parents superseded what may have been objectively deemed to have been the best interests of the child. Traditionally, therefore, the rights of the child are examined within the hierarchy of the constitutional rights framework. The same will necessarily be the case in matters involving the child witness. Regarding how the child witness is dealt with by the courts, it was clearly stated in the Supreme Court in *Donnelly v Ireland*<sup>339</sup> the right of an accused person to a fair trial is a superior right within that same hierarchy of constitutional rights.<sup>340</sup>

2.19.16 Under Article 34.1 of the Constitution of Ireland, justice ‘save in such special and limited cases as may be prescribed by law, shall be administered in public.’<sup>341</sup> The difficulties of children participating in judicial proceedings may be improved by the hearing of the matter ‘in camera’, in circumstances where the public are excluded or where there are strict reporting restrictions.

2.19.17 In family law and child care matters, cases may be heard ‘in camera’ meaning that the only persons permitted to be present are the parties concerned, their legal representatives and officers of the court. Under the *Courts and Civil Law (Miscellaneous Provision) Act 2013*, the in camera rules have been relaxed to allow, in certain circumstances, the public and members of the press to be present in court during family law and child care proceedings. Reporting restrictions are maintained under s.40A *Civil Liability and Courts Act 2004* as amended by the 2013 Act.

2.19.18 Although frequently termed the ‘in camera’ rule, certain other provisions do not quite come under this term. They provide for the exclusion of the public where children are giving evidence or where certain offences are being prosecuted but allow for certain other parties to be present during proceedings. S. 257 *Children Act*

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<sup>336</sup> *North-Western Health Board v. H.W.* (also known as the ‘PKU test’ case) [2001] 3 IR.

<sup>337</sup> *N. v. HSE* (also known as the ‘Baby Ann’ case) [2006] 4 IR 375.

<sup>338</sup> *Re JH* [1985] I.R. 375.

<sup>339</sup> *Donnelly v Ireland* 1 IR 321; [1998] 1 ILRM 402 (SC); Unreported, High Court, December 9, 1996.

<sup>340</sup> *Donnelly v Ireland* 1 IR 321 as per Hamilton CJ at p. 348.

<sup>341</sup> Article 34.1 Constitution of Ireland 1937

2001.<sup>342</sup> The section applies to any criminal proceedings where a child is called as a witness and provides that during his or her evidence, only certain person may remain in court. The section allows for officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons (if any) as the court may in its discretion permit to remain. S.257 *Children Act 2001* is a general provision for the exclusion of the public but only applies while a child is giving evidence in criminal proceedings.<sup>343</sup>

2.19.19 There is also general provision for the exclusion of persons throughout the entire hearing of criminal matters under s. 20(3) *Criminal Justice Act 1951*<sup>344</sup> which allows for the same categories of persons to remain i.e. officers of the Court, persons directly concerned in the proceedings, *bona fide* representatives of the Press, and such other persons as the Court may, in its discretion, permit to remain. However, the Court must be of the opinion that the offence is of an indecent or obscene nature in order to thus rule. S. 20 (4) of the same Act also provides the right of the parent, relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court. A similar provision, including the right of a parent, etc to remain is included in the *Criminal Justice (Female Genital Mutilation) Act 2012*.

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<sup>342</sup> Children Act 2001

257. Clearing of court in certain cases

(1) Where in any proceedings for an offence a person who, in the opinion of the court, is a child is called as a witness, the court may exclude from the court during the taking of his or her evidence all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons (if any) as the court may in its discretion permit to remain.

(2) The powers of a court under this section shall be in addition and without prejudice to any other power of the court to hear proceedings *in camera* or to exclude a witness until his or her evidence is required or to Part III (which relates to evidence through a television link in certain proceedings) of the Act of 1992.

<sup>343</sup> Children Act 2001

257. Clearing of court in certain cases

(1) Where in any proceedings for an offence a person who, in the opinion of the court, is a child is called as a witness, the court may exclude from the court *during the taking of his or her evidence ...*

<sup>344</sup> Criminal Justice Act 1951

(3) *In any criminal proceedings for an offence which is, in the opinion of the Court, of an indecent or obscene nature, the Court may, subject to subsection (4), exclude from the Court during the hearing all persons except officers of the Court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons as the Court may, in its discretion, permit to remain.*

(4) *In any criminal proceedings—*

(a) *where the accused is a person under the age of twenty-one years, or*

(b) *where the offence is of an indecent or obscene nature and the person with or against whom it is alleged to have been committed is under that age or is a female,*

*a parent or other relative or friend of that person shall be entitled to remain in Court during the whole of the hearing.*

2.19.20 A similar provision is also included in s.6 *Criminal Law (Rape) Act 1981* which allows for similar categories to remain and the general public to be excluded in any proceedings for a rape offence or the offence of aggravated sexual assault or attempted aggravated sexual assault or any connected inchoate offence. S. 3 of the same Act also provides the right of the parent, relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court. A similar provision, which also includes the right of a parent, etc to remain is included under s.8 *Criminal Justice (Female Genital Mutilation ) Act 2012*.

2.19.21 Section 2 *Criminal Law (Incest Proceedings )Act 1995*<sup>345</sup> allows for the same category of persons to remain. (It does not however include a similar provision to s.3 *Criminal Law (Rape) Act 1981* or s.8 *Criminal Justice (Female Genital Mutilation ) Act 2012*. A proposal is contained under s.24 *Criminal Law (Sexual Offences) Bill 2015* to exclude the public from hearings of proceedings under the *Punishment of Incest Act 1908* but does not contain a provision to allow for a relative or friend of the complainant to remain or a relative or friend of the accused where he or she is under 18 years of age.

2.19.22 An additional general power to exclude the public and restrict reporting of a trial, is contained under the *General Scheme of the Criminal Procedure Bill (2015)* in Head 2 part 6 which also contains a provision under part 8 which also provides that where the accused is a person under the age of eighteen, a parent, guardian, or other relative or friends of that person shall be entitled to remain Court during the whole of the hearing.<sup>346</sup>

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<sup>345</sup> *Criminal Law (Incest Proceedings )Act 1995*

2. Exclusion of public from hearings of proceedings

(1) *In any proceedings for an offence under the Act of 1908, the judge or the court, as the case may be, shall exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press and such other persons (if any) as the judge or the court, as the case may be, may, in his, her or its discretion, permit to remain.*

<sup>346</sup> *Revised General Scheme of the Criminal Procedure Bill ( June 2015)*

2.19.23 S.252 *Children Act 2001*<sup>347</sup> is a general provision which allows for the anonymity of any child whether he or she is a witness or a complainant. Reporting restrictions are also contained in s.7 *Criminal Law (Rape) Act 1981* in respect of the complainant. Alternatively, the trial judge may clear the court of persons not connected with a case when a child is giving evidence.<sup>348</sup> The court may also order that reporting restrictions will apply where a child is a witness or a complainant in any proceedings.<sup>349</sup> A child witness may have access to court accompaniment which will provide general, practical support within the court environment.<sup>350</sup> A pre-trial court visit may be arranged so that the child will be familiar with the court environment before giving evidence. Post-conviction, a child witness giving a victim impact statement may do so through an intermediary and/or by means of video link.<sup>351</sup> None of these measures may seem particularly radical today but each was ground-breaking at the time of enactment, over 20 years ago.

2.19.24 Taking into account the proposed legislative changes discussed above, there has still been little change of any significance in this jurisdiction since the *Criminal Evidence Act 1992*. There is no expressly stated overriding policy objective of the

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<sup>347</sup> The Children Act 2001  
s. 252 Anonymity of child in court proceedings

(1) Subject to subsection (2), in relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings—  
(a) no report which reveals the name, address or school of the child or includes any particulars likely to lead to his or her identification, and  
(b) no picture which purports to be or include a picture of the child or which is likely to lead to his or her identification,  
shall be published or included in a broadcast.  
(2) The court may dispense to any specified extent with the requirements of subsection (1) if it is satisfied that it is appropriate to do so in the interests of the child.  
(3) Where the court dispenses with the requirements of subsection (1), the court shall explain in open court why it is satisfied it should do so.  
(4) Subsections (3) to (6) of section 51 shall apply, with the necessary modifications, for the purposes of this section.  
(5) Nothing in this section shall affect the law as to contempt of court.

<sup>348</sup> S.257 Children Act 2001.

<sup>349</sup> S.252 Children Act 2001.

<sup>350</sup> See: *Victims Charter and Guide to the Criminal Justice System*. Victims of Crime Office, Dept. of Justice, Equality and Law Reform at p. 5.  
<http://www.victimsofcrimeoffice.ie/en/vco/Entire%20Charter.pdf/Files/Entire%20Charter.pdf> (Accessed 25<sup>th</sup> September 2015)

Court Accompaniment Court Services (CASS), Children at Risk in Ireland.

<http://www.cari.ie/our-services/cass-court-accompaniment-support-service> (Accessed 25<sup>th</sup> September 2015).

<sup>351</sup> SS..5 and 6 *Criminal Procedure Act 2010*.



legislation which contains the support measures. It is implicitly implied that the child witness should be protected but further express objective are crucial such as the need to maximise the evidence.<sup>352</sup> While legislative provisions are available for the child witness in court, there may be considerable difficulties in practically ensuring that the support measures are in place and that they are effective in practice.

2.19.25 A balance must be struck between the right of the child to be protected and the obligation of a society to ensure that witnesses testify to ensure that offences may be prosecuted. A dearth of empirical data conceals aspects of the criminal justice system such as the effects of delay, aggressive cross-examination or lack of training and facilities. Prosecutions where a child felt his or her voice was heard and where the best interests principle was applied may also go unnoticed. It is difficult in this jurisdiction to fully ascertain the efficacy of support measures which purportedly allow the voice of the child to be heard. Extensive research has been carried out in other jurisdictions concerning the examination of intermediary pilot projects<sup>353</sup> and more generally on the experiences of child witness in general.<sup>354</sup> It is submitted that similar research is necessary in Ireland. However well-defined the rights of the child may be in domestic legislation and international instruments, they will be of little impact if they are not implemented appropriately, and the corresponding State's obligations enforced, effectively. It is imperative to examine the procedural rights of the child witness to analyse how the rights of the child witness operate in practice.

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<sup>352</sup> For example, when considering which special measures may be appropriate, the courts in England and Wales, may consider which will maximise the evidence.

*'(2) Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—*

*(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and*

*(b) if so—*

*(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence;'*

*S. 19 Youth Justice and Criminal Evidence Act 1999.*

<sup>353</sup> Joyce Plotnikoff and Richard Woolfson, *The Go-Between Report* (Office of Criminal Justice Reform 2005).

<sup>354</sup> See e.g. in England and Wales: Richard Joyce Plotnikoff and Richard Woolfson, *—Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings —* (Lexicon Limited; The Nuffield Foundations – July 2009); *Young Witnesses in criminal proceedings - A progress report to Measuring Up?* (NSPCC, The Nuffield Foundation) (June 2010) ([www.nspcc.org.uk/inform](http://www.nspcc.org.uk/inform)).

2.19.26 Article 42A.1 states:

The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.<sup>355</sup>

2.19.27 For the first time, the rights of the child are expressly included in the Constitution of Ireland. While the rights of the child witness in criminal proceedings are not outlined specifically within the new article, Article 42A fortifies the rights of the child generally. As challenges are taken in light of the new Article, implicit, secondary and derivative rights will develop which will extend the context in which the child witnesses' rights can be evaluated. Article 42A may also ground a constitutional action involving an unenumerated right under Article 40.3.2° which reads:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.<sup>356</sup>

2.19.28 The child witness also has an express right to be treated equally under Article 40.1 which provides that 'all citizens shall, as human persons, be held equal before the law.'<sup>357</sup> Under this strengthened rights framework, the State may therefore be required to furnish adequate support measures to the child witness. This requirement will be on the basis that a child's inherent characteristics require facilitation in order to give them as similar a footing as possible as that of an adult when he or she is involved in the trial process.

2.19.29 While the unenumerated rights doctrine was popular in the late 60s and 70s following the case of *Ryan v The Attorney General*,<sup>358</sup> regard for it has declined in

<sup>355</sup> Art. 42A° *The Constitution of Ireland 1937*.

<sup>356</sup> Art. 40.3.2° *The Constitution of Ireland 1937*.

<sup>357</sup> Art. 40.1 *The Constitution of Ireland 1937*.

<sup>358</sup> *Ryan v. Attorney General* [1965] IR 294. The case of *Ryan* saw a challenge to the use of fluoridation in public supply of water and although the case failed on that point, it gave rise to the doctrine of

recent times. Kenny argues that it would still be possible to assert a right that is not explicitly contained in the Constitution of Ireland 1937 particularly if another right in the Constitution supports it.<sup>359</sup> He also suggests that there may be value in the doctrine of unenumerated rights in light of the High Court's ruling in the *Fleming v Ireland*.<sup>360</sup> Although Marie Fleming ultimately failed in the High Court, and on appeal in the Supreme Court, to be afforded the right to die through assisted suicide without fear of prosecution of the person who assisted her, the court ruled that the rights of the person under Art.40 were interpreted as guaranteeing autonomy in decision-making related to personal welfare.<sup>361</sup> Kenny states that this is, in theory, an astonishingly wide protection.

2.19.30 Parsing which factors may strengthen such a challenge, Kavanagh examines the criterion of 'justice' in discerning an unenumerated right.<sup>362</sup> It is submitted that this is an extremely strong factor in terms of the protection of the child witness. Effective support for the child witness that enables him or her to give evidence may directly affect the interests of justice in any criminal matter.

2.19.30 The protection of psychological and physical rights under Article 40.3.2 has most recently been upheld by the Irish courts in cases involving prison custody. In *Kinsella v The Governor of Mountjoy Prison*,<sup>363</sup> Hogan J held that the State was obliged, pursuant to Article 40.3.2 of the Constitution, not merely to protect the integrity of the human body of a citizen, but also the integrity of his or her mind and personality. In the more recent case of *McDonnell v The Governor of Wheatfield Prison*,<sup>364</sup> where the applicant challenged the constitutionality of solitary detention, Cregan J made a declaration that the prisoner's rights to bodily and psychological integrity were breached. The unenumerated right to bodily integrity has been

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unenumerated rights. While not an explicit right found in the Constitution of Ireland 1937, the right to bodily integrity was deemed to an implicit right under the Constitution in that case.

<sup>359</sup> David Kenny, *Recent Developments in the Right of the Person in Article 40.3: Fleming v Ireland and the Spectre of Unenumerated Rights* (2013), 1 *DUIJ*, 322-341.

<sup>360</sup> *Fleming v Ireland* [2013] IEHC 2; [2013] IESC 19; [2013] 2 IR 417 (SC)

<sup>361</sup> *Fleming v Ireland* [2013] IEHC 2 at para. 49 as per Kearns P.

<sup>362</sup> Aileen Kavanagh, *The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice*, Vol.2 *The Irish Jurist* 2012, 71-101.

<sup>363</sup> *Kinsella v The Governor of Mountjoy Prison*[2012]1IR 467; [2011] IEHC 235.

<sup>364</sup> *Prison governor to appeal decision over killer of girl in Tallaght* *The Irish Times* 20<sup>th</sup> February 2015, <http://www.irishtimes.com/news/crime-and-law/courts/high-court/prison-governor-to-appeal-decision-over-killer-of-girl-in-tallaght-1.2111600> (Accessed 21st September 2015).

consistently upheld in this jurisdiction and this right may potentially extend the right of a child witness not to be psychologically harmed unnecessarily while giving evidence.

2.19.31 It is essential to acknowledge that the rights of a child cannot be considered in isolation but must be assessed, in any given case, in light of the family background of the child concerned as well as the circumstances which may give rise to the need for rights protection. The State may also play a significant role in the situation. For example, in considering the unenumerated right of the right to travel, Finlay P stated in *The State (at the Prosecution of K. M. and R.D.) v The Minister for Foreign Affairs, Marie Burke and The Attorney General*<sup>365</sup> that where the court was dealing with a child who was under the age of reason, such a personal right, as under Article 40.3.2 must be construed in the light of the exercise of that right by the choice of his or her parent, parents or legal guardians 'subject always to the right of the Courts by appropriate proceedings to deny that choice in the dominant interest of the welfare of the child.'<sup>366</sup>

2.19.32 Where a child is called to give evidence, the parents or guardians are not wholly in control of the proceedings. The State therefore has a weighty responsibility in the protection of the child. Where a child must perform in strange circumstances and where he or she cannot be practically assisted by his or her parents or guardians, the State much surely have a heightened responsibility to provide adequate support. It is noteworthy that the State is calling upon the child to perform the particular civic function of assisting in the prosecution of criminal offences which will benefit society at large. It should be observed however that while a competent witness is a compellable witness, in practice, it is likely that neither a judge nor a prosecutor would force a child witness to testify.<sup>367</sup>

2.19.33 Within the realm of procedure, the courts have tended to emphasise the rights of the defendant to a fair trial and the broader concerns of the administration

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<sup>365</sup> *The State (at the Prosecution of K. M. and R.D.) v The Minister for Foreign Affairs, Marie Burke and The Attorney General* [1979]11R 73.

<sup>366</sup> *The State (at the Prosecution of K. M. and R.D.) v The Minister for Foreign Affairs, Marie Burke and The Attorney General* [1979]11R 73 at p. 81.

<sup>367</sup> See: para 3.9.4 where such an instance arose in criminal proceedings in England.

of justice.<sup>368</sup> In *Donnelly v Ireland*<sup>369</sup> and *White v Ireland*,<sup>370</sup> have indicated that there is a readiness to assist the child witness where technological advances improve the conditions for giving evidence but not at the risk of infringing the constitutional right of the defendant to a fair trial. However, if it were proven that a child witness had suffered irreparable harm as a result of giving evidence, the vindication of the child's constitutional rights must have meaningful traction.

### **2.20.0 Recent developments in child protection through case law of the European Court of Human Rights**

2.20.1 When the European Court of Human Rights (ECtHR) examines the use of support measures, it assesses the overall effect of any modification in the taking and admission of testimony in concert with any factors which may have an impact on the rights of the defendant, victim and witness. The Court must balance the rights of the defendant while ensuring that child witnesses can give his or her evidence in a safe environment with minimal stress. For instance, where certain Contracting States have criminal procedures which allow children's testimony to be taken prior to trial and admitted in the absence of the witness, the ECtHR has ruled that these procedures are not a violation of Article 6 where there was an opportunity for the defence to challenge the witness' testimony.

2.20.2 Ni Raifeartaigh notes the latitude afforded to vulnerable witnesses by the ECtHR in cases such as *MK v Austria*<sup>371</sup> and *SN v Sweden*.<sup>372</sup> In these cases, the Court took the view that cases involving children giving evidence in sexual offences justified the exception to the general principle that witnesses must give evidence at trial. This exception was allowed notwithstanding that the child's evidence was, effectively, the only source of evidence against the applicant.<sup>373</sup> Ni Raifeartaigh notes that the ECtHR cases involving modification to the manner of taking and admitting child testimony show that, equality of arms notwithstanding, the

<sup>368</sup> *The State (Healy) v Donoghue* [1976] 1IR 325. *In re Haughey* [1971] I.R.217.

<sup>369</sup> *Donnelly v Ireland* 1 IR 321; [1998] 1 ILRM 402 (SC).

<sup>370</sup> *White v Ireland* [1995] I IR 268.

<sup>371</sup> *MK v Austria* (1997) 24 EHRR CD 59.

<sup>372</sup> *SN v Sweden* (2004)39 EHRR 13.

<sup>373</sup> Una Ni Raifeartaigh, *The Convention and Irish Criminal Law : Selected Topics* ECHR and Irish Law (2<sup>nd</sup> Ed.) (Ed. Ursula Kilkelly) (Jordans 2009) para.8.59 at p 274.

Convention may not be an obstacle to those seeking special measures for special categories of complainant. But interestingly, she queries whether the Convention actually requires such special measures and notes that this would be ‘a novel and most interesting type of challenge, based on the absence of legislation rather than the offending features of existing legislation.’<sup>374</sup> Since Ni Raifeartaigh discussed this matter in 2009, the case for revised legislation providing meaningful support measures could be made more forcefully in the face of increased rights protection under the EU ‘Victims Directive’<sup>375</sup> and recent ECtHR judgements of *O’Keeffe v Ireland*,<sup>376</sup> *CS and CAS v Romania*<sup>377</sup> and *ND v Estonia*.<sup>378</sup>

2.20.3 As a separate but related matter, the *Convention on the Rights of the Child*<sup>379</sup> (CRC) and the *Guidelines of the Committee of Ministers on Child Friendly Justice* promote the rights and entitlements of a child in all circumstances including court proceedings. The manner in which the Contracting States operate their judicial systems is their responsibility provided that Convention rights are properly protected. Ratification of the CRC as well as the European Convention on Human Rights (ECHR) has required Ireland to adopt a greater shift towards positive rights obligations. Under the CRC and the ECHR, it appears that there is now an enhanced state responsibility to provide safer environments for the most vulnerable in society. This is increasingly apparent in light of recent judgements such as *O’Keeffe v Ireland*,<sup>380</sup> *CS and CAS v Romania*<sup>381</sup> and *ND v Slovenia*.<sup>382</sup>

2.20.4 Starmer has charted the cultural evolution towards positive obligations on governments to protect citizens from harm.<sup>383</sup> He is of the opinion that key developments in victim’s rights would not have taken place without the catalyst of

<sup>374</sup> Una Ni Raifeartaigh, *The Convention and Irish Criminal Law: Selected Topics ECHR and Irish Law* (2<sup>nd</sup> Ed.) (Ed. Ursula Kilkelly) (Jordans 2009) para.8.59 at p 274.

<sup>375</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>376</sup> *O’Keeffe v Ireland* (Application No 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>382</sup> *CS and CAS v Romania* (Application No. 26692/05) 20th March 2012.

<sup>378</sup> *ND v Slovenia* (Application no. 16605/09) (Fifth Section) 15 January 2015.

<sup>379</sup> Article 12, UN Convention on the Rights of the Child (1989).

<sup>380</sup> *O’Keeffe v Ireland* (App.No 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>381</sup> *CS and CAS v Romania* (App. No. 26692/05) (ECtHR 20th March 2012).

<sup>382</sup> *ND v Slovenia* (App. no. 16605/09) (Fifth Section) (ECtHR 15 January 2015).

<sup>383</sup> Keir Starmer, ‘*Human Rights, Victims and the Prosecution of Crime in the 21<sup>st</sup> Century*’ 11 (2014) *Crim.L.R.* 777.

human rights law. The responsibility to ensure that environments in the purview of a State will not cause harm has greatly expanded. An obvious example of burgeoning positive obligations is seen in the use of the ‘Osman warning’ which originated in a case where the police were aware that a teacher who had been harassing one of his students was at risk of doing harm.<sup>384</sup> The student’s father was eventually killed by the teacher involved. The European Court of Human Rights (ECtHR) found that there was a positive onus on the police to do more to protect those at risk. The ‘Osman warning’ is triggered when the police receive intelligence that a person is a risk and obliges the authorities to warn the person involved and offer him or her appropriate protection.

2.20.5 A more recent far reaching development, directly affecting this jurisdiction is the judgment of the ECtHR in *O’Keeffe v Ireland*.<sup>385</sup> It clearly suggests that the positive rights obligation of the State to protect children from harm may have a significant wide ranging effect. As a child, Louise O’Keeffe had been sexually abused in primary school by her teacher Leo Hickey. She was unsuccessful in High and Supreme Court proceedings in this jurisdiction in seeking to have the State found vicariously liable for failing to protect her while at school. Ms.O’Keeffe then brought an application to the ECtHR. The European Court found that the State had violated the applicant’s right to freedom from degrading treatment under Art.3 of the Convention. The Court found that the State had violated the applicant’s rights under Article 13 because it had failed to provide her with an effective remedy.

2.20.6 The treatment of Ms. O’Keeffe and the treatment of child witnesses in criminal proceedings obviously differ greatly. There is a critical difference between repeated sexual abuse perpetrated against a child and the treatment of a child witness during the course of an investigation and prosecution of an offence. While acknowledging this fact the case is still salient as firstly, it recognises the responsibility of the State in terms of obligations to protect children who come within its purview. Secondly it pitches it in wider terms. While the nature of the conduct, both by perpetrator and subsequently by the State, concerned in O’Keeffe are demonstrably more egregious, the situation is relevant to a child witness in

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<sup>384</sup> *Osman v United Kingdom* (2000) 29 EHRR 245.

<sup>385</sup> *O’Keeffe v Ireland* (App. No 35810/09) (ECtHR. 28<sup>th</sup> January 2014).

certain respects. The initial offences committed against Ms. O’Keeffe were appalling, the State failed to protect her from harm, to respond to her complaints and to vindicate her and provide a remedy. It is this latter treatment which is analogous to the treatment of the child witness in criminal proceedings.

2.20.7 In *O’Keeffe*,<sup>386</sup> the actions perpetrated against Ms. O’Keeffe had been committed under the auspices of a third party, that being the school which had been managed by the Catholic Church. Yet, the Court found the State to be liable for violations of the applicant’s rights in circumstances where the State should have been aware of the threat of or actual harm to the child and had an obligation to implement procedures that adequately protected the child. A higher level of responsibility must ensue where a child is exclusively within the purview of the State which is the case with a child witness. While the *O’Keeffe*<sup>387</sup> judgment involved an examination of the primary school system, it is submitted that the State would have similar obligations regarding the criminal justice system, and as in *O’Keeffe*,<sup>388</sup> whether the system contained ‘sufficient mechanisms of child protection.’<sup>389</sup>

2.20.8 The events which took place in *O’Keeffe*<sup>390</sup> occurred between January to mid-1973, a period of time which had very different social norms and sensitivities regarding children. It is noteworthy that the ECtHR analysed the acts and the circumstances in the context of the time in which they were committed and yet, still found that Ireland had a positive obligation to protect children from harm.<sup>391</sup> Social norms regarding children have evolved since the 1970s and there is now an acknowledged need for greater child protection in all areas of society, as a matter of domestic and international human rights law. The *UN Convention on the Rights of the Child* has significantly developed and strengthened the rights of children. Article

<sup>386</sup> *O’Keeffe v Ireland* (App. No 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>387</sup> *O’Keeffe v Ireland* (App. No 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>388</sup> *O’Keeffe v Ireland* (App. No 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>389</sup> *O’Keeffe v Ireland* (App. No 35810/09) (ECtHR 28<sup>th</sup> January 2014 at para. 150).

<sup>390</sup> *O’Keeffe v Ireland* (App. No 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>391</sup> ‘143. The relevant facts of the present case took place in 1973. The Court must, as the Government underlined, assess any related State responsibility from the point of view of facts and standards of 1973 and, notably, disregarding the awareness in society today of the risk of sexual abuse of minors in an educational context, which knowledge is the result of recent public controversies on the subject, including in Ireland.’

*O’Keeffe v Ireland* (App. No 35810/09) (ECtHR 28<sup>th</sup> January 2014) at para. 143.



24 of the *EU Charter of Fundamental Rights* outlines specific rights for children. The *European Convention on Human Rights Act 2003* has incorporated the rights of the *European Convention on Human Rights* into Irish law. The *EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* will oblige the State to establish greater legislative protections for child victims.<sup>392</sup> The insertion of Article 42A as a consequence of the Children's Rights Referendum in November 2012 strengthens the rights of the child in this jurisdiction albeit perhaps at a sub-constitutional level. The current rights framework results in an enhanced State responsibility to protect the child where the State has direct and indirect control of the circumstances in which the child operates.

2.20.9 The *O'Keeffe*<sup>393</sup> judgment widens the scope in terms of potential state responsibility and also confirms the positive obligations resting on States to protect the child in a comprehensive range of circumstances. Concerning criminal investigation, prosecution and trial, the ECtHR has recently underlined that the protection of children should be a priority. In *ND v Slovenia*,<sup>394</sup> the Applicant brought an application concerning a violation of Art. 3 of the ECHR arising out of the significant delay in the investigation and prosecution of sexual offences that had occurred at the hands of her uncle when she was six years of age. Although she had disclosed the offences to a school counsellor in 2000 when she was fourteen years of age and the investigation procedure began from that date, the hearing did not take place until 2009. The defendant was found guilty and the appeal court upheld the conviction and sentence one year later.

2.20.10 The ECtHR held that in so far as an investigation leads to charges being brought before the national courts, the positive obligations under Article 3 of the ECHR extend to the trial stage of the proceedings. In the ECtHR's opinion, the fact that 'the criminal proceedings remained at an almost complete standstill for six years

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<sup>392</sup> EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA)

<sup>393</sup> *O'Keeffe v Ireland* (App. No 35810/09) (ECtHR 28<sup>th</sup> January 2014).

<sup>394</sup> *ND v Slovenia* (App. 16605/09) (Fifth Section) (ECtHR 15 January 2015).

was manifestly at variance with the State's obligation to respect the best interests of the applicant as an underage victim of sexual offences.<sup>395</sup>

2.20.11 The case of *CAS and CS v Romania*<sup>396</sup> highlights the special protection which the ECtHR affords to children under the ECHR. In that case, the applicants claimed that procedural deficiencies in the investigation and prosecution of allegations of rape had given rise to violations of Articles 3, 6 and 8 of the ECHR. In considering the matter the ECtHR emphasised the obligations incurred by the State under Articles 3 and 8 of the ECHR in cases involving children which require that the best interests of the child be respected. It stated that the right to human dignity and psychological integrity required particular attention where a child is the victim of violence. It noted that the respondent State had assumed positive obligations under the various international instruments protecting the rights of child and emphasised the provisions of the CRC and the UN *Committee on the Rights of the Child* under which the respondent State was obliged to act.<sup>397</sup>

2.20.12 The ECtHR concluded that the authorities had failed to meet their positive obligations to conduct an effective investigation into the allegations of violent sexual abuse and to ensure adequate protection of the first applicant's private and family life. It found that there had been a violation of Articles 3 and 8 of the ECHR. The first applicant had complained about the length and outcome of the investigation and of the criminal proceedings and had relied on Article 6 of the ECHR concerning the determination of his civil rights. While the ECtHR deemed the application admissible, it held that there was no need to examine the complaint under Article 6. The restrictions in relation to Article 6(1) of the Convention are that the proceedings must be joined to a civil challenge in determination of the civil rights or obligations before the court.<sup>398</sup>

<sup>395</sup> *ND v Slovenia* (Application no. 16605/09) (Fifth Section) (ECtHR 15 January 2015) at para.61.

<sup>396</sup> *CAS and CS v. Romania* (Application no. 26692/05) (Third Section) (ECtHR 24 September 2012).

<sup>397</sup> Articles 19, 34 and 39, *UN Convention on the Rights of the Child* (1989).

<sup>398</sup> In *PM v Bulgaria* ECHR 49669/07 – 24/01/2012, the ECtHR held that there had been a violation of the respondent State's procedural obligations under Article 3 of the Convention as it had failed to conduct an efficient and timely investigation of the alleged sexual assaults against the complainant. It stated that in view of the exceptionally slow pace of the proceedings, it was not surprising that the prosecution eventually became time-barred and added that 'the investigation can hardly be regarded as having been effective and capable of leading to the proper punishment of those responsible.' The complainant claimed that the lack of an effective official investigation caused her feelings of injustice, helplessness and

2.20.13 The responsibility of State parties for the heightened protection of children had previously been emphasised in *Z and other v United Kingdom*,<sup>399</sup> in a case involving four children who had been subjected to parental abuse. While the abuse had been known to the authorities in October 1987, the children were not taken into care until 1992. The ECtHR stated that there is an obligation on States to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. The ECtHR stated that the necessary domestic measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.<sup>400</sup> This is a principle which could certainly be applied to child witnesses in criminal proceedings who may have to experience long delays and difficult and damaging treatment during the trial process.

### **2.21.0 Guidance from case law of European Court of Justice regarding the Council Framework Decision on the Standing of Victims (2001) regarding the EU Victim's Directive**

2.21.1 In relation to EU legislation, the European Court of Justice (ECJ) has previously considered the use of support measures in relation to the legislative provisions of certain States. *The Council Framework Decision on the Standing of*

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frustration. The ECtHR held that considered that the applicant must have sustained non-pecuniary damage as a result of the breaches of her rights found in the case. The ECtHR noted that the applicant did not join the criminal proceedings against her aggressors as a civil party and that therefore the proceedings at issue did not concern the determination of her civil rights within the meaning of Article 6. The ECtHR further noted that the applicant's grievances concerning the protracted investigation had already been examined under Article 3 and therefore her claim that there had been a violation of her rights under Article 6 was inadmissible. See also *Case of Moreira de Azevedo v Portugal* (1991) 13 E.H.R.R. 721 in respect of a violation of Article 6 involving criminal proceedings.

<sup>399</sup> *Z and others v United Kingdom*, (App.29392/95, 10 May 2001 [GC]),(2002) 34 EHRR 97, ECHR 2001 – V.

<sup>400</sup> *Z and others v United Kingdom*, (App.29392/95, 10 May 2001 [GC]),(2002) 34 EHRR 97, ECHR 2001 – V at 73. In relation to violations under Article 8, in *X and Y v The Netherlands X and Y v The Netherlands* (1986) 8 EHRR 235. the ECtHR has stated that children and other vulnerable individuals, in particular, are entitled to effective protection. In that case the fact that the respondent State had no effective legislative protection concerning sexual abuse against persons with an intellectual disability prompted the ECtHR to find that there had been a violation of Article 8 of the Convention. The ECtHR has consistently observed that States have a positive obligation inherent in Article 8 of the Convention to criminalise offences against the person including attempts to perpetrate offences and to reinforce the deterrent effect of criminalisation by applying criminal law provisions in practice through effective investigation and prosecution. See also *MC v Bulgaria* (2005) 40 EHRR 20 ; *KU v Finland* (2009) 48 EHRR 52.

*Victims in Criminal Proceedings* of the 15th March 2001<sup>401</sup> heightened focus of the issues of victims in criminal proceedings. It has now been overtaken by *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision ('Victim's Directive')*. Articles 2 and 3 of the Framework Decision focused on the respect and facilitation of the victim, particularly vulnerable witnesses, in criminal proceedings. Article 8 outlined general principles to be adopted by Member States to protect victims and minimise any stress in giving evidence.

2.21.2 The Council Framework Decision prepared the ground for the implementation of Victim's Directive.<sup>402</sup> The Victim's Directive contains specific provisions on the treatment of child witnesses during the investigation and trial of criminal charges. As mentioned above, Article 10 outlines the right to be heard<sup>403</sup> and states that where a child victim is to be heard, due account shall be taken of the child's age and maturity. Article 22 provides the right for an individual assessment of victims to identify specific protection needs. Article 23 provides the right to protection of victims with specific protection needs during criminal proceedings and Article 24 sets out a specific right to protection of child victims during criminal proceedings. Article 25 sets out the requirement for the training of practitioners and Article 26 outlines the requirement for the cooperation and coordination of services.<sup>404</sup>

2.21.3 Speculation as to how the ECJ will interpret domestic legislation under the Directive may be informed by two cases which involved issues regarding support measures under the protections set out by the Council Framework Decision of 2001.

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<sup>401</sup> Council Framework Decision on the standing of victims in criminal proceedings of the 15th March 2001  
<sup>402</sup> EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA).

<sup>403</sup> Article 10, 1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity.

EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA)

<sup>404</sup> Article 29 Report The Commission shall, by 16 November 2017, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including a description of action taken under Articles 8, 9 and 23, accompanied, if necessary, by legislative proposals.

*Pupino*<sup>405</sup> and *Bernardi*,<sup>406</sup> were preliminary rulings before the ECJ concerning the manner in which support measures for vulnerable witnesses were to be used by the domestic court in light of the Council Framework Decision.

2.21.4 The case of *Pupino*<sup>407</sup> examined whether evidence of young children could be taken at a preliminary stage of criminal proceedings, in specially designed facilities and with the aid of a psychiatrist and admitted later at trial under a procedure called a Special Inquiry procedure. The defendant, a nursery school teacher who was accused of mistreating her students, opposed the taking of the evidence as she argued that it was not within the exceptions which allowed for the taking of such evidence in the domestic legislation. The matter was referred to the ECJ by Italy for a preliminary ruling in order to establish the scope of Article 2, 3 and 8(4) of the Framework Decision. The Court determined that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court should be able to authorise young children in judicial proceedings to give their testimony in accordance with arrangements which guarantee an appropriate level of protection, for example, before the trial process takes place.<sup>408</sup>

2.21.5. The Court noted that in order to achieve the aims of the Framework Decision, a national court should be able, when taking the testimony of vulnerable victims, to use a special procedure such as the Special Inquiry procedure. This will prevent the loss of evidence, reduce the repetition of questioning to a minimum, and prevent the damaging consequences for those victims of their giving testimony at trial.<sup>409</sup> The Court emphasised that the Framework Decision must be interpreted in such a way that

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<sup>405</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ).

<sup>406</sup> Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), lodged on 25 October 2010, Denise Bernardi v Fabio Bernardi* (2011/C 13/36).

<sup>407</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ).

<sup>408</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ) at para. 61.

<sup>409</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ) at para. 57.

fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the ECHR and interpreted by the European Court of Human Rights, are respected.

<sup>410</sup> The Court ruled that the national court was required to take into consideration all the rules of national law and to interpret them, so far as is possible, in the light of the wording and purpose of the Framework Decision<sup>411</sup> facilitating the needs of the child witness in as far as possible.

2.21.6. While *Pupino*<sup>412</sup> discussed whether support measures such as the taking of evidence of vulnerable victims prior to trial were permissible, the case of *Bernardi*<sup>413</sup> question concerned whether the use of support measures for vulnerable witnesses should be mandatory.<sup>414</sup> The case involved the use of ‘incidente probatorio’ a procedure which allowed for the early gathering of evidence under Italian law as well as special arrangements for hearing testimony. The procedure was designed for the same reasons outlined above in *Pupino* i.e. to reduce the repetition of questioning to a minimum, and to prevent the damaging consequence of giving testimony in open court.<sup>415</sup> As in the case of *Pupino*, the Court stated that that it is a matter for Member States to decide the means by which protection under Articles 2, 3 and 8(4) of the Framework Decision is afforded to vulnerable victims.<sup>416</sup>

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<sup>410</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ) at para. 59.

<sup>411</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ).

<sup>412</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ).

<sup>413</sup> Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), lodged on 25 October 2010 — Denise Bernardi v Fabio Bernardi* (2011/C 13/36).

<sup>414</sup> The question referred to the court was as follows:

“Must Articles 2, 3 and 8 of Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>(1)</sup> be interpreted as precluding national provisions, such as Article 392(1a) of the Italian Code of Criminal Procedure, in so far as the latter does not impose an obligation on the Public Prosecutor to request an early hearing and examination of a victim who is a minor by means of the Special Inquiry procedure prior to the main proceedings, and Article 394 of the Code of Civil Procedure, which does not make it possible for that minor victim himself or herself to appeal to the courts against a negative decision by the Public Prosecutor on his or her request to be heard in accordance with the appropriate Special Inquiry procedure?”

Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), lodged on 25 October 2010 — Denise Bernardi v Fabio Bernardi* (2011/C 13/36).

<sup>415</sup> Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), lodged on 25 October 2010 — Denise Bernardi v Fabio Bernardi* (2011/C 13/36) at para 31.

<sup>416</sup> Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), lodged on 25 October 2010 — Denise Bernardi v Fabio Bernardi* (2011/C 13/36) at para 33.

2.21.7 Interpreting the domestic legislation in the context of the wording and purpose of Articles 2, 3 and 8(4) of the Framework Decision, the Court ruled that there was no obligation on the Prosecutor to apply to the competent court to use such special measures such as the ‘incidente probatorio’. Further the Court ruled that there was no right of appeal against the decision of the Public Prosecutor not to use that special measure.<sup>417</sup>

2.21.8 While it is appealing to believe that the mandatory use of support measures would ensure that vulnerable victims are protected, obligatory protections would also remove the autonomous element from the victims regarding the flexibility of whether support measures or used at all or which support measures may be used. Lessons have been learned in light of the mandatory nature of the Special Measures Direction brought in under s.16 of the *Youth Justice and Criminal Evidence Act 1999*. The section was subsequently amended by the *Coroners and Justice Act 2009* to allow the Court to consider whether the witness in question required the support measures and which support measures were appropriate for the witness who would be giving evidence.<sup>418</sup>

2.21.9 Arguably, the provisions within the Directive, particularly regarding child victims, are sufficiently flexible to allow the Member States an opportunity to implement them minimally. The level of protection the Directive will afford in practice to the child victim in any Member State remains to be seen. In addition, as mentioned above, the Directive only pertains to victims in criminal proceedings and so it may have limited benefit for child witnesses who are not victims of a crime in the given proceedings.

2.21.10 It is difficult to predict how the ECJ will rule on any future issues arising from the Directive. Guidance can perhaps be taken from the Court’s rulings in

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<sup>417</sup> Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy)*, lodged on 25 October 2010 — *Denise Bernardi v Fabio Bernardi* (2011/C 13/36) at para 33.

<sup>418</sup> For a fuller discussion on this matter see Laura Hoyano and Caroline Keenan, *Child Abuse, Law and Policy Across Boundaries* (Oxford University Press 2010) *Appendix: Reforms in Procedures for Child Witnesses* at p.946.

*Pupino*<sup>419</sup> and *Bernardi*.<sup>420</sup> The Court will undoubtedly assess if the domestic legislation affords sufficient rights to the child witness in the context of the goals of the Directive. The Court will also surely consider the defendant's rights as well as the victim's not only through the rights contained in the *Charter of Fundamental Rights* and existing EU legislation but also in the context of State obligations under the *European Convention on Human Rights*. It will not interfere with the Member States entitlement to draft the necessary legislation which will achieve the purpose of the Directive in the manner in which it sees fit but will rule on whether the domestic legislation achieves the goals of the Directive.

2.21.11 As Von Berg has observed, the Charter states that children shall have 'such protection and care as is necessary for their well-being', and, in all actions taken by the State 'the child's best interests must be a primary consideration.' But he also notes that the ECJ has not yet considered how these rights and interests can be balanced.<sup>421</sup> It is submitted that enhanced state responsibility under the Directive and under the *EU Charter of Fundamental Rights* may mean that the Court will direct Member States to increase the level of protection they currently afford to child witnesses.

### **2.22.0 Domestic remedies where support measures are inadequate**

2.22.1 It is evident that the possession of rights is only effective where those rights can be asserted in a practical and timely manner. Post-trial, an action in tort may be brought against the State. After the exhaustion of domestic remedies, an unsuccessful applicant can possibly bring his or her case to the European Court of Human Rights. Where the child witness is inadequately supported before or during the trial, recourse may be sought through judicial review proceedings or through a preliminary reference ruling before the ECJ. It should be noted that in order to exercise this remedial option, the child will have to rely on adults to act on his or her behalf. While involving the

<sup>419</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ).

<sup>420</sup> Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), lodged on 25 October 2010 — Denise Bernardi v Fabio Bernardi* (2011/C 13/36).

<sup>421</sup> Piers Von Berg, *Children's Evidence and new EU Directives*, Arch.Rev.2013,3,6-7, at p. 6.



rights of defendants, the cases of *Rattigan v DPP*,<sup>422</sup> *Nash v DPP*<sup>423</sup> and *G v DPP*<sup>424</sup> may provide a model in judicial review proceedings for child witnesses who are inadequately protected by the State prior to or during the trial of the relevant offence. Where psychological harm has occurred during the trial process, and judicial review proceedings have not been brought or have been unsuccessful, legal challenge may be brought against the State post trial.

2.22.2 The concept of natural justice is a changing one adapting to meet evolving social mores. Fennelly J has stated:

The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed.<sup>425</sup>

2.22.3 It is submitted that there should be an increased awareness of the right of the child to be heard and adequately protected in all criminal proceedings. The use of support measures should be considered to ensure that the procedures are conducted in a manner that is fair both to the defendant and the child witness. Should these rights fail to be protected, judicial review proceedings may be an appropriate option.

## 2.23.0 *Judicial Review Proceedings*

2.23.1 Where there are there significant deficiencies in the exercise of the child witness' rights in the criminal courts, there may be a possibility for the taking of judicial review proceedings. Judicial review is concerned with the decision making process rather than the substance of the matter itself and there are a various remedies available through judicial review proceedings which may be appropriate in certain

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<sup>422</sup> *Rattigan v DPP* [2008]IESC 34; [2008] 4 IR 639.

<sup>423</sup> *Nash v DPP* [2012] IEHC 598; [2012] 12 JIC 1701.

<sup>424</sup> *G v DPP* [2014] IEHC 33.

<sup>425</sup> *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at p. 52.

circumstances. These are certiorari, prohibition, mandamus, quo warranto, declaration as well as recourse to damages where the court sees fit. These remedies are wholly at the discretion of the Court and it may grant any relief which it considers appropriate, notwithstanding the fact that such relief has not been specifically claimed by the applicant.<sup>426</sup>

2.23.2 The timing of judicial review proceedings is a particular issue in the matter of support measures for child witnesses. As a general rule, judicial review should not be sought once the trial has commenced.<sup>427</sup> Carney J has stated that 'it cannot be emphasised strongly enough that an expedition to a judicial review court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial.'<sup>428</sup>

2.23.3 Yet, as in the cases described above, applications and rulings on support measures may frequently take place at the beginning of the trial which means that if there is a judicial review proceeding on behalf of the child witness, disruption will be caused not only to the child witness but to the defendant. This is a procedural deficiency and indicates that the use of pre-trial hearings should be placed on a statutory basis and implemented in practice. Practitioners should not be forced to utilise judicial review proceedings to ensure that the courts are dealing with the needs and rights of the child witness, as well as those of the defendant, in a manner consistent with the needs of natural justice.

2.23.4 Where judicial review proceedings are warranted and where leave is granted, the nature of the remedy may depend on what is required for the support of the child witness. Any order that a trial judge has made could potentially be struck down by an order of certiorari.<sup>429</sup> The order of certiorari requires the order, or record of the order, of a lower court to be sent to the court of review to be quashed if there are

<sup>426</sup> Derek Dunne, *Judicial Review of Criminal Proceedings* (RoundHall 2011) at Chapter 2 para. 2-03 at p. 66.

<sup>427</sup> Hilary Biehler *Judicial Review of Administrative Actions* (Roundhall 2013).

<sup>428</sup> *DPP v Special Criminal Court & Paul Ward* [1999] 1 IR 60 at 69-70.

<sup>429</sup> The order of certiorari has been described as:

*'The great remedy available to citizens, on application to the High Court, when anybody or tribunal ( be it a court or otherwise) having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution acts in excess of legal authority or contrary to its duty.'*  
*State (Abenglen Properties Ltd.) v Dublin Corporation* [1984] IR 381 at 392, per O'Higgins CJ.

grounds for doing so.<sup>430</sup> The invalidity of the order must first be established and it is common for the High Court to grant an order of mandamus for the lower court to reconsider the proceedings or to remit the proceedings to the lower court pursuant to Order 84 rule 26(4) for reconsideration in accordance with the judgment of the High Court.<sup>431</sup>

2.23.5 In *O'D v DPP*,<sup>432</sup> the High Court granted an order of certiorari quashing the order of Ryan J allowing the use of video link for witnesses under s.13 of the Criminal Evidence Act 1992. The court stated the trial judge had not administered the test correctly i.e. to evaluate whether the use of the support measures would mean more than just that the witnesses would be saved an inconvenience or unpleasantness. It went on to say that the court should only permit the giving of evidence by video link where it was satisfied by evidence that a serious injustice would be done, in the sense of a significant impairment to the prosecution's case, if evidence had to be given in the normal way, viva voce, thus necessitating evidence by video link in order to vindicate the right of the public to prosecute offences of this kind.<sup>433</sup> The court granted an order of certiorari to quash the order providing for the use of video link and remitted the matter back to the Circuit Criminal Court for a rehearing of the application under s. 13 of the Act of 1992.

2.23.6 An order of mandamus lies to compel the performance of a legal duty of a public nature.<sup>434</sup> The obligation in question must impose a duty and mandamus will not lie to compel performance of a power or discretion.<sup>435</sup> Constitutional protections and specific legislation for child witnesses may increase the obligations of the courts to provide adequate assistance to the child witness as the courts are increasingly under a duty to protect the child witness.

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<sup>430</sup> *R v Electricity Commissions* [1924] 1 KB at 204-205. See also *State (Colquhoun v D'Arcy)* [1936] IR 641.

<sup>431</sup> See generally Derek Dunne, *Judicial Review of Criminal Proceedings* (RoundHall 2011) Chapter 2 at p. 66.

<sup>432</sup> *O'D v DPP* [2010] 2 IR 605.

<sup>433</sup> *O'D v DPP* [2010] 2 IR 605 at p. 613.

<sup>434</sup> Hilary Biehler *Judicial Review of Administrative Actions* (Roundhall 2013) at p. 376.

<sup>435</sup> Hilary Biehler *Judicial Review of Administrative Actions* (Roundhall 2013) at p. 376. *Minister for Labour v Grace* [1993] 2 IR 53; *State (Sheehan) v Ireland* [1987] IR 550

2.23.7 The remedy of prohibition will lie to restrain a public body from embarking on a course of action that would lead to the making of a decision that is in excess of jurisdiction.<sup>436</sup> Dunne notes that the modern significance of prohibition lies in its status as the appropriate remedy for preventing the occurrence of a threatened or anticipated breach of constitutional rights, before the breach occurs.<sup>437</sup> This may be an appropriate remedy where there has been a ruling in pre-trial hearing which counsel may wish to challenge on the basis of an infringement of a constitutional right of either that of the defendant or the child witness. In *East Donegal Co-Operative Livestock Mart Ltd v Attorney General*, Walsh J noted that in order to afford proper protection of the rights guaranteed by it, the Constitution must enable the person invoking a constitutional right not merely to redress a wrong resulting from an infringement of the constitutional right, but also, to prevent the threatened or impending infringement of the constitutional right and to put an apprehended infringement of the constitutional right to the test.<sup>438</sup>

2.23.8 The use of the order of prohibition in criminal proceedings may be used more commonly where there has been significant delay in the prosecution of the offences and there is a risk that a fair trial will not be possible.<sup>439</sup> Dunne notes that the modern practice in judicial review applications seeking orders restraining criminal trials from proceedings is to seek an order of prohibition against the DPP. As, strictly speaking, orders of prohibition can only be granted against inferior courts and tribunals, the correct type of order to seek against the DPP is an injunction restraining the DPP from taking any further steps in the prosecution of the applicant rather than an order of prohibition.<sup>440</sup> In *Rattigan v DPP*<sup>441</sup> and *Nash v DPP*<sup>442</sup> both applicants sought an order seeking an injunction prohibiting the DPP from pursuing charges against them. While both applications were unsuccessful, costs were awarded acknowledging that there were serious prosecutorial inadequacies in both cases.

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<sup>436</sup> Derek Dunne, *Judicial Review of Criminal Proceedings* (RoundHall 2011) at Chapter 2 para. 2-33 at p. 79

<sup>437</sup> Derek Dunne, *Judicial Review of Criminal Proceedings* (RoundHall 2011) at Chapter 2 para. 2-33 at p. 79

<sup>438</sup> *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317 at 338 per Walsh J.

<sup>439</sup> *State (O'Connell) v Fawsitt* [1986] IR 362.

<sup>440</sup> *PP v DPP* [2000] 1 IR 403 at 405 per Geoghegan J.

<sup>441</sup> *Rattigan v DPP* [2008] IESC 34; [2008] 4 IR 639.

<sup>442</sup> *Nash v DPP* [2012] IEHC 598; [2012] 12 JIC 1701.

2.23.9 Article 42A of the Constitution of Ireland<sup>443</sup> may now assist in grounding an application for prohibition where a child witness' constitutional rights are in jeopardy and where serious harm may result from the inability of the State to act suitably. However, as noted above, the remedy is only appropriate in respect of a lower tribunal. In matters concerning the actions of the DPP or the Courts Services the orders of certiorari, mandamus, declaratory and/or injunctive relief may be more appropriate.

2.23.10 Order 19, rule 29 of the Rules of the Superior Courts provides that 'no action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed.'<sup>444</sup> De Blacam notes that in making a declaration '... the court does not, as it does with other remedies, alter the position of the parties...the court merely by the grant of its declaration affirms the legal position.'<sup>445</sup> A declaration by the High Court in judicial review proceedings may be sufficient to prompt the trial court to ensure that appropriate measures are provided for the child witness.

2.23.11 Order 84 Rule 25 of the Rules of the Superior Courts provides that in an application for judicial review, the court may award damages to the applicant if the court is satisfied that if the claim had been made in a civil action, the application would have been awarded damages. The particulars of the wrongdoing alleged and any items of special damages must be set out as in ordinary action in accordance with the provisions of Order 19, rules 5 and 7 which apply to a statement relating to a claim for damages. The judiciary and An Garda Síochána are immune from damages. An action for damages may not be appropriate where the needs of a child witness have warranted judicial review proceedings.

2.23.12 In addition, the goal of taking judicial review proceedings would be to remedy the situation of the child witness during the trial itself and damages may not

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<sup>443</sup> Art.42A of the Constitution of Ireland, 1937. (See Appendices).

<sup>444</sup> Rules of the Superior Courts of Ireland.  
<http://www.courts.ie/rules.nsf/lookupp.link/Superior%20Court%20Rules%20Index>  
(Accessed 19<sup>th</sup> April 2015).

<sup>445</sup> Mark DeBlacam, *Judicial Review*, 2<sup>nd</sup> edn (Tottel, 2008), para.31.01 at p.451.

be an appropriate remedy. The order of costs may give more indication as to any criticism of the procedures which have impacted on the child witness. Where the court indicates that it cannot give the remedies as described above, it may indicate that the procedures are yet at fault by awarding costs to a greater or lesser degree as with the cases of *Rattigan v DPP*<sup>446</sup> and *Nash v DPP*.<sup>447</sup>

2.23.13 For certainty and transparency, pre-trial hearings<sup>448</sup> must take place in good time before the trial, and the decision of the judge must have certainty. In all cases involving child cases, any application which will affect the child witness should not be adjourned for the trial judge to resolve. The provision for preliminary hearings currently drafted in the current *General Scheme of the Criminal Procedure Bill (2015)*<sup>449</sup> should specify that where a case involves a child witness, applications for disclosure and support measures must be made as early as possible where appropriate, and those rulings will be adhered to unless overruled by judicial review proceedings.

2.23.17 Where judicial review proceedings are unsuccessful, it is possible that further legal action may be taken against the State. The child witness must show that psychological harm has been caused but post *O'Keeffe*,<sup>450</sup> and in the light of EU Directives and ECtHR case law as described above, there is enhanced State responsibility to ensure that his or her voice is heard in criminal proceedings. There are also increased positive obligations to protect the child witness particularly in circumstances which are, to all intents and purposes, in the control of the State.

2.23.18 Where a domestic remedy is unsuccessful, an application may be made for remedies before the European Court of Human Rights assuming that the admissibility

<sup>446</sup> *Rattigan v DPP* [2008] IESC 34; [2008] 4 IR 639.

<sup>447</sup> *Nash v DPP* [2012] IEHC 598; [2012] 12 JIC 1701.

<sup>448</sup> The pre-trial hearing is conducted under:

*'Circuit Court Practice Directions, CC12 Pre-Trial Procedure'*. (CC13-Midland; CC14-South Eastern Circuits)

*'Prosecution Counsel on the Dublin Circuit are required to alert the court as to:*

4 c) Video link, video recorded and CCTV evidence

4. Whether it is intended to have admitted as evidence a video recording of any evidence.

<sup>449</sup> *Revised General Scheme of a Criminal Procedure Bill June 2015*

<sup>450</sup> *O'Keeffe v Ireland* Application No 35810/09 (ECtHR 28<sup>th</sup> January 2014).

conditions are met.<sup>451</sup> There is no doubt that in the absence of detailed legislation and procedural guidance, it falls to the judiciary to determine the parameters of the available support measures. This places too great an obligation on the judiciary to resolve issues which should be addressed by the legislature.

### 2.24.0 Conclusion

2.24.1 Ni Raifeartaigh noted in 2009 that because of the overlap between the Constitution and the ECHR, many criminal lawyers believe that the Convention has little or no relevance to their practice. But she underlines the importance of the Convention observing that occasionally, it may lead the way.<sup>452</sup> That position is even stronger today. Recent European Court of Human Rights case law may highlight responsibilities which the State has been reluctant to acknowledge.<sup>453</sup>

2.24.2 ECtHR case law is clear that protections should exist against psychological harm and that protection should be enhanced for children, who are among the most vulnerable in society.<sup>454</sup> Ireland may fail in two regards first. It could be asserted that the current support measures which are available to the child witness are insufficient to protect him or her from psychological harm. While there are legislative provisions for support measures, these may not be implemented adequately either due to lack of resources or training. For example, while Ireland provides for the use of intermediaries under S.14 of the *Criminal Evidence Act 1992*, the provision is rarely used and this may affect the testimony of a complainant as in case of *DPP v AG*<sup>455</sup> mentioned above. While the use of video link is widely employed, there are still courthouses that do not have video link facilities installed such as in *DPP v AC*.<sup>456</sup> While recorded testimony is becoming widely used for complainants under 14 and

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<sup>451</sup> The taking of civil proceedings is necessary to ground an Article 6(1) of the *European Convention on Human Rights*. Being a civil process, it is arguable that judicial review proceedings may be sufficient to ground a challenge under Article 6(1) of the ECHR.

<sup>452</sup> Una Ni Raifeartaigh, *The Convention and Irish Criminal Law: Selected Topics* ECHR and Irish Law (2<sup>nd</sup> Ed.) (Ed. Ursula Kilkelly) (Jordans 2009) para. 8.61 at p. 275.

<sup>453</sup> *O’Keeffe v Ireland* 28<sup>th</sup> January 2014 (Application No 35810/09) ECtHR; *CS and CAS v Romania* (Application No. 26692/05) 20th March 2012. *ND v Slovenia* (Application no. 16605/09) (Fifth Section) 15 January 2015; *X and Y v The Netherlands* (1986) 8 EHRR 235.

<sup>454</sup> *CS and CAS v Romania* (Application No. 26692/05) 20th March 2012; *Z and others v United Kingdom*, (App.29392/95, 10 May 2001 [GC]),(2002) 34 EHRR 97, ECHR 2001 – V at 73. *X and Y v The Netherlands* (1986) 8 EHRR 235; *PM v Bulgaria* ECHR 49669/07 - 24/01/2012.

<sup>455</sup> See: *DPP v AG* at para.2.36.0.

<sup>456</sup> See: *DPP v AC* at para.2.32.0.

for persons with an intellectual disability, the poor implementation of the provision on a practical basis is reflected in the cases discussed above.<sup>457</sup>

2.24.3 The publication of legislation in anticipation of the *EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*<sup>458</sup> may increase the levels of protection afforded to the child witness in Irish criminal courts. It is conceivable that a provision for legal representation on behalf of the child witness could be established as a support measure in the future. There is a precedent for this under *S.4A Criminal Law (Rape) Act 1981* (as amended by *s.34 Sex Offenders Act 2001*) which allows for the complainant, in a case of rape or sexual assault, to be afforded legal representation where the defence wish to cross-examine him or her on previous sexual history. The needs of the child witness are so particular and the risks of psychological harm are so significant that specialist legal representation may be necessary to ensure that the rights of the child witness are protected.

2.24.4 Article 42A of the Constitution of Ireland and the provisions under ECtHR and EU legislation would underpin any legal challenge in respect of the treatment of child witnesses in criminal proceedings. It is submitted that the fact that the rights of the child witness are strengthened to this extent render future legal challenges all the more likely.

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<sup>457</sup> See: DPP v AG at para.2.36.0.

<sup>458</sup> *EU Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.*



### 3.0.0 Chapter III - Observed Proceedings - Procedural Rights of the Child Witness

#### 3.1.0 Introduction

3.1.1 In conducting the research for this thesis, it has become apparent that no legal, empirical research, with regard to the treatment of child witnesses in criminal proceedings, has been conducted in Ireland.<sup>459</sup> The absence of empirical evidence represents a clear limitation of our capacity to understand the conditions that give rise to policy concerns about the evidence of children in criminal proceedings. The Joint Oireachtas Committee on Child Protection has accordingly recommended that research be undertaken in this area.

The Committee recommends further study of victim responses to the criminal justice system and of the means that might be available to alleviate any unnecessary hardship caused to victims by the operation of the criminal trial process.<sup>460</sup>

The principle research method of the observed proceedings has been doctrinal in nature. However, incorporated within it is a limited empirical component, namely the carrying out of a description and analysis of select observed court proceedings. A total of eight proceedings were observed by the author, four in the Circuit Court and four in the Central Criminal Court.

3.1.2 In each of the observed cases the offences concerned serious sexual offences that involved either a child complainant or a person with an intellectual disability. The inclusion of complainants who had an intellectual disability in observed proceedings is necessary as the application of legislation is similar in respect of the child and person with an intellectual disability under s.19 *Criminal Evidence Act*

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<sup>459</sup> Smaller studies have been carried out in a social work context. The research published in *Child Sex Abuse and the Irish Criminal Justice System* – Graham Connon, Allan Crooks, Alan Carr, Barbara Dooley, Suzanne Guerin, Derek Deasey, Deirdre O’Shea, Imelda Ryan, Anne O’Flaherty - Child Abuse Review (2011) Vol. 20 Issue 2 (Wiley & Co.)

<sup>460</sup> *Joint Oireachtas Committee Report on Child Protection* (November 2006) Chapter 11, para 11.10.8 at page 78.

1992. Each of the proceedings was held in camera<sup>461</sup> Due to practical considerations in terms of trial delays, advance notification of the giving of evidence, and other factors, some cases were observed from beginning to end but some involved only the observation of the application for support measures and the observation of the evidence of the child complainant.

3.1.3 An empirical study, even of this limited kind raises certain ethical consideration and concerns.<sup>462</sup> In keeping with this policy, the author asked and received the permission of the court under the appropriate legislation. I did not know any of the parties concerned in the proceedings and there were no conflicts of interests involved. While observing proceedings, I kept long hand notes which I retained in my possession at all time. In my analysis of the cases in this research, I have anonymised the cases. All descriptions and comments in this thesis have preserved the anonymity of both the complainant and the accused. The names of the judges have been mentioned as this will not identify the parties concerned.<sup>463</sup> In respect of the retention and storage data, the only non – anonymised data are my notes and these are stored in keeping with Trinity College Dublin policy.<sup>464</sup>

### 3.2.0 DPP v XY<sup>465</sup> *Central Criminal Court, November 2010*

3.2.1 In DPP v XY, the accused was alleged to have forced a female with an intellectual disability into performing the act of oral sex on him. As there is no provision for this specific offence under the *Criminal Law (Sexual Offences) Act*

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<sup>461</sup> See below

<sup>462</sup> Trinity College Dublin Policy on Good Research Practice V3.0  
[https://www.tcd.ie/research/dean/assets/pdf/FINAL\\_Good%20Research%20Practice%20policy\\_COUNCIL%20APPROVEDandminutedgg.pdf](https://www.tcd.ie/research/dean/assets/pdf/FINAL_Good%20Research%20Practice%20policy_COUNCIL%20APPROVEDandminutedgg.pdf) (Accessed 25<sup>th</sup> April 2016)

P. Crane and H. Kritzer (eds.) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

L. Epstein and A.D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014).

P. Dunleavy, *Authoring a PhD: How to plan, draft, write and finish a doctoral thesis or dissertation* (Palgrave McMillan 2003)

<sup>463</sup> This is consistent with the reporting of these cases in the media.

<sup>464</sup> Trinity College Dublin Policy on Good Research Practice V3.0  
[https://www.tcd.ie/research/dean/assets/pdf/FINAL\\_Good%20Research%20Practice%20policy\\_COUNCIL%20APPROVEDandminutedgg.pdf](https://www.tcd.ie/research/dean/assets/pdf/FINAL_Good%20Research%20Practice%20policy_COUNCIL%20APPROVEDandminutedgg.pdf) (Accessed 25<sup>th</sup> April 2016)

<sup>465</sup> The names of the cases described have been changed to preserve the anonymity of the complainants and defendants involved.

1993 (which provides for certain sexual offences against persons with a mental impairment), he was charged under s. 4 of the *Criminal Law (Rape) (Amendment) Act 1990*, which makes no provision for offences against the mentally impaired. For the first time in the Central Criminal Court, a recording of the complainant's statement was admitted in evidence under s.16(1)(b) *Criminal Evidence Act 1992*. However, at the close of the prosecution evidence, an application for a direction to find the accused not guilty was granted by Mr. Justice White on the basis that there was no evidence of an assault or hostile act on the part of the accused. The complainant had said that she complied with the accused's repeated request for oral sex. Having found that evidence was not, and could not be given, that "force" had been an element of the circumstances surrounding the alleged offence, Mr. Justice White directed that the jury find the accused not guilty. This was the first instance of recorded testimony being admitted as examination in chief evidence in the Central Criminal Court.<sup>466</sup>

### **3.3.0 DPP v AB Circuit Criminal Court, November 2014**

3.3.1 The case of *DPP v AB* involved the admissibility of a recording under s.16(1)(b) of the *Criminal Evidence Act 1992* concerning an allegation of sexual assault by a complainant who was seven years of age at the time the recording was made and eleven years of age at trial, the case having been adjourned three times. The offence was alleged to have occurred some years prior to the recording.

3.3.2 The trial was due to last two to three days and during the pre-trial hearing<sup>467</sup> no issues regarding the recording of the evidence had been made known to the prosecution.<sup>468</sup> On the first day of trial, the defence challenged the admissibility of

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<sup>466</sup> See also: Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* The Bar Review 2011, 16(1), 2-6.

<sup>467</sup> The pre-trial hearing is conducted under: 'Circuit Court Practice Directions, CC12 Pre-Trial Procedure'. (CC13-Midland; CC14-South Eastern Circuits)

'Prosecution Counsel on the Dublin Circuit are required to alert the court as to:

4 c) Video link, video recorded and CCTV evidence

[....

4. Whether it is intended to have admitted as evidence a video recording of any evidence.

<sup>468</sup> 'Circuit Court Practice Directions, CC12 Pre-Trial Procedure'

5. The defence will be required to be in a position to notify the court as to:.....

the recording. Legal argument concerning the admission took two days in which the recording was played to the trial judge and the complainant was cross-examined as to the evidence that would be given at trial. The trial judge ruled that the recorded evidence was admissible and after a trial that took approximately two weeks, the defendant was found guilty.

### **3.4.0 DPP v AC Circuit Criminal Court, July 2011**

3.4.1 In the case of *DPP v AC*, two child complainants had given examination in chief evidence under *s.16(1)(b)* which, despite defence objection, was then admitted at trial. The trial took place approximately 16 months after the evidence was recorded and the court allowed the complainants to be cross-examined via video link. The matter originated in one county but as there were no video link facilities in the appropriate court room,<sup>469</sup> the trial was moved to another county for one day. On that day, the trial was delayed due to difficulties playing the recording. When the recording was played in the court room, the sound was very low and potentially inaudible to the jury. An application was made by the prosecution for a transcript to be given to the jury while the recording was played at trial<sup>470</sup> but the judge ruled against this and a means was found to allow the recording to be played more audibly.

3.4.2 The first recording was approximately one hour in length while the second recording was one hour and 36 minutes in length.<sup>471</sup> Having heard evidence from the first witness, the second witness's cross-examination only began at 6pm. Defence counsel stated that he would have no objection to postponing cross-examination until the following day. The court decided to continue and when cross-examination began, the child witness became too distressed to carry on. The court reconvened on

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*d) whether there are any requirements for the running and presentation of the defence case which need to be addressed by the court or the Courts Service in advance.'*

Despite this practice direction, applications regarding the admissibility of *s.16(1)(b)* recordings still take place on the first day of trial without any consequences if no admissibility issues are raised at pre-trial hearings.

<sup>469</sup> At time of writing, video link facilities are still not available in the original county.

<sup>470</sup> The application cited English case law which provides for the jury to have transcripts of recorded evidence under narrow parameters e.g., the jury cannot bring the transcript into the jury room during deliberations in case the evidence is given an unnatural weight. *R v Welstead* [1996] 1 Cr App R 59 CA; *R v Popescu* [2011] Crim LR 227 CA; *R v Sardar* [2012] EWCA Crim 134.

<sup>471</sup> The length of the recording was due to the Specialist Interviewer wishing to avoid asking leading questions which might prejudice the admission of the recording at trial.

the following day and cross-examination was completed without incident. The defendant was ultimately found guilty.

### 3.5.0 DPP v AD Central Criminal Court, January 2015

3.5.1 The *Good Practice Guidelines*<sup>472</sup> provide that the witness may watch the recording of his or her statement while it is being played to the court or jury.<sup>473</sup> In *DPP v AD*, a rape trial, there was an interval of more than two years between the recording and the trial.<sup>474</sup> Defence counsel argued that to allow the complainant to watch the recording as it was being played to the jury would sanction a significant and prejudicial departure from traditional practice where the witness is both examined and cross-examined in the body of the court. Where evidence is given live at trial, there would be no opportunity for the memory of the witness to be refreshed after giving examination in chief evidence and before being cross-examined. The trial judge, McCarthy J, upheld the defendant's challenge citing the length of the interval between the recording of the evidence and the trial. The length of delay would mean that should the witness watch the recording, there was a greater risk that she would be repeating details from the recording rather than relaying details of the incident itself. Ultimately, no transcript of the recording was given to the witness *in lieu* of a witness statement, which would be the normal practice in these circumstances. The witness was cross-examined without watching the recording or

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<sup>472</sup> *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences. An Garda Síochána, (July 2003).*

Anecdotal evidence communicated to the author indicates that not all counsel have been supplied with the *Good Practice Guidelines* and not all counsel know that they exist. While the *Guidelines* are non – statutory and subject to overruling by the courts, they may assist the court by furnishing some parameters for practitioners to work within. They require revision in the face of changing practice. For example, the *Guidelines* state that should a subsequent recorded interview be required, a request should be made to the DPP. (Para.1.30 at p. 14) This has now been revised and a request for a supplemental recorded interview can now be made to the senior investigating officer in the case. *Revision of Policy by Deputy Director, November 2009.*

<sup>473</sup> *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences. An Garda Síochána, (July 2003) at Section XV 'Cross-Examination' at p.9.*

<sup>474</sup> Where there has been a significant interval between the time of the incident and the recording of evidence, or the recording of the evidence and the trial, questions may arise as to whether the witness, having watched the recording, is remembering details of the event or details of the recording itself. This may then give rise to issues of competency, particularly in very young witnesses See: *R v Powell* [2006] EWCA Crim 3; *R v Malicki* [2009] EWCA Crim 365.

having been able to refresh her memory as to its content.<sup>475</sup> Ultimately, the defendant pleaded guilty to a lesser charge.

### **3.6.0 DPP v AE Dublin Circuit Criminal Court, June 2014**

3.6.1 A significant advantage of the recording of evidence is that it allows the court to place the witness in the temporal context of the offence i.e. a detailed visual record is taken at the time of the incident and thus the child witness's age at the time of that incident is made clear to the court. This is particularly important where the passing of a short length of time will have a significant impact in the life of a child. In *DPP v AE*, due to internal investigative issues, the interval between the taking of the examination in chief evidence under s.16(1)(b) and the trial was five years. The complainant was 12 years of age at time of the recording and was cross-examined at trial when she was 17 years of age. While the length of this delay was unusually attenuated, waiting times outlined in the Courts Services Report<sup>476</sup> indicate routinely waiting times for trials, with some variability from venue to venue. *DPP v AE* resulted in an acquittal but there were several factors which impacted on the trial including a change in investigation personnel which exacerbated the delays as well as the omission in the taking of necessary statements from other witnesses.

### **3.7.0 DPP v AF Central Criminal Court, November 2014**

3.7.1 In *DPP v AF*, Hunt J gave careful consideration to the defence challenge to the admission of a s.16(1)(b) recording, in a trial involving rape, where the complainant had an intellectual disability. During the *voir dire*, the recording was played to the court. In deciding to admit the recording, Hunt J observed that the purpose of the provision was to facilitate the taking and admission of evidence in circumstances where the complainant would have difficulties giving evidence otherwise, and that

<sup>475</sup> In England and Wales, the guidance (albeit also non-statutory) regarding this support measure is significantly more comprehensive but also states that the witness may watch the recording prior to trial. See *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures Chapter 4, Witness Support and Preparation, Refreshing the Memory of the Witness* at p.117. (Ministry of Justice) (March 2011).  
[http://www.cps.gov.uk/publications/docs/best\\_evidence\\_in\\_criminal\\_proceedings.pdf](http://www.cps.gov.uk/publications/docs/best_evidence_in_criminal_proceedings.pdf) (Accessed 28<sup>th</sup> September 2015).

<sup>476</sup> wish  
<http://www.courts.ie/Courts.ie/Library3.nsf/0/3B21EBCDBCA7469C802575E6003DBD7F?OpenDocument> (Accessed 25th September 2015).

there was a legislative presumption to admit the evidence unless its admission would be unfair to the accused.<sup>477</sup> He noted that the words of the Act, ‘mental handicap’ were outdated. He stated however they were very clear in that, where a complainant had an intellectual disability, he or she was eligible to have his or her evidence admitted via s.16(1)(b) regardless of his or her capacities. The complainant in this case had a strong regional accent and the prosecution applied for a transcript to be given to the jury while watching the recording citing English case law.<sup>478</sup> Hunt J ruled against this application. He held that there was a potential risk that this would give an unnatural weight to the recorded evidence.

3.7.2 The defendant subsequently pleaded guilty to aggravated sexual assault. At sentencing in April 2015, defence counsel stated that during the *voir dire* the defendant realised at that point the harm he had caused to the complainant and decided to plead guilty. Hunt J noted that it was unfortunate that the legal issues were not dealt with sooner and hoped that the situation would change in the future which was perhaps an oblique reference to the possible placing of pre-trial hearings on a statutory basis under the *Criminal Procedure Bill (2015)*.<sup>479</sup>

### **3.8.0 DPP v AG Dublin Circuit Court, December 2013**

3.8.1 In December 2013, in a case of sexual abuse of a person with an intellectual disability, an application for an intermediary to assist the complainant during proceedings was made just prior to the beginning of trial. The complainant had a mild intellectual disability and the application was made under s.14 *Criminal Evidence Act 1992* which provides for the use of an intermediary in certain circumstances.

3.8.2 The application was refused by the judge of Court 5 in the Dublin Circuit Court in the Criminal Court of Justice. Court 5 is the ‘administration court’ where pre-trial issues may be resolved prior to the trial beginning before the trial judge.

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<sup>477</sup> See S. 16(1) *Criminal Evidence Act 1992* ‘...a video recording.... **Shall** (emphasis added) be admissible’. S.16(2) provides that the recording shall not be admitted if it is not in the interests of justice to do so and if its admission will cause unfairness to the accused.

<sup>478</sup> Counsel cited English case law in support of the application: *R v Welstead* [1996] 1 Cr App R 59 CA; *R v Popescu* [2011] Crim LR 227 CA.; *R v Sardar* [2012] EWCA Crim 134.

<sup>479</sup> *Preliminary Trial Hearings, Revised General Scheme of the Criminal Procedure Bill*, (June 2015)

The judge in this matter stated that any difficulties regarding communication issues could be dealt with counsel at the trial which was to commence 3 days later. He added that if in the event that this proved inadequate, an application could be made to the trial judge for the use of an intermediary. When the trial was underway and the time came for the complainant to give evidence via video link, the system malfunctioned. In the ensuing delay, the defendant pleaded to a lesser charge and the complainant was thus relieved of any obligations to give evidence.<sup>480</sup>

3.8.3 While anecdotally the support measure of an intermediary has been used in this jurisdiction, it has only been used in cases where there has been an extreme difficulty in communication on the part of the witness and even then the role of intermediary has been closer to that of an interpreter. There is no reported case law in this jurisdiction and no procedural guidance concerning the provision under s14 of the Criminal Evidence Act 1992.<sup>481</sup>

### **3.9.0 DPP v AH Central Criminal Court, June 2015**

3.9.1 In the recent case of *DPP v AH*<sup>482</sup> before the Central Criminal Court in June 2015, the defendant was charged with offences including 64 counts of anal, vaginal

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<sup>480</sup> An area which requires research is the stage at which defendants change their plea in cases involving vulnerable witnesses. Anecdotal evidence from counsel who have prosecuted such cases suggest that the rulings in respect of the admissibility of evidence of recorded testimony will have a significant impact on the decision of defendants to plead to the offence or plead guilty to a lesser charge. The courts may then consider that the fact that a vulnerable witness will not have to give evidence or undergo cross-examination a mitigating factor in sentencing. It is suggested, based on communication from defence counsel, that it is in the interest of defendants to wait to see if a child will be able to swear up in court ie be present in court and prepared to give evidence. A defendant will frequently have no case to answer where the child is unable to give testimony. Where a witness is prepared to give evidence, a guilty plea, often to a lesser charge, will be accepted. The introduction of both examination in chief and cross-examination recorded evidence, as well as the placing of pre-trial hearings on a statutory basis, could circumvent such brinkmanship within the process.

<sup>481</sup> Counsel have successfully applied for an intermediary for a defendant to participate fully in the trial but again, these cases have not been reported. See: *DPP -v- Paul Merrigan* (Bill No.: 183/14) This case is currently on appeal in the Court of Appeal. The appeal was heard on the 25<sup>th</sup> June 2015 and judgment is awaited.

The right of the defendant to be facilitated to more effectively participate in proceedings through an intermediary was established in England and Wales in *C v Sevenoaks Youth Court* [2009] EWHC 3088 and *R v Dixon* [2013] EWCA Crim 465; [2014] 1 MHLR 148. Section 104 of the Coroners and Justice Act 2009 which will amend the *Youth Justice and Criminal Evidence Act 1999* provides for examination through an intermediary of a vulnerable accused, but it is not yet in force.

<sup>482</sup> *DPP v AH*, Central Criminal Court, June 2015.

Aaron Rogan and Fiona Ferguson, *Man (35) who began sexually abusing his daughter when she was seven years old is jailed for 15 years* The Irish Independent, 31<sup>st</sup> July 2015  
<http://www.independent.ie/irish-news/courts/man-35-who-began-sexually-abusing-his-daughter-when-she-was-seven-years-old-is-jailed-for-15-years-31418611.html> (Accessed 28th September 2015).



and oral rape of his daughter dating from when the child was four years of age to eleven years of age which was eventually reduced to approximately half that number. The trial was personally observed by the author. Three recordings of the complainant's statements under s.16(1)(b) *Criminal Evidence Act 1992* had been taken over two years. The complainant had made a complaint in 2012 and one recording had been conducted by Specialist Interviewers. When new disclosures had been made, a second interview had been conducted. The DPP had requested further detail regarding times and locations of the alleged abuse and had asked for a third interview. The complainant was unable to reveal any further detail but had made fresh disclosures. She was then shown the first two recordings and a third recording was made in 2013. The first trial took place in Galway in 2014 but collapsed due to fresh disclosure by TUSLA. The second trial took place in June 2015 in the Central Criminal Court. The defence challenged the admission of the recordings on the basis that the Specialist Interviewers had asked leading questions. The prosecution responded that these questions were not leading as they arose out of the clarification procedure prior to the purpose of which was to ascertain whether the recording of a statement was warranted. The court admitted all recordings and the defendant, almost fourteen years of age at the time of trial, was cross-examined. There was inconclusive physical evidence which did not identify the defendant as the perpetrator. Ultimately, the jury found the defendant guilty on 22 counts and he was sentenced to 15 years imprisonment. Due to evidential issues at trial, it is likely that an application for an appeal will be lodged.

### **3.10.0**      *Comments on cases observed*

3.10.1 In trials involving vulnerable witnesses, it is not always the case that the same representative of the Chief Prosecution Solicitor will attend on any given day with the consequent risk that the personnel who attend will not have specific knowledge of the issues in the case. It also appears that quite junior Garda officers frequently prosecute cases involving sexual assault, bearing full responsibility for any issues which may arise. With regard to cases involving recorded testimony under s.16(1)(b)

of the *Criminal Evidence Act 1992*, the Specialist Interviewer<sup>483</sup> has experience of conducting recorded interviews with vulnerable witnesses and is cognisant of the procedural aspects of their admission at trial. However, the Specialist Interviewer is not the prosecuting member in the case and his or her role is necessarily limited to the recording of the testimony and the subsequent provision of testimony authenticating the recording in court.

3.10.2 When a recording under s.16(1)(b) is made, a transcript of it may be prepared to assist in the prosecution. The question of transcripts where recorded testimony is admitted at trial is a consistent difficulty. To assist the prosecution of cases using s.16(1)(b), Specialist Interviewers prepare a *Verbatim Record of Salient Points* in relation to what offences and sections of the recording may be relevant. This is included with the recording prior to the preparation of the Book of Evidence. S.16(1)(b) states that a recording under this section is admissible at trial ‘as evidence of any fact stated therein of which direct oral evidence would be admissible’. If admitted at trial, this section may be understood as meaning that the evidence is sealed and no further questions can be asked by way of examination in chief. However, this question has yet to be definitively ruled on by the courts.

3.10.3 Whether a transcript is made of the relevant sections of the recording or the entire recording, and whether the recording and/or the transcript become part of the Book of Evidence is a point which requires clarification. A reliable transcript is imperative to ensure efficient progress. For example, where transcripts are not supplied with the Book of Evidence, delays will occur where early pleas are made as the prosecution cannot furnish the court with details of the relevant offence(s). There is no clarity as to which agency has responsibility for the preparation of transcripts of the recordings made under s.16(1)(b). Another significant question is which agency retains responsibility for the editing of the recording where this is required at trial. Playback issues especially regarding audibility of the recording, occur frequently, possibly due to different audio visual systems being used to record and/or edit and then play the recording in court.

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<sup>483</sup> S.16(1)(b) *Criminal Evidence Act 1992* allows for the recording to be taken by a person competent for the purpose. While the majority of Specialist Interviewers are Gardaí, some HSE personnel also conduct S.16(1)(b) interviews.

3.10.4 The cases cited above show certain difficulties in the implementation of adequate support measures. Anecdotal evidence communicated to the author by barristers dealing with the prosecution and defence of cases involving child witnesses, suggest that delays, late applications for support measures, late handovers between counsel, frequent change of state personnel in addition to inexperienced personnel, are routine occurrences in cases involving child witnesses.

3.10.5 Since the introduction of the suite of support measures contained in the *Criminal Evidence Act 1992*, there has been no thorough or consistent evaluation of the experience of child witnesses who have gone through the trial process. Research has been carried out by Dr. Inga Ryan and colleagues<sup>484</sup> but it is accepted by Dr. Ryan<sup>485</sup> that the research was carried out with a small cohort of subjects and that wider research is required to understand the experience of child witnesses in this jurisdiction. Even so, the research which was undertaken did indicate that the experience of child witnesses in this jurisdiction was overwhelmingly negative.<sup>486</sup>

3.10.6 Ní Raifeartaigh has called for child witnesses in child sexual abuse trials to be treated with respect and dignity. She has highlighted the need for a multi-agency cultural change stating that ‘we are not doing our best by the children who go through the criminal justice system’.<sup>487</sup> Despite recent legislative<sup>488</sup> and

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<sup>484</sup> *Child Sex Abuse and the Irish Criminal Justice System* – Graham Connon, Allan Crooks, Alan Carr, Barbara Dooley, Suzanne Guerin, Derek Deasey, Deirdre O’Shea, Imelda Ryan, Anne O’Flaherty - Child Abuse Review (2011) Vol. 20 Issue 2 (Wiley & Co.) pps.102-119.

<sup>485</sup> Communication during author’s paper, *Irish Criminal Bar Conference*, Kings Inns, 28<sup>th</sup> April 2012.

<sup>486</sup> Research in the neighbouring jurisdiction of England and Wales has been carried out on a consistent basis and may inform decisions regarding support measures for child witnesses in this jurisdiction. This also indicates that a high proportion of child witnesses emerge from the trial process with a negative experience.

See Plotnikoff and R. Woolfson ‘*The Go-Between*’ - an evaluation of the pathfinder projects implementing the use of intermediaries in six jurisdictions in England and Wales) (2006); Plotnikoff and R. Woolfson, *In Their Own Words: The Experiences of 50 Young Witnesses in Criminal Proceedings* (NSPCC & Victim Support, 2006); J. Plotnikoff and R. Woolfson, *Measuring Up? Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings* London (NSPCC/Nuffield Foundation, 2009); Plotnikoff, Joyce and Woolfson, Richard - *Young Witnesses in Criminal Proceedings – A Progress Report to Measuring Up?* (Lexicon Limited; The Nuffield Foundations – June 2011); Hoyano and C. Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford: Oxford University Press, 2010); *Children and Cross-Examination: Time to Change the Rules?* J. Spencer and M. Lamb (eds) (London: Hart);

<sup>487</sup> Úna Ní Raifeartaigh SC, *The Bar Review, Child sexual abuse cases: the need for cultural change within the criminal justice system - Volume 14, Issue 5, (November 2009).*

constitutional developments, there is a risk that poor implementation of new, revised and/or existing support measures will result in child witnesses experiencing difficulties at trial. How the State best protects a child from psychological harm while he or she gives evidence at trial in criminal proceedings is a significant challenge. The nature of the support measures the State can provide to enable the child to give his or her best evidence in criminal proceedings is an evolving and complex issue. In this jurisdiction, there is minimal research as to how giving evidence at trial may psychologically or emotionally affect a child witness.<sup>489</sup> The data which informed the current legislation<sup>490</sup> requires updating to allow for appropriate reform. Recent impetus for reform stems from our obligations under European Union law,<sup>491</sup> as well as Ireland's obligations as a State party to the European Convention on Human Rights.<sup>492</sup>

3.10.7 In the investigation and prosecution of criminal offences, two factors directly affect the child witness - the use of support measures and the issue of procedural efficiency. The use of support measures may involve the provision of video link, recorded testimony, intermediaries, screens and support persons. In this jurisdiction,

<sup>488</sup> Although drafted in 1992, the provision for recorded testimony was commenced in this jurisdiction in October 2008. *The Criminal Law (Human Trafficking) (Amendment) Act 2013* now extends the provision to witnesses under 18 involving offences under s. 3 (1),(2) and (3) *Child Trafficking and Pornography Act 1998* and ss.2, 4 or 7 *Criminal Law (Human Trafficking) Act 2008*. The Criminal Law (Sexual Offences) Bill 2015, published in November 2014, includes a proposal to widen the eligibility for s.16(1)(b) to witnesses under 18 in relation to sexual offences and also to amend the interpretation of 'sexual offences' within the *Criminal Evidence Act 1992*. The EU 'Victims Directive' must be implemented by 16th November 2015 and the legislation as been drafted under the *Criminal Justice (Victims of Crime) Bill 2015*. Indications are that s.16(1)(b) will be widened for witnesses under 18 (and persons with an intellectual disability) in certain proceedings as well as to victims who may be deemed in need of the support measure.

<sup>489</sup> The most relevant and recent research is outlined in the article, *Child Sex Abuse and the Irish Criminal Justice System* – Graham Connon, Allan Crooks, Alan Carr, Barbara Dooley, Suzanne Guerin, Derek Deasey, Deirdre O'Shea, Imelda Ryan, Anne O'Flaherty - *Child Abuse Review* (2011) Vol. 20 Issue 2 (Wiley & Co.) pps.102-119.

<sup>490</sup> Notably *The Report of the Advisory Group on Video Evidence 'The Pigot Report'* (Home Office UK 1989); *Speaking Up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1988) Para. 11.25 at p. 87; Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August 1989) Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990); The Law Reform Commission Report on Sexual Offences against the Mentally Handicapped. (LRC 33-1990);

<sup>491</sup> *European Union Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* which came into force on the 14<sup>th</sup> November 2012 and domestic legislation is to be brought into force by 16<sup>th</sup> November 2016.

<sup>492</sup> *O'Keefe v Ireland* (Application No 35810/09) (ECtHR 28<sup>th</sup> January 2014); *CS and CAS v Romania* (Application No. 26692/05) 20th March 2012. *ND v Slovenia* (Application no. 16605/09) (Fifth Section) 15 January 2015; *X and Y v The Netherlands* (1986) 8 EHRR 235.

some support measures are provided for legislatively,<sup>493</sup> while the court has an inherent jurisdiction to provide others.<sup>494</sup>

3.10.8 The matter of procedural efficiency concerns how effectively the matter is dealt with by the totality of the professional agencies who deal with the investigation and prosecution of the criminal offence. This will involve multiple agencies who engage with the witness from the original complaint through to an acquittal or conviction, sentencing and possibly even appeal, at trial. While the experience and training of the investigation and trial personnel will significantly affect the efficiency of the process, other factors will also play their part. These include issues regarding disclosure, the nature of court facilities and technical services, the length of the court lists,<sup>495</sup> the waiting times to give evidence once the trial has begun,<sup>496</sup> and the availability of judges for hearing.

3.10.9 The examination of these practical, procedural issues is extremely important as they have a considerable impact on the experience of child witnesses. The scope of this thesis is limited to the analysis of support measures within the criminal justice

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<sup>493</sup> The use of video link, intermediaries and recorded testimony are provided for (in certain circumstances) under the *Criminal Evidence Act 1992*.

<sup>494</sup> The trial judge has an inherent jurisdiction to accommodate the individual needs of a witness provided that it does not infringe the constitutional right of the defendant to a fair trial. A support person who sits with the child witness may furnish physical comfort to the child and enable him or her to relay his or her testimony. Nonetheless, there are strict parameters in the use of such a support measure. The support person may not in any way prompt, suggest or interrupt the testimony to the court. However, he or she may be able to alert the court if the child witness is experiencing any serious difficulties in giving evidence. To all intents and purposes the support person is mute but his or her physical presence in court may comfort the child witness and allow him or her give evidence and minimise the stress while doing so. The case of *R v Smellie* (1919) 14 Cr App R 128 (CA) established the precedent that screens may be used in order to shield the witness from sight of the accused. This may assist the child witness to feel less inhibited and stressed when giving testimony in court. The *Criminal Law (Sexual Offences) Bill 2015* indicates that the use of screens may be put on a statutory basis. There appears to be no indication that the use of support person will be put on a statutory basis as yet.

<sup>495</sup> A Central Criminal Trial may take 12/13 months to be heard from the time of the first listing in the Central Criminal Trial list after the return for trial from the District Court. The waiting times for Circuit Court trials vary depending on jurisdiction but range from 3 months to 24 months.

For trial waiting times see The Courts Services Annual Report (Courts Services 2014) 'Waiting times as at 31st December 2014' at p. 61.

<http://www.courts.ie/Courts.ie/Library3.nsf/0/3B21EBCDBCA7469C802575E6003DBD7F?OpenDocument> (Accessed 25th September 2015).

<sup>496</sup> While discussing the advantage of full pre-trial recording, Spencer notes that '*One obvious improvement is likely to be that the child is not kept waiting outside the courtroom for a day and half, as with the four year old girl in the Barker case.*' John Spencer, *Conclusions: (i) Is Section 28 workable? And (ii) If Section 28 is Workable, Will it Solve all the Problems that Arise from the Cross-Examination of Children? 'in Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) ) p.175.

system; the focus of this section will remain on the issue of whether the provision and implementation of support measures is so deficient in this jurisdiction as to give rise to legal challenges before or during the trial process or through judicial review proceedings. Alternatively, there may be a question as to whether there is sufficient foundation, post-trial, to ground a civil action against the State in circumstances where it is alleged that psychological harm has been caused to the witness as a result of the negligence of the State in providing adequate support measures.

3.10.10 The practical correlation between the rights of child witnesses and the provision and implementation of support measures must be examined to evaluate whether the procedural rights of child witnesses are being vindicated. While independent empirical research regarding support measures is lacking in this jurisdiction, an analysis of law and practice suggests that the provision and use of support measures falls short of the goals of the relevant rights documents<sup>497</sup> which seek to protect the child witness in criminal proceedings. Using the benchmark of the case law from the European Court of Human Rights<sup>498</sup> and the European Court of Justice,<sup>499</sup> it is submitted that the procedural deficiencies in relation to child witnesses in this jurisdiction could be challenged by child witnesses before domestic and international courts. This might lead to courts and the legislature providing higher levels of protection for the child from psychological harm and at the same time enabling the child witness to give better testimony at trial.

3.10.11 Judicial review proceedings such as taken in cases like *Rattigan v DPP*,<sup>500</sup> *Nash v DPP*<sup>501</sup> and *G v DPP*<sup>502</sup> examined State obligations to protect the rights of the defendant in criminal proceedings where there had been significant prosecutorial

<sup>497</sup> The UN *Convention on the Rights of the Child* (1989), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (31<sup>st</sup> May 2011), *European Union Charter of Fundamental Rights* (2009).

<sup>498</sup> *O’Keeffe v Ireland* 28<sup>th</sup> January 2014 (Application No 35810/09) ECtHR; *CS and CAS v Romania* (Application No. 26692/05) 20<sup>th</sup> March 2012. *ND v Slovenia* (Application no. 16605/09) (Fifth Section) 15 January 2015.

<sup>499</sup> Case C-105/03 *Reference for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against Maria Pupino*, 16<sup>th</sup> June 2005 (ECJ); Case C-507/10 *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), lodged on 25 October 2010, Denise Bernardi v Fabio Bernardi* (2011/C 13/36).

<sup>500</sup> *Rattigan v DPP* [2008] IESC 34; [2008] 4 IR 639.

<sup>501</sup> *Nash v DPP* [2012] IEHC 598; [2012] 12 JIC 1701.

<sup>502</sup> *G v DPP* [2014] IEHC 33

delay. In each case, orders were sought to prevent the trial from proceeding asserting that it would be impossible to obtain a fair trial in due course of law under Article 38.1. The trials in *Rattigan v DPP*<sup>503</sup> and *Nash v DPP*<sup>504</sup> proceeded, but the court granted costs to the unsuccessful applicants in both cases<sup>505</sup> highlighting the prosecutorial deficiencies which gave rise to the judicial review applications in each case. In *G v DPP*<sup>506</sup> the trial was prohibited in circumstances where there was significant delay in the prosecution of serious sexual offences where the defendant was sixteen years of age at the time of the alleged incident while the complainant was eight years of age. Although the defendant took responsibility for the offences, significant delays in investigation, charge and trial led to judicial review proceedings. Prohibiting the trial, O'Malley J stated:

Clearly, therefore, expedition is essential if the legislative and public policy requirements relating to child offenders are to be met. The duty to ensure expedition rests, in the first instance, on the Gardaí and the prosecution authorities. As stated in the authorities cited, it is a duty "over and above" the normal duty to ensure a reasonably expeditious trial for accused persons.<sup>507</sup>

3.10.12 While the right of the defendant to a fair trial is explicitly protected under Article 38.1 including the right to an expeditious trial,<sup>508</sup> and the rights of the child offender to an expeditious trial is a duty 'over and above' that normal duty, the

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<sup>503</sup> *Rattigan v DPP* [2008] IESC 34; [2008] 4 IR 639.

<sup>504</sup> *Nash v DPP* [2012] IEHC 598; [2012] 12 JIC 1701.

<sup>505</sup> The Court in *Nash v DPP* [2012] IEHC 598; [2012] 12 JIC 1701, limited the costs to the applicant granted to one third. The court said that the case was distinguishable from *Rattigan v DPP* [2008] IESC 34; [2008] 4 IR 639 where full costs were granted to the applicant/appellant due to the fact that, although the Supreme Court had affirmed the High Court's refusal of prohibition, it nevertheless viewed the issues of delay and want of candour on the part of State agencies so gravely that it awarded full costs to the applicant/appellant. The Court in *Nash* stated that detailed and at least potentially stateable arguments specific to the facts of an enormously grave case had to be presented and considered. The Court added that in considering the interests of justice, it was no small matter that accused persons in major cases should be able to retain in their defence or in related judicial review proceedings practitioners of commensurate experience and ability. Combining that factor and the issue of forensic delay in the matter, the Court ruled that a departure from the normal costs rule i.e. costs follow the event was warranted.

<sup>506</sup> *G v DPP* [2014] IEHC 33.

<sup>507</sup> *G v DPP* [2014] IEHC 33.

<sup>508</sup> Gannon J emphasised that the description of the rights he outlined in *State (Healy) v Donoghue* [1976] I.R. 325 was not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence. *State (Healy) v Donoghue* [1976] I.R. 325 at 336.

rights of the child witness are increasingly reinforced under constitutional and international obligations. The Supreme Court acknowledged in *Donnelly v Ireland*,<sup>509</sup> the constitutional rights of the defendant will take precedence over the rights of the child witness.<sup>510</sup> Nonetheless, increased constitutional protections<sup>511</sup> and international obligations<sup>512</sup> may require greater State action for the protection of child witnesses at trial. It is possible that participatory rights for child victims as set out in the *EU Directive on Establishing Minimum Standards on the Rights, Support and Protection and Victims of Crime*<sup>513</sup> and ECtHR case law<sup>514</sup> which emphasise the importance of an expeditious trial and effective support measures, are sufficient to ground judicial proceedings during a trial to oblige the court to provide adequate support measures.

### ***3.11.0 Deficiencies in the implementation of support measures: observed proceedings***

3.11.1 In the absence of an evaluation of the effectiveness of support measures which have been introduced in this jurisdiction, a description of cases which have been observed by the author may be of some benefit. On an anecdotal level, they appear to be indicative of the wider experiences of legal practitioners in the criminal justice system where difficulties with procedure and the use of support measures are common. Inadequacies in the implementation of the support measures may be, as here, compounded by procedural inefficiencies such as delay or personnel issues (e.g. where there may be late handover of files from one counsel to another or where personnel within the Chief Prosecution Solicitor's or DPP's office may not be wholly familiar with the legislation regarding the use of support measures.) These factors will exacerbate the difficulties for the child witness as he or she progresses through the investigation, prosecution and trial of the offence. Procedural considerations may affect whether the defendant will plead at an earlier stage in

<sup>509</sup> *Donnelly v Ireland* 1 IR 321.

<sup>510</sup> *Donnelly v Ireland* 1 IR 321 as per Hamilton CJ at p. 348.

<sup>511</sup> Article 42A *The Constitution of Ireland* 1937.

<sup>512</sup> See: *Chapter II – The Rights of the Child Witness in Criminal Proceedings* at p. 25.

<sup>513</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32012L0029>.

<sup>514</sup> *CS and CAS v Romania* (Application No. 26692/05) 20th March 2012; *ND v Slovenia* (Application no. 16605/09) (15 January 2015; *Z and others v United Kingdom*, (App.29392/95, 10 May 2001 [GC]),(2002) 34 EHRR 97, ECHR 2001 – V at 73. *X and Y v The Netherlands* (1986) 8 EHRR 235.



proceedings. For example, an application to admit recorded evidence under s.16(1)(b) of the *Criminal Evidence Act 1992* must be made at the outset of the trial. If the evidence is admitted, the defendant may opt to plead to the offences set out on the indictment or he or she may consider offering a plea to a lesser charge.

## 4.0.0 Chapter IV - Competence, Compellability and Corroboration

### 4.1.0 Introduction

4.1.1 The question of the competence of the child witness is directly linked to the issue of the rights of the child witness. If the child is deemed to be an incompetent witness, then his or her testimony will be excluded from the trial process thereby omitting his or her voice from criminal proceedings. In this section, the test of competence for children, as it currently exists in this jurisdiction, will be assessed with reference to appropriate case law. There have been considerable developments concerning the accommodation of the testimony of child witnesses and this includes a relaxation regarding the admission of sworn testimony. The history of the test for competence will therefore be considered in tandem with an evaluation of the practical considerations it may involve at trial. The question of compellability and corroboration of child witnesses are also important questions in relation to child witnesses and these will be examined.

### 4.2.0 The requirement for a test of competence

4.2.1 A test for competence is of practical use in that it restricts the admission of evidence which is of little intrinsic value and which may be unfair to the accused. The Australian Law Commission stated in its 2006 Report that the “primary rationale for the existence of tests of competence is to guard against the admission of evidence of little or no probative value.”<sup>515</sup> In England and Wales, in its report *Speaking Up For Justice*, the Home Office stated:

4.2.2 It is important to have a safeguard in place to prevent the court hearing evidence which is not only irrelevant but which, if admitted, would be unfair to the accused.<sup>516</sup> It is a common law presumption that all witnesses in this jurisdiction are presumed competent and will give testimony that is either sworn or affirmed. If any issues arise during the giving of evidence, the court may administer a test to examine if the witness is competent to give evidence. The competency provision in this

<sup>515</sup> Chapter 4, *Competence and Compellability*, Uniform Evidence Law (ALRC Report 102) Australian Law Reform Commission, (13th February 2006).

<sup>516</sup> *Speaking Up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1988) Para. 11.25 at p. 87.

jurisdiction is not set out in a specific legislative provision but has derived from a separate provision which allows for the admission of unsworn evidence at trial. S.27 *Criminal Evidence Act 1992* provides that evidence of children under 14 and persons with an intellectual disability will be admitted otherwise 'on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.'<sup>517</sup> It is this criterion, the ability to give an intelligible account of events which are relevant to the proceedings, which has emerged as the competency test in this jurisdiction.<sup>518</sup>

#### 4.3.0 *The definition of competence*

4.3.1 The issue of competence has, at different times over the evolution of the criminal justice system, comprised a number of aspects including the ability of the child to take the oath, to observe, to remember, to tell the truth and to be able to give an intelligible account of events. The definition of competence regarding the admission of children's testimony has changed significantly over time. In the 18<sup>th</sup> century, the understanding and taking of an oath was a prerequisite under *R v Brasier*.<sup>519</sup>

[A]n infant, though under seven years of age, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequence of an oath...for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court...'<sup>520</sup>

4.3.2 The requirement for the child to understand the nature of the oath in order to have his or her sworn testimony admitted at trial was extremely restrictive. In order

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<sup>517</sup> S.27(1) *Criminal Evidence Act 1992*.

<sup>518</sup> *O'Sullivan v Hamill* [1998] 2 IR 9.

<sup>519</sup> *R v Brasier* (1779) 1 Leach 199.

<sup>520</sup> *R v Brasier* (1779) 1 Leach 199 at 200.

to give evidence, younger witnesses would have to show that they understood the nature of the oath and the spiritual consequences of perjuring themselves. If the child was unable to take the oath, his or her testimony could not be admitted and so the prosecution case was significantly undermined. Legislative developments facilitated the admission of children's testimony in order to assist the prosecution of offences which involved them. Greater latitude was given to children who testified under *s.4 Criminal Law Amendment Act 1885*.<sup>521</sup> This allowed for the admission of unsworn testimony in a prosecution for the defilement of a girl under 13 years of age. Unsworn testimony of the complainant or a witness in the case who was of 'tender years' could be admitted if the court was of the opinion that the complainant and/or witness were possessed of sufficient intelligence to justify the reception of the evidence and also understood the duty of the telling the truth. The admission of unsworn testimony was extended under *s.30 Children Act 1908*<sup>522</sup> where unsworn evidence could be admitted in certain offences if the child was possessed of sufficient intelligence to justify the reception of the evidence, and understood the duty of speaking the truth.

4.3.3 In this jurisdiction, the test for competency in relation to child witnesses under 14 has now evolved to an ability to give an intelligible account of events under *s.27 Criminal Evidence Act 1992*. This is entwined with the provision to facilitate the admission of unsworn testimony. McGrath states that a general competency test has emerged from the present test of competency under *s.27 Criminal Evidence Act 1992* for children:

A witness can only give evidence if he or she is capable of giving intelligible testimony. This requirement has a statutory foundation in the case of children and person with a mental disability, but is of more general application.<sup>523</sup>

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<sup>521</sup> 'Defilement of girl under thirteen years of age'  
*S. 4 Criminal Law Amendment Act 1885.*

<sup>522</sup> 'Evidence of child of tender years.'  
*s.30 The Children Act 1908.*

<sup>523</sup> Declan McGrath *Evidence* (Thomson Round Hall 2014) Para 3-08 at p. 86.

4.3.4 On a common law basis, witnesses are presumed to be competent and may give sworn or affirmed testimony without a test of competency being administered by the court. Should issues arise the court may assess the competence of the witness within the context of the provision which allows for the unsworn testimony of children and persons with an intellectual disability. Thus, while s.27(1) *Criminal Evidence Act 1992* provides for the unsworn evidence of children under the age of 14 and for persons with an intellectual disability who have reached that age, the condition for that provision has become the test for competence for all witnesses.<sup>524</sup>

4.3.5 In this jurisdiction, Walsh notes that ‘A witness is said to be competent if he or she has the capacity to offer admissible testimony pertaining to an issue in the trial.’<sup>525</sup> It is important to differentiate between the question of competence and the issue of credibility. If a child witness is deemed competent and his or her evidence is admitted at trial, then the credibility of the child witness, as with any other witness, is a matter for the jury.<sup>526</sup> The assessment of competence is the responsibility of the judge and this assessment does not involve the credibility of the witness. Hoyano and Keenan note:

The goal is not to ensure that the evidence is credible, but only that it meets the minimum threshold for being heard; the court’s enquiry is into capacity to perceive, recollect, and communicate, not whether the witness actually perceived, recollects, and can communicate about the events in question.<sup>527</sup>

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<sup>524</sup> Declan McGrath, *Evidence* (Round Hall 2014) ‘*Evidence of Children*’ para 4 -179 at p 86.

<sup>525</sup> Prof.Dermot Walsh, *Criminal Procedure* (Thomson Roundhall, 2002) para. 18.02 at p. 855.

<sup>526</sup> *DPP v Wall* [2005] IECCA 140; *DPP v. Hanley* [2011] 1 I.R. 247; *DPP v Pringle* [1995] 2 IR 547; *O’Sullivan v Hamill* [1998] 2 IR 9.

<sup>527</sup> Laura Hoyano and Caroline Keenan, *Child Abuse, Law and Policy Across Boundaries* (Oxford University Press 2010) Chapter 8 at p. 599 citing *R v Marquand* [1993] 4 SCR 223 (236); *R v MAM* [2001] BCCA 6 (British Columbia CA)(Rowles J).

#### 4.4.0 *Legislative reform under Criminal Evidence Act 1992*

4.4.1 The Law Reform Commission of Ireland's *Consultation Paper on Child Sexual Abuse* published in 1989<sup>528</sup> examined certain perceived notions regarding children's evidence. These perceptions included aspects such as that the children's intellectual and memory immaturities may make them unreliable witnesses, that children are highly suggestible, that children may be unable to distinguish between fantasy and reality and that children may lie about sexual abuse.<sup>529</sup> The Consultation Paper also considered the concept of a minimum age regarding competence. It also examined whether expert evidence should be a factor in determining the competence of the witness or if the issue of competence should be an area that the court should continue to decide.

4.4.2 A comparative analysis of other jurisdictions also informed the provisional recommendations made by the Commission which emphasised that they were made in the context of child sexual abuse. These recommendations were that the court should continue to make the ultimate decision as to the competence of the witness, that there should be an alternative to taking the oath which would be in the form of an affirmation. This would take place after the issue of competence has been determined, which would ascertain the child's cognitive ability. In addition the Consultation Paper, recommended that the corroboration requirements be relaxed for the admission unsworn testimony and that the warning be relaxed in relation to the evidence of the sworn evidence of child witnesses. The Consultation Paper also recommended that expert evidence be admissible in assisting the court regarding the issue of the competence of the child witness.

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<sup>528</sup> Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989).  
<sup>529</sup> Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989).  
Chapter 5 *Evidence: Competence of Children as Witnesses* at pps. 81-106.

4.4.3 These aspects regarding competence were then included in the Law Reform Commission *Report on Child Sexual Abuse*.<sup>530</sup> The *Report*, published in 1990, examined such considerations as the minimum age for witness, the nature of the test for competence in as much as it should include both an ability test as well as an obligation to understand and/or tell the truth looking to other jurisdictions to analyse how they approached the issue of competence with particular regard to child witnesses.<sup>531</sup> Ultimately, the recommendations of the Report concerning competence were that the court should make the ultimate decision as to the competence of children to give evidence.<sup>532</sup> The Report also stated that the test of competency should be the capacity of the child to give an intelligible account of events which he or she has observed.<sup>533</sup> The Report recommended that the requirement to warn a jury before they could convict on the evidence of a child and the mandatory corroboration warning concerning the unsworn evidence of a child should be abolished.<sup>534</sup>

4.4.4 With regard to the oath, the Report recommended that Section 30 of the *Children Act 1908* be repealed and replaced by a provision that allowed for the unsworn evidence of a child under 14 to be admitted where the child is deemed to be competent.<sup>535</sup> The *Criminal Evidence Act 1992* encompassed all these recommendations. The leap from the parameters of s.30 of the *Children Act 1908* to the provisions regarding unsworn testimony, competence and discretionary corroboration requirements were monumental in scope. A significant cultural change was thereby instituted within the criminal justice system making it easier, on a practical basis, to admit the evidence of child witnesses. While acknowledging the difficulties a child may have in taking the oath it allowed for the ability of a child to observe and to remember facts and to allow for these to be admitted under s.27. By removing the mandatory warnings for both sworn and unsworn testimony, it also

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<sup>530</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990).

<sup>531</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) *Chapter 5: The Competence of Children as Witnesses* at p. 50.

<sup>532</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) *Chapter 5: The Competence of Children as Witnesses Para 5.18* at p. 56.

<sup>533</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) *Chapter 5: The Competence of Children as Witnesses Para 5.18* at p. 56.

<sup>534</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) *Chapter 5: The Competence of Children as Witnesses Para 5.28* at p. 60.

<sup>535</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) *Chapter 5: The Competence of Children as Witnesses Para 5.36* at p. 63.

revised the perception of the child witness that their evidence is inherently unreliable and weaker while placing the responsibility on the trial judge to assess the quality of the evidence and ensure that where it was weaker to ensure the fair trial of the accused by allowing for discretionary warnings to the jury in whatever form the trial judge saw fit under s.28 of the Act.

#### 4.4.5 As Healy states:

By identifying intelligibility as the sole criterion when considering whether to receive the unsworn evidence of a child under 14 years, the legislature signalled a vital shift in policy, which is to encourage and receive the evidence of children, where relevant, with any concerns in individual cases instead affecting the evidence's weight or value by the close of the trial.<sup>536</sup>

However, in *DPP v PP*<sup>537</sup> the court referred to the request for the witness to tell the truth as a factor regarding the competency of the child witness. This is thus in contrast with Healy's contention that intelligibility is the sole criterion for the admission of sworn testimony.

4.4.6 The age of eligibility for the admission of unsworn testimony under s.30 *The Children Act 1908* was that of 'a child of tender years'.<sup>538</sup> As outlined, the current age for the admission of unsworn testimony under s.27(1) *Criminal Evidence Act 1992* is that of under 14 years of age. The particular age is significant as it echoes a provision within the same Act. S.16 (1)(b) *Criminal Evidence Act 1992* which allows for the admission of recorded testimony for complainants under the age of 14. S.27(1) thereby allows the taking of this evidence outside of the trial process without the requirement for it to be sworn and so the two provisions echo each other under the age eligibility criteria.

4.4.7 Unsworn evidence may be given otherwise than on oath or affirmation if the court is satisfied that the witness is able to give an intelligible account of events

<sup>536</sup> John Healy, *Irish Laws of Evidence* (Thomson Round Hall, 2004) Para.2.12 at p. 50.

<sup>537</sup> *DPP v PP* [2015] IECA 152.

<sup>538</sup> 'Evidence of Child of Tender Years'  
S.30 *The Children Act 1908*.



which are relevant to the proceedings. The wording of the provision may lead to some ambivalence. The use of the word ‘satisfied’ implies that there is an obligation on the court to conduct an examination of the child witness.<sup>539</sup> The use of the word ‘capable’ may indicate that the child witness must have the requisite skill of giving an intelligible account of relevant proceedings but is not required to do so at all times during the course of giving evidence.<sup>540</sup> It is arguable if there is any latitude which may be given by the court in respect of the fact that the child may be overwhelmed by the trial itself but may still be capable of giving an intelligible account.

4.4.8 The provision says “in any proceedings” thus allowing the child witness to give unsworn evidence regarding any criminal offence. This differentiates the admission of unsworn testimony as a support measure from that of others within Part III *Criminal Evidence Act 1992*. Support measures such as video link, recorded testimony and intermediaries may only be used in the prosecution of certain offences under s.12 of the Act. These include violent, sexual, trafficking and pornography offences. The admission of unsworn testimony for children under 14 in any criminal proceedings is beneficial and it is submitted that the same latitude be extended to all support measures involving child witnesses.

4.4.9 One of the most significant difficulties surrounding the testimony of child witnesses is the fear that children are fantasists and liars.<sup>541</sup> Perhaps as a result of

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<sup>539</sup> See *DPP v PP* [2015] IECA 152 where counsel for the appellant cited *DPP v Mallen* [2011] IECCA 19 in relation to the requirement of a peace commissioner to be satisfied as to the relevant Garda’s belief that a search warrant. The statutory provision required an exercise in mental engagement of the facts as an essential part of the inquiry. The court in *DPP v PP* did not address this question as it determined that no issue regarding the witness’s competence under the provision was warranted by her testimony. The question remains to be determined in respect of an inquiry under s.27 *Criminal Evidence Act 1992*.

<sup>540</sup> *R v Barker* [2010] EWCA Crim 4, [2010] All ER (D) 126 where the court stated that it is not a requirement that the witness understand and be understood completely throughout proceedings. ‘The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent.’

[2010] EWCA Crim 4 at p.16 as per LCJ Judge.

<sup>541</sup> ‘..... a deep-seated assumption is embedded in society and reflected in our law that young children are unreliable and incompetent witnesses. This assumption, we are satisfied, is erroneous, and inimical to the constitutional rights of young citizens who, although they may not be endowed with an adult’s capacity better to withstand the ordeal of giving evidence, have the same right, under Article 40 of the Constitution, to the defence and vindication of their personal rights. Accordingly, in order to defend and

this, the development of unsworn testimony for child witnesses has included the provision for the offence of perjury. Perjury is an offence committed by a person who:

asserts upon oath, duly administered in a judicial proceeding before a competent court or tribunal at which evidence on oath may be heard, of the truth of some matter of fact, material to the question depending in that proceeding, which assertion the assertor does not believe to be true when he makes it, or on which he knows himself to be ignorant.<sup>542</sup>

The offence of perjury was contained in s.30 of the *Children Act 1908*<sup>543</sup> and this provision is still included under s.27 *Criminal Evidence Act 1992*.<sup>544</sup> The offence of perjury for child witnesses raises a number of issues. It is a common law offence and requires independent evidence in order to be prosecuted. Due to the age of criminal responsibility in this jurisdiction,<sup>545</sup> child witnesses under the age of 12 could not be prosecuted for a criminal offence including perjury. Between the age of 12 and 14, an offence of perjury can only be taken with the consent of the DPP. A prosecution could still take place where the age of the witness is between 14 and 18 years of age, has given sworn testimony in court and subsequently given false testimony. There appears to be no procedural guidance which indicates that the child witness should be warned where appropriate that he or she may be prosecuted for perjury if he or she gives false evidence when testifying.

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*vindicate the rights of all young citizens, the State must ensure that there is no removable obstacle barring their access to the Courts. In order properly to vindicate the right of a child to bodily integrity, our laws should ensure that where it is possible for the child to give evidence for the People in a prosecution of his or her alleged abuser, such evidence should be made available.'*

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) para.7.02 at p.67.

<sup>542</sup> Murdochs Irish Legal Companion.(Accessed 2<sup>nd</sup> May 2016)

<sup>543</sup> 'Evidence of child of tender years.'

*S.30(b) The Children Act 1908.*

<sup>544</sup> *S.27(2) 'If any person whose evidence is received as aforesaid makes a statement material in the proceedings concerned which he knows to be false or does not believe to be true, he shall be guilty of an offence and on conviction shall be liable to be dealt with as if he had been guilty of perjury.'*  
*Criminal Evidence Act 1992.*

<sup>545</sup> Section 129 of the *Criminal Justice Act 2006* amended s.52 *Children Act 2000*. The age of criminal responsibility has been raised to 12. The section contains the proviso that a child of 10 or 11 may be responsible for the offences of murder, manslaughter, rape, rape under s. 4 of the *Criminal Law (Rape)(Amendment) Act 1990* or aggravated sexual assault. Where a child under 14 years of age is charged with an offence, the Director of Public Prosecution's consent must be given to proceed beyond remand or bail proceedings.

4.4.10 Should the witness give evidence which he or she knows to be false, a prosecution for perjury under this section for a child under 12 would not be possible under the amended s. 52 of *the Children Act 2001* and prosecution of a child under 14 could not proceed without the consent of the Director of Public Prosecutions. However, it is contended that despite the absence of an express requirement to tell the truth, the legislative purpose of the perjury obliges the child witness to tell the truth. The *mens rea* required for the prosecution of the offence of perjury would implicitly oblige the witness to understand that he or she was obliged to tell the truth and to understand that not to do so and to lie on purpose would be an offence.<sup>546</sup>

4.4.11 The inclusion of the offence of perjury may have been in order that the child witness would be discouraged from lying in court. It is difficult to say how this provision could work in practice where there is no accompanying practice or procedural guidance that explicitly states that the child witness should be informed of the perjury offence. There are no reported cases where child witnesses have been prosecuted for perjury<sup>547</sup> and so it is submitted that the perjury provision has no real efficacy. An alternative approach would be to enact a legislative provision for child witnesses under the age of 14 years of age to require the judge to convey to the child witness in an appropriate manner the seriousness of the circumstances and to communicate to the child witness the importance of telling the truth. It is difficult to say whether the offence of perjury should be retained for child witnesses from the age of 14 years of age to the age of 18 years of age where sworn testimony is given. However, it is submitted that the current circumstances for child witnesses under 14 years of age require revision as the current perjury provision appears to serve no practical purpose.

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<sup>546</sup> See *DPP v Michael O'Brien* [2010] IECCA 103 regarding the requirement to tell the truth which the Court stated could be satisfied by the circumstances in which the statement was taken.. See also *DPP v PP* [2015] IECA 152 where the court commented regarding the truth as a factor regarding the competency of the child witness. This is thus in contrast with Healy's contention that intelligibility is the sole criterion for the admission of sworn testimony.

<sup>547</sup> John Healy, *Irish Laws of Evidence* (Thomson Round Hall, 2004) Para.2.12 at p. 50.  
No prosecution for perjury was undertaken in the case of *DPP v Hannon* [2009] IECCA 43 where many years after the offence, the complainant confessed that she had lied at trial.

4.4.12 The safeguards, which were perhaps too restrictive, are now diminished to the point where it is difficult to ascertain whether there is now any sanction on the child to tell the truth at all. It is submitted that the offence of perjury should be revised for children under 14 years of age. Rather than include an offence which would be difficult to prosecute and which has little or no practical impact, a legislative obligation to require the court to ask the child witness to promise to tell the truth could be more effective. This proposal was given legislative form in the *Criminal Code of Canada* in 2005<sup>548</sup> and has a practical effect. Lyons states that the comprehension of the child witness of truth and lies may be underestimated and a promise to tell the truth yields increased honest responses.<sup>549</sup> Whether or not any sanction could or should be imposed is difficult to evaluate but to communicate to the child, in an age appropriate way, that it is important to tell the truth and to elicit from him or her a promise to do so may be more successful. Depending on the age of the child witness it may also be of use to explain the potential consequences to the defendant of giving false testimony.

4.4.13 There is, to some extent, ambiguity if it is possible for a child witness under 14 to give sworn testimony. The provision states that ‘in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.’<sup>550</sup> The trial judge may allow the child witness to give sworn testimony if he or she feels it is appropriate to do so. The perception of the courts regarding the divine aspect to the giving of sworn testimony has changed considerably since *R v Brasier*.<sup>551</sup>

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‘Promise to tell truth

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.’

c.32 An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, 2005.

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Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice informed by Psychology and Law* at p. 76.

*Children’s Testimony – A Handbook of Psychological Research and Forensic Practice* (Eds. Michael E. Lamb, David J. La Rooy, Lindsay C. Malloy and Carmit Katz.)

(Wiley-Blackwell) (2<sup>nd</sup> edn, 2011).

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S.27(2) *Criminal Evidence Act 1992*.

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*R v Brasier* (1779) 1 Leach 199.

4.4.14 This change was seen in *R v Hayes*<sup>552</sup> where, in response to questions from the court, a 12 year old boy stated that he had not received religious instruction and had not heard of God. However the boy had stated that he understood the importance of telling the truth and was then sworn and gave evidence. On appeal, the Court of Appeal acknowledged that ‘the divine sanction of an oath’ was probably no longer recognised in society and held that the consideration to be determined was:

...whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.<sup>553</sup>

4.4.15 The court also stressed that the determination of competence to take the oath was a matter for the trial judge who was in the position of being able to personally assess the witnesses. Bridge LJ stated that an appellate court should ‘hesitate long’ before interfering with that decision.<sup>554</sup> It may then be possible for a trial judge to determine that a child witness is capable of giving sworn testimony. Healy notes that there is ambiguity whether or not a child under 14 could still give sworn evidence. He states:

The provision is clearly enabling, and it does not appear to intend to oust the trial judge’s discretion to accept the sworn evidence of a child under 14 years or the unsworn evidence of a child over 14 years, although it may be expected that a stronger case would need to be made for either. The common law tends against operating a fixed chronological scale for competence or capacity with respect to testifying and most other actions.<sup>555</sup>

4.4.16 After an assessment, a trial judge may decide that a child witness is capable of giving sworn testimony. This was the situation in the case of *DPP v AB*<sup>556</sup> the

<sup>552</sup> *R v Hayes* [1977] 1 W.L.R. 234.

<sup>553</sup> *R v Hayes* [1977] 1 W.L.R. 234 at p. 237 per Bridge LJ.

<sup>554</sup> *R v Hayes* [1977] 1 W.L.R. 234 at 237 per Bridge LJ.

<sup>555</sup> John Healy, *Irish Laws of Evidence* (Thomson Round Hall, 2004) Para.2.13 at p. 50.

<sup>556</sup> *DPP v AB*, Circuit Criminal Court, November 2014. See para.2.31.0.

child witness' examination in chief recorded testimony was admitted under s.16(1)(b) *Criminal Evidence Act 1992*. She was 12 years of age at the time of trial and was sworn before being cross-examined. This practice may be adhered to by certain judges more than others and there appears to be no consistent practice in this area. To what extent sworn testimony of child witnesses will be perceived differently to that of unsworn testimony is unknown. Traditionally, the major difference between the admission of sworn or unsworn testimony was that sworn testimony had no mandatory corroboration requirements. As part of a parcel of ground breaking measures, Section 28 *Criminal Evidence Act 1992* dispensed with the requirement for mandatory corroboration for unsworn testimony and made the corroboration warning discretionary. As Heffernan notes:

Unsworn testimony, however, suffered from several deficiencies at common law: it was generally not admitted unless accompanied by sworn corroborative evidence and, even then, necessitated the delivery by the trial judge of a cautionary warning to the jury. There was also the inherent danger that juries would attach weight to testimony not copper fastened with the safeguard of the oath. The current law not only removes the need for children to take the oath but also cures these traditional limitations.<sup>557</sup>

4.4.17 There is no public guidance<sup>558</sup> in relation to the test to allow the child witness to give unsworn testimony. In *DPP v PP*,<sup>559</sup> recorded examination in chief testimony had been admitted as evidence under s.16(1)(b) *Criminal Evidence Act 1992*. The trial judge had made no inquiry as to whether the complainant was eligible to have such evidence admitted i.e. was under 14 years of age at the time of recording. He had also omitted to assess whether the complainant was eligible to give unsworn testimony at trial under s.27 *Criminal Evidence Act 1992*. The defendant appealed on these and other grounds. The Court of Appeal accepted that s.27 *Criminal Evidence Act 1992* does not prescribe the manner or form in which the inquiry should be embarked on. However, it was the view of the court that it is

<sup>557</sup> Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury 2014) Para 4.39 at p 136.

<sup>558</sup> The Judicial Treatment Bench Book is not available publicly. Personal communication from Mr. Justice Edwards, Secretary, Association of Judges of Ireland, 22<sup>nd</sup> July 2015.

<sup>559</sup> *DPP v PP* [2015] IECA 152 at p. 11 as per Sheehan J.

preferable that such an inquiry be held prior to the placing the evidence before the jury. It dismissed the appeal and referring to these particular grounds it stated that the absence of an inquiry did not result in an unfairness to the defendant as it was clear from her testimony that the complainant was not only capable of giving an intelligible account but did so. The court stated that the failure to carry out a formal inquiry in advance of the complainant giving evidence did not render the trial unsatisfactory.<sup>560</sup>

4.4.18 This decision underpins the decision in *AG v O'Sullivan*<sup>561</sup> where the court stated that where the complainant gave sworn testimony which was not objected to during the course of the trial, and where it had been shown that the complainant's testimony did, in no way, give any foundation for such an objection, there could be no grounds of appeal on the basis that no preliminary examination was made. Although *O'Sullivan*<sup>562</sup> involved sworn as opposed to unsworn testimony, it forms part of the body of jurisprudence which affirms the contention that where no objection is made and no issue arises as to competence, there is no ground for appeal merely on the basis of no inquiry having been made in advance of the evidence being given by the witness.

4.4.19 In *AG v Kehoe*<sup>563</sup> the court stated that it would follow *R v Hill*<sup>564</sup> in determining that it was for the trial judge to determine competence. Where there is a challenge to competency the party tendering the witness may examine him or her to prove competency and the party making the challenge has the right to cross-examine the witness.<sup>565</sup> The question of competence must be determined in the case itself; the trial judge cannot rely on a previous finding of competence by him or her or any other judge in a previous case.<sup>566</sup>

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<sup>560</sup> *DPP v PP* [2015] IECA 152 at p. 11 as per Sheehan J.

<sup>561</sup> *AG v O'Sullivan* [1930] IR 552 at pps 556-557.

<sup>562</sup> *AG v O'Sullivan* [1930] IR 552 at pps 556-557.

<sup>563</sup> *AG v Kehoe* [1951] 1 IR 70

<sup>564</sup> *R v Hill* (1851) 2 Den 254.

<sup>565</sup> 'I propose to follow the practice in *R. v. Hill*, which I accept and believe to be correct. Counsel for the Attorney General will examine the witness to demonstrate her competency, and counsel for the accused will be permitted to cross-examine and to call evidence upon this issue, if he thinks proper. The final determination of the issue is for the judge alone.'

*AG v Kehoe* [1951] 1 IR 70 as per Maguire J at p. 71.

<sup>566</sup> *People (AG) v Keating* [1953] I.R. 200 at 201.

4.4.20 Charleton *et al*<sup>567</sup> note that Carney J has ruled that a consideration of the modern statutory requirement<sup>568</sup> as to whether the child can give an intelligible account of events is best done by examination in the presence of the jury. They note that this is because that examination may assist the jury as to the weight to be attached to such evidence. This implies an overlap between the issues of competence and credibility and it is contended that this is potentially unfair. A witness may be deemed incompetent and his or her evidence excluded. In the alternative, a witness may be deemed competent and his or her evidence admitted. In either case no superfluous information should be conveyed to the jury. This position may be contrasted with the position in England and Wales where the examination for the competence of a witness should take place in the absence of a jury.<sup>569</sup> Archbold<sup>570</sup> notes that it is plainly advisable to take any objection to competency before the witness is sworn or commences to give evidence.<sup>571</sup> In *R v Yacoob*<sup>572</sup> the court stated that the beginning of the trial is the appropriate time for determining the competence and compellability of a prosecution witness. In respect of child witnesses, this has been reinforced by the Court of Appeal in *DPP v PP*<sup>573</sup> where that court said that it is preferable that an inquiry as to the eligibility of the child witness to give unsworn testimony under s.27(1) *Criminal Evidence Act 1992* be held prior to placing the evidence before the jury.

<sup>567</sup> Peter Charleton, Paul Anthony McDermott and Marguerite Bolger, *Criminal Law* (Butterworths, 1999) para. 2.25 at p. 124.

<sup>568</sup> S.27 *Criminal Evidence Act 1992*.

<sup>569</sup> 'Determining whether witness to be sworn.'

(1) Any question whether a witness in criminal proceedings may be sworn for the purpose of giving evidence on oath, whether raised— .....

(5) Any proceedings held for the determination of the question mentioned in subsection (1) shall take place in the absence of the jury (if there is one).

(6) Expert evidence may be received on the question.

(7) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties.

(8) For the purposes of this section a person is able to give intelligible testimony if he is able to—

(a) understand questions put to him as a witness, and

(b) give answers to them which can be understood.'

S.55 *Youth Justice and Criminal Evidence Act 1999*.

<sup>570</sup> Archbold, *Criminal Pleading Evidence and Practice* (ed. P.J. Richardson) Sweet & Maxell 2012) Para. 8.56 at p. 1244.

<sup>571</sup> See *Woolaston v Hakeill* (1841) 3 Scott N.R. 593; *Bartless v Smith* (1843) 12 L.J. Ex.287; *R v Hampshire* [1995] 2 Cr. App.R 319, CA.

<sup>572</sup> *R v Yacoob*, [1981] 72 Cr. App. R. 313 CA.

<sup>573</sup> *DPP v PP* [2015] IECA 152.



4.4.21 Several assessments of a child witness by the trial judge have been observed by the author and these appear to follow a similar pattern. In the presence of the jury, prior to the child testifying either through recorded statement or live in court via video link, the judge will ask the witness general questions as to his or her age, what class he or she is in school, about a recent event, whether he or she made his or her first Communion or Confirmation and whether he or she understands what the truth is. Since the commencement of s.16(1)(b)<sup>574</sup> *Criminal Evidence Act 1992* and the admission of recorded testimony under that section, a responsibility to assess and monitor competence is now given to the Specialist Interviewers.<sup>575</sup> These trained interviewers conduct the recorded record examination in chief evidence in anticipation of its admission at trial. The *Good Practice Guidelines*<sup>576</sup> were drafted in 2003 as procedural guidance for use of the s.16(1)(b) *Criminal Evidence Act 1992* and include a section regarding the assessment of competence of the witness with a view to the admission of the recorded testimony at trial.<sup>577</sup> As there may be a considerable interval between the taking of the recording and the commencement of the trial itself,<sup>578</sup> a trial judge may assess the competence of a child witness before he or she is cross-examined. The final determination of competence rests with the trial

<sup>574</sup> '16. Videorecording as evidence at trial.'  
*Criminal Evidence Act 1992.*

<sup>575</sup> A Specialist Interviewer is the term which denotes a member of the Garda or a person competent for the purpose who conducts a recorded interview with the appropriate witness for admission at trial at a later date under s. 16 (1)(b) *Criminal Evidence Act 1992.*

<sup>576</sup> *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences. An Garda Síochána, (July 2003).*

<sup>577</sup> '2.14 Following an assessment of the complainant's development and needs, the interview team should consider whether, in principle, the complainant is likely to be able to give a coherent account of the events under investigation.

2.15 A video recording will be able to speak to the court of any fact stated therein of which direct oral evidence by the complainant would be admissible. The issue of the competence of a complainant may therefore arise in relation to a video recording.

2.16 It is not possible to predict precisely, how the courts will treat the question of competence, if it is raised. It is reasonable for the interview team to assume that the courts will be willing to listen to the evidence of any complainant who can give a clear account of the alleged offence in a manner that the team, as a whole, can understand.'

*Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences. An Garda Síochána, (July 2003), 'Section 2 – Before The Interview', paras 2.14- 2.18, at p. 18.*

<sup>578</sup> For trial waiting times see The Courts Services Annual Report (Courts Services 2014) 'Waiting times as at 31<sup>st</sup> December 2014' at p. 61.

<http://www.courts.ie/Courts.ie/Library3.nsf/0/3B21EBCDBCA7469C802575E6003DBD7F?OpenDocument> (Accessed 25<sup>th</sup> September 2015).

judge<sup>579</sup> and if the trial judge deems the witness to be incompetent then the recorded testimony will also be excluded. It is a requirement of the provision that the witness is available at trial for cross-examination<sup>580</sup> and if this is not possible, then all the evidence of the witness will be excluded. The definition of available for cross-examination for cross-examination is still to be determined definitively. If the child witness is physically present for cross-examination but is limited in his or her response, to what extent is he or she 'available'? Alternatively, the term 'available for cross-examination' may infer a responsibility on the court to determine that the child witness is a competent witness in respect of a particular standard of ability to testify.

4.4.22 As use of the provision is relatively recent in this jurisdiction, there are no reported instances of this happening.<sup>581</sup> It is likely that were the situation to arise, the matter would be considered in light of the appropriate case law in England and Wales.<sup>582</sup> In addition, guidance concerning the issue of competency is included in Ministry of Justice guidance in England and Wales, *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures*<sup>583</sup> and the manner of checking the competence of a witness.<sup>584</sup> It is submitted that similar guidance would be welcome in this jurisdiction. It would also be helpful to have similar legislative provision as in England and Wales<sup>585</sup> which expressly allows the court to hear expert evidence concerning the competence of the witness. In Ireland, expert evidence on the matter of competence may be given through the inherent jurisdiction of the court.

<sup>579</sup> *AG v Kehoe* [1951] 1 IR 70 at 71.

<sup>580</sup> 'Provided that, in the case of a video recording mentioned in paragraph (b), the person whose statement was video recorded is available at the trial for cross-examination.'  
S.16(1)(b) *Criminal Evidence Act 1992*.

<sup>581</sup> See also: *DPP v Michael O'Brien* [2010] IECCA 103 regarding 'available for cross-examination' concerning s.16 *Criminal Justice Act 2006*.

<sup>582</sup> *R v Powell* [2006] 1 CAR 31 ; *R v Malicki* [2009] EWCA Crim 365.

<sup>583</sup> *Achieving Best Evidence in Criminal Proceedings :Guidance on interviewing victims and witnesses, and guidance on using special measures* (Ministry of Justice)(March 2011).

<sup>584</sup> *Achieving Best Evidence in Criminal Proceedings :Guidance on interviewing victims and witnesses, and guidance on using special measures* (Ministry of Justice)(March 2011) para.5.20 at p.136.

<sup>585</sup> 55 (6)— Determining whether witness to be sworn.

'(6) Expert evidence may be received on the question.'  
S. 55 *Youth Justice and Criminal Evidence Act 1999*.

4.4.23 It is to be noted that the competency of a witness will generally be assessed with the benefit of support measures such as video link, recorded testimony and if necessary with an intermediary. Although, there is no statutory or procedural guidance regarding this aspect, it is significant that guidance in England and Wales mentions specifically that the competence of a witness is to be determined with the use of support measures. It states:

All people, whatever their age, are competent to act as witnesses unless they cannot understand questions asked of them in court, or cannot answer them in a way that can be understood with, if necessary, the assistance of Special Measures (Section 53 of the 1999 Act).<sup>586</sup>

4.4.24 Archbold notes<sup>587</sup> that the incompetency of a witness may become apparent, however, only after he has commenced to give evidence<sup>588</sup> and, at common law, an objection may be made at any time during the trial.<sup>589</sup> The recording of pre-trial testimony now means that there may be a long interval between the taking of recorded examination in chief evidence and cross-examination at trial. In *R v Powell*<sup>590</sup> the defendant was convicted of child sexual abuse. Recorded examination in chief testimony was recorded close to the time of the offence. This had been admitted at trial under s.27 *Youth Justice and Criminal Evidence Act 1999*, played to the court and the child witness then cross-examined. On appeal, the court said that the test of competency should have been revisited by the trial judge at the time of cross-examination. The court was unsure of the competency of the complainant who was three and a half, particularly as the child was interviewed nine weeks after the date of the incident and there was a nine month delay from the time of offence to date of trial. The implication of the case is that the test of competency remains live throughout the trial.

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<sup>586</sup> *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (Ministry of Justice)(March 2011) 'Competence and capacity to be sworn' para.5.20 at p. 136.

<sup>587</sup> Archbold, *Criminal Pleading Evidence and Practice* (ed. P.J. Richardson) Sweet & Maxell 2012) Para. 8.56 at p. 1244.

<sup>588</sup> *Jacobs v Layborn* (1843) 11 M. & W. 685

<sup>589</sup> *Stone v Blackburn* (1793) 1 ES.37.

<sup>590</sup> *R v Powell* [2006] 1 CAR 31.

4.4.25 In *R v Malicki*<sup>591</sup> the defendant was accused of child sexual abuse and the complainant was four years and 8 months. Again, recorded examination in chief evidence taken close to the time of the incident was admitted at trial and the child witness cross-examined some time after the alleged incident. The Court of Appeal said that it could not be sure whether the complainant was remembering the details of the video of her recorded testimony or the details of the event itself. There was a delay of 14 months from the date of offence to the time of trial. Again the implication of the judgment is that competency is an issue that remains live throughout the trial and in both *Powell*<sup>592</sup> and *Malicki*<sup>593</sup> the court quashed the convictions and did not order a retrial.

4.4.26 This issue is now particularly relevant in the Irish jurisdiction with the commencement of s.16(1)(b) of the *Criminal Evidence Act 1992* and the admission of recorded examination in chief testimony where there may be a considerable delay between the taking of the recording and the cross-examination of the child witness at trial. There has been no reported case law as yet regarding this issue in this jurisdiction.

#### 4.5.0 Age of the Witness

4.5.1 Section 27 *Criminal Evidence Act 1992* does not specify a minimum age under which a child may not give evidence. The prior age eligibility for the admission of unsworn testimony under s.30 *The Children Act 1908* was a child of 'tender years'. However, case law indicated a minimum age under which it was unlikely that a child would be called on to testify.<sup>594</sup> The credibility of a child under a certain age was in doubt due to his or her capacity to remember and communicate details of the event

<sup>591</sup> *R v Malicki* [2009] EWCA Crim 365.

<sup>592</sup> *R v Powell* [2006] 1 CAR 31

<sup>593</sup> *R v Malicki* [2009] EWCA Crim 365

<sup>594</sup> In *R v Wallwork* [1958] 42 CAR 153 the court deprecated the calling of a child under 5 years of age. Regarding the admission of the sworn testimony of children the court in *AG v O'Sullivan* [1930] IR 552 stated:

*'The section does not, in our opinion, alter the previous law as to the reception of the evidence of children given on oath, that is to say, it was and is a question, not of age, for there is no precise limit of age fixed by any rule within which the evidence of children on oath is to be excluded, but it is a question of the intelligence and actual mental capacity of the child witness "its sense and reason of the danger and impiety of falsehood".'*

*AG v O'Sullivan* [1930] IR 552 at p.556.

to the court. There is also a doubt as to whether it is in the child's interests to give evidence where there may be a risk that he or she may be harmed by the process. Recently, the evidence of very young children has been accepted by courts in neighbouring jurisdictions as competent and credible and given in circumstances where support measures have been used to ensure that the child witness is protected.<sup>595</sup> While there has been no legislative definition of the age at which testimony may be given,<sup>596</sup> the courts have given certain indications of the age for which unsworn testimony is unacceptable.

4.5.2 Section 30 *The Children Act 1908* stated that a child of 'tender years' may give unsworn evidence if the child is sufficiently intelligent to allow the court to justify accepting such evidence as well as if the child is able to understand the duty of telling the truth. The phrase 'tender years' is not explicitly outlined in the section but in *AG v O'Sullivan*,<sup>597</sup> counsel for the appellant stated that the definition of 'child' in s.131 of the *Children Act 1908* indicated that under 14 should be regarded as being of 'tender years.'<sup>598</sup>

4.5.3 In *R v Wallwork*,<sup>599</sup> Lord Goddard CJ "deprecated" the calling of a child of five as a witness in a case of incest, saying that it was "ridiculous" to suppose a jury would attach any value to it.<sup>600</sup> As late as 1990, the Court of Appeal in *R v Wright and Ormerod*<sup>601</sup> said that "quite exceptional circumstances" would be required to justify receiving the evidence of a child of 'extremely tender years', such as six and stated that it would be a "bold tribunal" which disregarded *Wallwork*.<sup>602</sup>

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<sup>595</sup> In *R v Barker* [2010] EWCA Crim 4, [2010] All ER (D) 126 the complainant was four and half years of age when cross-examined at trial. Since that trial, a child of three has given evidence in a case involving serious assault.

'Three-year-old becomes youngest trial witness'

The Independent (UK), 12<sup>th</sup> November 2011.

(<http://www.independent.co.uk/news/uk/crime/threeyearold-becomes-youngest-trial-witness-6261012.html>) (Accessed 25<sup>th</sup> September 2015).

<sup>596</sup> "The law has sensibly resisted generalised assumptions about child development and, in particular has not prescribed a minimum or threshold age at which a child is deemed automatically competent to give evidence."

Liz Heffernan, *Evidence Cases and Materials* (Thomson Round Hall 2005) at p77.

<sup>597</sup> *AG v O'Sullivan* [1930] IR 552.

<sup>598</sup> *AG v O'Sullivan* [1930] IR 552.

<sup>599</sup> *R v Wallwork* [1958] 42 CAR 153.

<sup>600</sup> *R v Wallwork* [1958] 42 CAR 153 at 160.

<sup>601</sup> *R v Wright and Ormerod* [1990] CAR 91.

<sup>602</sup> *R v Wallwork* [1958] 42 CAR 153.

4.5.4 However, as noted by Bala et al,<sup>603</sup> the ability of the child to act as a witness has taken priority over his or her age in certain cases. *R v Wallwork*<sup>604</sup> and *R v Wright and Ormerod*<sup>605</sup> have been overtaken with the assistance of legislative developments.<sup>606</sup> In *D.P.P. v. M*,<sup>607</sup> an appeal case, the respondent was convicted of indecently assaulting a four year-old girl based on the child's unsworn testimony. The respondent argued the due to her age the child was too young to testify yet the court held that the court could not deem the child incompetent based on her age alone:

The words of (the new provision)<sup>608</sup> are mandatory. Care must always be taken where a question is raised as to whether a young child is capable of giving intelligible testimony. But where the child is so capable the court does not enjoy some wider discretion to refuse to permit the child's evidence to be given... A child will be capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible.<sup>609</sup>

4.5.5 In addition, in *D.P.P. v. G*<sup>610</sup> two young children aged six and eight were permitted to give evidence-in-chief. The court refused to hear testimony from a proposed defence expert that the children were incompetent to testify. The Appeal Court held that the trial court was right to refuse to hear the expert evidence, as the competency inquiry "is a simple test well within the capacity of a judge or magistrate." The statutory requirement for "intelligible testimony" from the child

<sup>603</sup> Nicholas Bala, Kang Lee, R.C.L. Lindsay and Victoria Talwar, *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform* International Journal of Children's Rights 18 (2010) 53-77 (McGill University, Canada).

<sup>604</sup> *R v Wallwork* [1958] 42 CAR 153.

<sup>605</sup> *R v Wright and Ormerod* [1990] CAR 91.

<sup>606</sup> 33A(2A) of the *Criminal Justice Act 1988* as amended by S. 52 *Criminal Justice Act 1991* provided for the unsworn testimony of children under 14 years of age.

<sup>607</sup> *D.P.P v. M* [1998] Q.B. 913, [1997] 2 All E.R. 749.

<sup>608</sup> S. 52 *Criminal Justice Act 1991*.

<sup>609</sup> Nicholas Bala, Kang Lee, R.C.L. Lindsay, and Victoria Talwar, *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform* International Journal of Children's Rights 18 (2010) 53-77 (McGill University, Canada).

<sup>610</sup> *DPP v G* [1998] Q.B. 919, [1997] 2 All E.R. 755.

was held by Lord Justice Phillips to be “evidence that is capable of being understood.”<sup>611</sup>

4.5.6 More recently there has been a significant case which wholly reflects the significant cultural change regarding the perception of the testimony of very young witness. In *R v Barker*<sup>612</sup> the complainant, X, gave testimony at the age of 4 and half years of age concerning allegations of anal rape which had occurred when she was two and half years of age. She had disclosed details of the evidence when she was three and a half and her examination in chief testimony had been recorded at that age under s.27 *Youth Justice and Criminal Evidence Act 1999*. Medical evidence showed that the allegation had occurred but was inconclusive as to the identity of the perpetrator. The trial had been delayed due to the fact that the defendant had also been charged with the unlawful death of X’s brother, Peter Connolly also known as Baby P and that trial took priority. Therefore, X was cross-examined at trial when she was four and a half years of age. The defendant was convicted predominantly on her testimony and subsequently challenged the decision on the basis of the competence of the complainant. The appeal court deemed the child witness competent in accordance with the parameters set down in s.53 of the *Youth Justice and Criminal Evidence Act 1999* and quashed the appeal. The judgment noted that the courts had seen an increasing willingness to accommodate the witness:

The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give

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<sup>611</sup> *DPP v G* [1998] Q.B. 919, [1997] 2 All E.R. 755 at 759.

<sup>612</sup> *R v Barker* [2010] EWCA Crim 4, [2010] All ER (D) 126.

the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished.<sup>613</sup>

#### 4.6.0 Comparative analysis in other adversarial jurisdictions

##### 4.6.1 England and Wales

4.6.2 The test which governs competence in England and Wales is contained in s.53 of the *Youth Justice and Criminal Evidence Act 1999*.<sup>614</sup> It applies to all witnesses of all ages and all intellectual capacities. The test has been simplified to a straightforward examination of whether the witness can understand the questions being put to him or her and whether the answers given can be understood. If this is not possible, then the witness is not competent to give testimony in criminal proceedings.

4.6.3 The extension of competency for children in England and Wales evolved over many years. A child could give unsworn testimony under the s. 30 *Children Act 1908* and the offence of perjury was still very much a live issue through s.38 *Children and Young Persons Act 1933*<sup>615</sup> which reiterated the parameters for unsworn evidence of children of tender years but also allowed for the summary conviction of a child who had given false evidence. As Spencer notes,<sup>616</sup> the *Pigot*

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<sup>613</sup> *R v Barker* [2010] EWCA Crim 4, [2010] All ER (D) 126 at para 42.

<sup>614</sup> 'S.53 Competence of witnesses to give evidence.

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

(2) Subsection (1) has effect subject to subsections (3) and (4).

(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—

(a) understand questions put to him as a witness, and

(b) give answers to them which can be understood.

(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).

(5) In subsection (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).'

*Youth Justice and Criminal Evidence Act 1999*.

<sup>615</sup> 'S.38 Evidence of child of tender years.'

*Children and Young Persons Act 1933*.

<sup>616</sup> JR Spencer, *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) Introduction at pg. 8.



*Report*<sup>617</sup> prompted a change in legislation on competency which resulted in s.52 *Criminal Justice Act 1991*.<sup>618</sup> Further evolution and clarification in relation to the test for competency and the unsworn testimony of children is now contained in *Youth Justice and Criminal Evidence Act 1999*. The issue of unsworn evidence for young children is now covered by s.55 *Youth Justice and Criminal Evidence Act 1999* providing for the unsworn testimony of persons under 14, with the test as set out in s.53 and with the explicit provision in s.56 of the Act that such evidence shall not deem a consequent conviction, verdict or finding in the proceedings to be unsafe. S.54 provides that the court determines the competence of the witness. It is for the party that tenders the witness to satisfy the court on the balance of probabilities that the witness is competent to give evidence in the proceedings.<sup>619</sup>

4.6.4 The provision for perjury for children under 14 is contained in s.57 of the Act and the offence is still to be tried summarily with the fine not to exceed £250. However, as with the jurisdiction in Ireland, the rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence was abolished in the *Crime and Disorder Act 1988*. This results in the situation that a child over 10 is now responsible for their actions and may be prosecuted for an offence.

#### 4.6.5 Australia

4.6.6 The federal test in Australia is quite similar in the broadness of its scope. Similarly to s.53 of the *Youth Justice and Criminal Evidence Act 1999* in England and Wales, the issue is one of the witness not having the capacity of understanding the question or not being able to give an answer that is capable of being understood.

4.6.7 As with the test in England and Wales, the question of competence is dependent on both questions, a capacity to be able to understand the question and a

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<sup>617</sup> Home Office, *Pigot Committee: Report of the Advisory Group on Video Evidence* (1989, London: Home Office).

<sup>618</sup> 'Competence of children as witnesses.'  
s. 52 *Criminal Justice Act 1991*.

<sup>619</sup> '54.—Determining competence of witnesses.'  
*Youth Justice and Criminal Evidence Act 1999*.

capacity to be able to give an answer that is capable of being understood. If either one fails, the witness is deemed to be an incompetent witness.<sup>620</sup>

#### 4.6.8 Canada

4.6.9 The competence test for the admission of unsworn testimony under s.16<sup>621</sup> of the *Evidence Act* in Canada is heavily dependent on the ability of the witness to understand the nature of the oath or solemn affirmation and whether he or she is able to communicate the evidence. Under s.16.1 of the Act, a child under 14 may give unsworn testimony and in s.16.1(3)<sup>622</sup> of the Act, the competence issue for child witnesses is further clarified as it states that the evidence of a proposed witness shall be received if “ they are able to understand and respond to questions.” The competence test differs in that while the first section of the test dictates that the child witness must understand the question, the stipulation that the child witness must be able to respond is dissimilar to the idea that they must be able to be understood as in the English, Welsh and Australian test.

4.6.10 The issue of perjury in Canada is relevant under s.131<sup>623</sup> of the *Criminal Code of Canada* which outlines the offence of perjury and under s.132<sup>624</sup> of the *Criminal Code* the potential penalty for the indictable offence under the *Code*, is a term of imprisonment of up to 14 years. However, s.13<sup>625</sup> of the *Criminal Code* also states that no person shall be convicted of an offence in respect of an act or omission while that person was under the age of twelve years.

4.6.11 It is submitted that while s.27 *Criminal Evidence Act 1992* was groundbreaking at the time of its enactment, it requires revision with regard to

<sup>620</sup> See *Bench Book for Children giving evidence in Australian Courts*. The Australasian Institute of Judicial Administration Incorporated. (Dec 2012)

<sup>621</sup> ‘S. 16 Witness whose capacity is in question’  
*Evidence Act, Canada* (current to 10<sup>th</sup> September 2015).

<sup>622</sup> *Provision for unsworn testimony - Canada Evidence Act* (current to 10<sup>th</sup> September 2015).

<sup>623</sup> S.131 *Criminal Code of Canada*

<sup>624</sup> ‘Everyone who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years’

S.32 *Punishment, Criminal Code of Canada*.

<sup>625</sup> ‘13. No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.’

*Criminal Code of Canada*

extension of the test of competence and the admission of unsworn testimony for children under 14 years of age. The models contained in legislation England and Wales and Australia would be appropriate examples to draw from. A simpler test which would mean that competence depends on whether the witness understands the question put to him or her and whether the court understands the responses would greatly clarify the test both for witnesses and practitioners.

#### 4.7.0 Compellability

4.7.1 It is rare that the compellability of child witnesses is raised. Logic would suggest that it would be counterproductive for a witness, if deemed competent, to be compelled to give evidence. A distressed or wholly silent witness is not one who can generally give any useful evidence and any party tendering such a witness would be open to allegations of cruelty and bullying. Recourse for child witnesses who are unable or unwilling to give evidence has been found in s. 16 *Criminal Justice Act 2006*.<sup>626</sup> S.16 allowed for the admission of statements at trial where the witness had resiled from making the statement but where he or she was available for cross-examination and the provenance of the statements could be verified. In the case of *DPP v Michael O'Brien*,<sup>627</sup> a child witness who had given details of the incident in a recorded interview, recanted when the matter came to trial. Under the provision, the recording of her testimony was deemed admissible at trial as the various tests within the section were satisfied regarding the availability at trial for cross-examination as well as the identity of the author of the document.

4.7.2 However, concerning a witness who is competent and compellable and who will not give testimony in court, the offence of contempt may move them to give testimony. With respect to child witnesses, there is again the consideration of the age of criminal responsibility which may make it difficult to prosecute successfully for non-compliance with a witness summons. But perhaps the more significant disincentive would be the reluctance of the court to put a child through the stress of such a process. It is more likely that where a child witness or a witness with an intellectual disability refuses to give evidence the prosecution will fail.

4.7.3 Canon and Nelligan<sup>628</sup> state that all persons are competent witnesses and a competent witness may be compelled to give evidence in all proceedings. The effect of a person being regarded as compellable is that he can be imprisoned for contempt

<sup>626</sup> '16. Admissibility of certain witness statements'  
*Criminal Justice Act 2006*.

<sup>627</sup> *DPP v Michael O'Brien* [2010] IECCA 103.

<sup>628</sup> Ruth Cannon and Niall Neligan, *Evidence* Thomson Round Hall (2002) Chapter 6 at p. 65.

of court if he refused to attend or, if attending, refuses to answer any questions put to him unless he or she has the defence of privilege.

4.7.4 Archbold states that:

A witness is competent if he may lawfully give evidence and compellable if he may lawfully be required to give evidence. Competent witnesses are usually but not necessarily compellable.<sup>629</sup>

A case reported in *The Guardian*<sup>630</sup> highlights the difficulties of compelling a vulnerable witness to testify. A young girl, who had been groomed by the defendant who faced child sexual abuse charges, refused to give evidence against him. The judge ordered her to be held in custody and ultimately she gave evidence and the defendant was convicted. Technically the rights of the complainant as a child were not violated in this case. As a competent witness, a child is also a compellable witness but compelling a child witness to attend court and give evidence may be, in the long run, a counterproductive action. In this case, the defendant was convicted because the judge took action to ensure the complainant was present to give evidence. The right of this complainant concerning his or her right to have her voice heard, was to a certain extent, eroded in that there must surely be a concomitant right, an adjunct to the right to be heard, of the right not to speak.

4.7.5 However, in this case the rights of children in general to be protected were strengthened as there was surely a risk that had the evidence against this defendant not been heard, he was at risk of committing future offences. One of the solutions to this difficulty would be ensure that the evidence is recorded in its entirety prior to the trial so that there is less brinkmanship and weight of pressure on the complainant's evidence at the trial itself. However, this is not to assume that full recorded testimony would resolve all issues for very vulnerable witnesses who have

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<sup>629</sup> Archbold, *Criminal Pleading Evidence and Practice* (ed. P.J. Richardson) (Sweet & Maxell 2012) Para. 8.52 at p.1242.

<sup>630</sup> Caroline Davies, *Judge under fire after ordering detention of child sex abuse victim*, *The Guardian*, Thursday 5<sup>th</sup> March 2014. <http://www.theguardian.com/uk-news/2014/mar/05/judge-bradford-bartfield-order-child-sex-abuse-victim> (Accessed 25th September 2015).

complicated needs particularly in circumstances where there are dysfunctional relationships with the defendants in question.

4.7.6 The above case, as distressing as it is, had a successful conclusion yet the cost of the personal trauma involved in a child of 15 being kept in custody in order to give evidence against a person she has been groomed by, who she has been made pregnant by and with whom she has had a significant relationship cannot be estimated. What the case cannot indicate is how many cases do not go to trial because there is insufficient support for the complainants involved who, ultimately, are not or cannot be forced to give testimony against the defendant.<sup>631</sup>

#### 4.8.0 Corroboration

4.8.1 Section 28 *Criminal Evidence Act 1992* dispensed with the mandatory requirement for corroboration in the case of the unsworn evidence of a child. It follows that a jury may now convict solely on the basis of the unsworn testimony of a child under the age of 14.<sup>632</sup> Prior to the 1992 Act a child under 14 years of age could give unsworn evidence at trial but a conviction could not be secured on that evidence alone and required independent corroborative evidence. In addition, if the child was able to give unsworn testimony, the judge was obliged to give a mandatory corroboration warning to the jury regarding the evidence of a child in a sexual offences case.<sup>633</sup>

4.8.2 Section 28 *Criminal Evidence Act 1992* mirrored the amended corroboration requirements in s.34 of the *Criminal Justice Act 1988* in England and Wales. S. 34 abolished the requirement for corroboration if the testimony admitted was that of a child.<sup>634</sup> S.34 had three functions. There was no longer a requirement for

<sup>631</sup> A similar action could be taken in this jurisdiction. The District Court Rules do allow for an application for a warrant for a committal of a witness who refused to give evidence or produce documents. Order 21 Rule 2 (*Schedule: B - Forms in criminal proceedings Form: 21,7 Warrant Of Committal Of Witness (Refusal To Give Evidence Or Produce Documents)*).

<sup>632</sup> Prof. Dermot Walsh, *Criminal Procedure* (Thomson Roundhall, 2002) para. 18.14 at p. 867.

<sup>633</sup> See: s.30 *The Children Act 1908*. See also: *AG v O'Sullivan* [1930] IR 552.

<sup>634</sup> 'Abolition of requirement of corroboration for unsworn evidence of children  
*The proviso to subsection (1) of section 38 of the Children and Young Persons Act 1933 (under which, where the unsworn evidence of a child of tender years admitted by virtue of that section is given on behalf of the prosecution, the accused is not liable to be convicted unless that evidence is corroborated by some other material evidence in support thereof implicating him) shall cease to have effect.*

corroboration for the unsworn testimony of a child and the warning regarding uncorroborated testimony was made discretionary rather mandatory. In addition, it allowed the unsworn testimony of a child to corroborate other evidence including unsworn testimony of other children thus allowing children who were not able to offer sworn testimony to corroborate each other.<sup>635</sup> In child sexual abuse cases involving multiple complainants, this is obviously an extremely significant change.

4.8.3 Due to the commencement of ss.27 and 28 *Criminal Evidence Act 1992*, a child under 14 years of age can give unsworn evidence and that evidence can be the sole basis for a conviction. In a case involving sexual offences, the question of whether to give a corroboration warning is to be given to the jury by the trial judge is now discretionary. These changes are extremely significant not only for the practical ramifications concerning the prosecution of criminal offences which pertain to children but also regarding the perception of a child's evidence. Under s.27, a child under 14 is able to give evidence without having to show that he or she understands the meaning of taking an oath. The requirement for that admission is that he or she can give an intelligible account of events which are relevant to the proceedings. The dispensation of the corroboration requirement under s.28 *Criminal Evidence Act 1992* means that where there is no physical evidence, independent witnesses or any other corroborative evidence, a child's evidence, alone, can be the basis of a conviction where that child is under 14 and gives unsworn testimony. Under s.28(2), this warning was made discretionary and if a warning was given to the jury, the judge may give it in words of his or her own choosing. Under s.28(3) of the Act the unsworn evidence of a child can now corroborate the testimony of another person's testimony whether that evidence be sworn or unsworn.

4.8.4 These steps greatly altered the previous belief within the criminal justice system that a child's evidence was fundamentally untrustworthy and gives even the

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(2)Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child.

(3)Unsworn evidence admitted by virtue of section 38 of the [1933 c. 12.] *Children and Young Persons Act 1933* may corroborate evidence (sworn or unsworn) given by any other person.'

S. 34 of the *Criminal Justice Act 1988*.

<sup>635</sup>

However, as Walsh notes, the corroboration warning is still required if the child is an accomplice. See Prof. Dermot Walsh, *Criminal Procedure* (Thomson Roundhall, 2002) para. 18.14 at p. 867.

young child's evidence a credence which would have been fundamentally undermined by *Wallwork*<sup>636</sup> in which the court stated that:

The child was called as a witness, but said nothing. The court deprecates the calling of a child of this age as a witness. Although the learned judge had the court cleared as far as it can be cleared, it seems to us to be unfortunate that she was called and, with all respect to the learned judge, I am surprised that he allowed her to be called. The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could.<sup>637</sup>

4.8.5 There have been significant changes in the perception of the competence of child witnesses in this jurisdiction, particularly over the last thirty years.<sup>638</sup> This indicates an evolution in the social and cultural understandings of the abilities of the child witness as perceived and acted upon by the Irish criminal justice system. The child witness' testimony has traditionally been regarded as unreliable.<sup>639</sup> The child witness has, and is, also perceived to be suggestible and malleable in the face of cross-examination.<sup>640</sup> However, legislative provisions and safeguards have placed the role of the child witness on a statutory footing within the criminal justice system and this has bolstered the belief that a child can be a credible witness capable of giving valuable and reliable evidence.

<sup>636</sup> *R v Wallwork* [1958] 42 CAR 153.

<sup>637</sup> *R v Wallwork* [1958] 42 CAR 153 at 160 as per Lord Goddard CJ.

<sup>638</sup> Analysis of the evidence of children has become more important in the face increasing reports of child abuse. *The Report of the Advisory Group on Video Evidence* (1989, London: Home Office). Chaired by HH Thomas Pigot QC, "The Pigot Report" has influenced significant legislative change since its publication.

<sup>639</sup> "The common law perception that children were, in general, not sufficiently trustworthy to serve as witnesses, was a reflection of widespread contemporary beliefs. The psychiatric, medical and psychological opinions of the late nineteenth and early twentieth centuries reinforced some of these beliefs. Based, on biased case observations (made by exclusively male professionals), rather than on methodologically sound research, it was believed that children, especially girls, were inherently unreliable witnesses and prone to fantasy or fabrication, and that crimes such as the sexual abuse of children were a rare occurrence."

Nicholas Bala, Kang Lee, R.C.L.Lindsay and Victoria Talwar, *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform* International Journal of Children's Rights 18 (2010) 53-77 (McGill University, Canada) at p. 55 referencing Smart, C., "A History of Ambivalence and Conflict in the Discursive Construction of the 'Child Victim' of Sexual Abuse", *Social & Legal Studies* 1999 (8 (3)), 391 - 409.

<sup>640</sup> For an analysis of the frailties of child witness in the course of cross-examination in the Australian context, which references other common law jurisdictions, see Caruso, David and Cross, Timothy, *The case in Australia for further reform to the cross-examination and court management of child witnesses*, International Journal of Evidence and Proof, E. & P. 2012, 16(4), 364-397.



#### 4.9.0 Conclusion

4.9.1 The test of competence and how it is regulated is vital regarding the admission of children's testimony. Certain criticisms may be made where the test for competency is extremely rigid and does not allow for the evidence of children. Spencer notes four specific issues in this regard.<sup>641</sup> The practical effect of a restrictive competency test together with the hearsay test infers impunity on many child abusers, particularly those who choose victims who are very young. Secondly, a small child could possibly relate reliable information about events that had occurred before he or she has the mental and verbal capability necessary to articulate the difference between truth and falsehood and to explain why it is important to tell the truth, as the rules of competency, have in the past, required. Thirdly, even having satisfied the competency test there is no guarantee that the child will tell the truth. Fourthly, the immaturity of a witness and his or her ability to tell the difference between truth and falsehood is something which in principle ought to go to the weight the court is prepared to put on the evidence, not whether it will listen to it or not.

4.9.2 The psychological damage caused to a witness deemed incompetent either at the beginning or midway through giving evidence at a trial can only be surmised. However, the right of the accused to a fair trial, of necessity, is an overarching right.<sup>642</sup> Therefore, in order to protect the accused's constitutional right to a fair trial and to prevent distress and harm to the witness, one solution would be to evaluate the competency of the witness in a benign manner and then if he or she is deemed competent, to take all of his or her evidence pre-trial. Only in exceptional circumstances or if it is the choice of the child, should he or she be brought 'live' into the trial.

4.9.3 If the test for competence is misaligned with the emotional and cognitive abilities of the child witness, significant issues may flow from this. The right of the child to have his or her voice heard in proceeding is diminished. Prosecutions

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<sup>641</sup> JR Spencer, *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) Introduction at pg. 8.

<sup>642</sup> See: *Donnelly v Ireland* [1998] 1 I.R. 321 at 348 (SC).

become difficult if not impossible without the evidence of the child and offences affecting children may be committed with impunity because perpetrators can more easily rely on the fact that children have a higher hurdle to jump to be deemed competent witnesses. If many children may not be able to achieve the competence requirements necessary to give testimony in court, the prosecution of offences against them becomes more difficult.

4.9.4 The threshold of competency for children is far higher than witnesses in general before the evidence is put before the jury as there is a continual informal screening process. This screening process begins with the Garda interview and if relevant, the child care unit in a hospital in respect of whether the witness can give a credible account of the relevant incident. A decision being taken to send the file to prosecute, the screening process continues with the DPP and then with the counsel who evaluate how the witness will perform at trial. The determination of competence ultimately rests with the trial judge but it is submitted that there are many screening layers before the witness is ever examined by the judge.

4.9.5 At any stage of the screening process, there is a continual balancing of rights. There exists the right of the DPP not to prosecute all offences brought to her attention if there is a strong possibility that the witness may be deemed incompetent. There is also the right of the judge to consider that the witness is an incompetent witness. However, the child witness must be protected from any fear resulting from the trial process itself which may deem him or her an incompetent witness. The accused has a right to a fair trial and this is balanced against the right of the child to have his or her voice heard in criminal proceedings. There is also the general potential for harm caused to vulnerable witnesses who may be unable to reach the standards set by the criminal justice system regarding their competency. If the standard is set too high or the examination is carried out erroneously then there is a grave risk that certain perpetrator of offences against the vulnerable will act with impunity knowing that their victims are likely to be deemed incompetent at trial and will be unable to give to testimony.

4.9.6 The issue of credibility is a matter for the jury yet the testimony of children is examined and screened before any testimony can be put before the jury. Yet, if their

testimony is rejected by the court, the stakes are higher for a child witness or person with an intellectual disability. The personal stress is traumatising for the witness deemed incompetent and the practical effect is that offences cannot be prosecuted. A revision of the competency test in this jurisdiction is necessary. A more generalised test would minimise the associations which still exist regarding the inherent unreliability of child witnesses. Once a general, non-age eligible test for all witnesses is passed then the issue of credibility is with the jury.

4.9.7 Procedural guidance is also required concerning how the test is administered and what expert evidence may assist in determining whether a child witness is competent to give evidence. This would mean that there is a consistency across judges as to how competence is determined. What may assist in the stature of testimony given by child witnesses is a requirement for to promise to tell the truth which seems to have shown to be effective.<sup>643</sup>

4.9.8 In addition to this requirement, removing the offence of perjury for children under 14 may also be a more realistic suggestion in achieving higher standards for the quality of children's testimony. The offence of perjury as it stands currently has little or no input into the trial process. A legislative requirement to ask the child witness to promise to tell the truth may yield better results in this jurisdiction.

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*'However, it would be preferable to ask the child witness to promise to tell the truth than to inquire into the child's apparent understanding of the truth and lies. Research has demonstrated that eliciting an age appropriate oath from children (such as 'Do you promise that you will tell the truth?') increases children's honesty. (Lyon and Dorado,2008;)(Talwar, Lee and, Bala and Lyndsay, 2002,2004) even among children who fail truth –lie competency tasks (Lyon et al.,2008). The fact that the court no longer elicits an oath does not prevent the attorney presenting the child witness from eliciting a promise.'*

Thomas D. Lyons *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law*, Children's Testimony, A Handbook of Psychological Research and Forensic Practice Edited by Michael E. Lamb, David J.La Rooy,Lindsay C. Malloy,and Carmit Katz. (2<sup>nd</sup> edn) (Wiley-Blackwell, 2011) at p. 80.

## 5.0.0 Chapter V – The Support Measure of Video Link

### 5.1.0 Introduction

5.1.1 This chapter will examine the giving of evidence of child witnesses via live television link otherwise known as video link. The most significant support measure in practical terms, video link was established in the context of the need for procedural modifications which better facilitated the evidential requirements of the child witness.<sup>644</sup> The chapter will analyse the parameters of the legislative provisions for child witnesses in criminal proceedings. The constitutional challenges to the use of the support measure will be considered and their implications regarding the development of support measures in general for child witnesses will be assessed. The chapter will also look at how the success of the support measure may be quantified and consider how the efficacy of the measure has evolved since its commencement.

### 5.2.0 Section 13 Criminal Evidence Act 1992

5.2.1 In order to minimise the trauma of the child witness giving evidence in court, one solution is to physically remove him or her from the body of the court itself. With the development of live television link technology, the transmission of evidence to the courtroom from another location became possible. In its *Report on Child Sexual Abuse*,<sup>645</sup> the Law Reform Commission advocated the use of live link whereby the court, including the defendant and jury, can still see the complainant, but the complainant does not have to see the defendant.<sup>646</sup>

5.2.2 Subsequent to the recommendation, the support measure was enacted, in this jurisdiction, under Section 13 of the *Criminal Evidence Act 1992*.<sup>647</sup> S. 13 allows for

<sup>644</sup> Law Reform Commission Report on Child Sexual Abuse (LRC 32-1990).

<sup>645</sup> Law Reform Commission Report on Child Sexual Abuse (LRC 32-1990) at pps.70-72 and 94.

<sup>646</sup> 'The use of a live TV link enables one to locate the child outside the courtroom in a comfortable and congenial environment while everyone in the courtroom will be able to observe the child giving her evidence.'

<sup>647</sup> Law Reform Commission Report on Child Sexual Abuse (LRC 32-1990) (1990) para.7.08 at p. 70.

S. 13 of the *Criminal Evidence Act 1992* was commenced on the 15<sup>th</sup> February 1993 through the *Criminal Evidence Act 1992 (Commencement) Order, 1993* (S.I. No. 38).

the use of 'a live television link' where the person is under 18 years of age, unless the court sees good reason to the contrary and, in any other case, with the leave of the court. The section applies to an offence under section 12 of the Act, predominantly violent, sexual offences as well as trafficking and pornography offences. It is not limited to indictable offences and therefore may be used in the District Court. The evidence is recorded while being given and counsel and the judge remove their wigs and gowns when the witness is testifying. While either a defence or prosecution witness may apply for use of the support measure, the child defendant is explicitly excluded from availing of it. It may be used in proceedings under section 4E of the Criminal Procedure Act 1967 where the accused is applying to have the charges dismissed. It may also be used under 4F of the *Criminal Procedure Act 1967* where evidence is taken prior to trial on deposition.

5.2.3 In *Phonographic Performance Ltd v Cody*,<sup>648</sup> Murphy J noted that the trial judge had stated that "the examination of witnesses *viva voce* and in open court is of central importance in our system of justice and that it is a rule not to be departed from lightly."<sup>649</sup> It is therefore understandable that Fennell observed that provisions under Part III of the *Criminal Evidence Act 1992*, including s.13, are "quite radical in departing from oral testimony being given by witnesses in the presence of the accused, subject to the sanction of the oath and cross-examination."<sup>650</sup>

5.2.4 The catalyst for this procedural change was the high rate of offences against children<sup>651</sup> and the difficulties in the prosecution of these offences if stress and trauma overwhelmed the witness when he or she gave evidence at trial.<sup>652</sup> While recommending the support measure, the Law Reform Commission noted in its

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<sup>648</sup> *Phonographic Performance Ltd v Cody* [1998] 4 IR 504.

<sup>649</sup> *Phonographic Performance Ltd v Cody* [1998] 4 IR 504 at 521.

<sup>650</sup> Caroline Fennell, *The Law of Evidence In Ireland* (Bloomsbury Professional 3<sup>rd</sup> Ed.) (2009) para 5.18 at p. 197.

<sup>651</sup> The *Law Reform Commission Consultation Paper on Child Sexual Abuse* noted the disparity of reporting in figures of rates of abuse but stated that 'rates commonly cited by the media and at special conferences are that one in five girls and one in ten boys are sexually assaulted before they become adults'. *The Law Reform Commission Consultation Paper on Child Sexual Abuse* (1989), Appendix 1, 'The Finding of Research into Child Sexual Abuse' at p. 208.

<sup>652</sup> In *R v Wallwork* [1958] 42 CAR 153, the five year old witness was so overwhelmed during the trial that she was unable to speak and the case served as a benchmark for some time, in terms of the age under which the courts felt that it was counterproductive to call a child witness. See also *R v Wright and Ormerod* [1990] CAR 91.

*Report on Child Sexual Abuse*<sup>653</sup> that ‘it is always preferable to conduct trials in the usual way’ but also stated that ‘if its use enabled more cases to be presented without distress for the complainant while securing fair procedures for the accused, some lack of physical immediacy can be tolerated.’<sup>654</sup>

5.2.5 Over a relatively short space of time, the use of live television link by child witnesses has become common place<sup>655</sup> in this and in other common law jurisdictions.<sup>656</sup> In this jurisdiction, the original observation of the Law Reform Commission that it was preferable to conduct trials in the traditional manner appears to have been disregarded.<sup>657</sup> Anecdotally, the support measure is almost automatically granted when applied for in relation to child witnesses under s.13(1)(a) *Criminal Evidence Act 1992*. Applications for the support measure under s.13(1)(b) *Criminal Evidence Act 1992* i.e. in any other case with the leave of the court, must be supported by reasons.<sup>658</sup>

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<sup>653</sup> *Law Reform Commission Report on Child Sexual Abuse* (LRC 32-1990).

<sup>654</sup> *Law Reform Commission Report on Child Sexual Abuse* (LRC 32-1990) para.7.09 at p. 71.

<sup>655</sup> Fennell notes that “[T]his particular “exceptional” provision once introduced (the 1992 Act) and sanctioned (Donnelly) became normalised as the facility to give evidence through a live television link granted to children and other vulnerable witnesses was extended by the Criminal Justice Act, s.39, to a person other than the accused with leave of the court.”

Caroline Fennell, *The Law of Evidence In Ireland* (Bloomsbury Professional, 3<sup>rd</sup> edn.) (2009) para.5.28 at p. 201.

“Part III of the Criminal Evidence Act 1992 laid the foundations for the television link facility in the State and from which subsequent Acts drew selectively.”

John Healy, *Laws of Evidence* (Thomson RoundHall) (2004) para.1-57 at p. 32.

<sup>656</sup> England and Wales: s.24 of the *Youth Justice and Criminal Evidence Act 1999* as amended by the *Coroners and Justice Act 2009*. Previously, the giving of evidence via live television link was provided for by s.32 *Criminal Justice Act 1988* as amended by ss.54 and 55 of the *Criminal Justice Act 1991*, now repealed and replaced by s.24 of the *Youth Justice and Criminal Evidence Act* as amended by the *Coroners and Justice Act 2009*. Scotland: s.271J of the *Criminal Procedure (Scotland) Act 1995* (c.46), as inserted by s.1 of the *Vulnerable Witnesses (Scotland) Act 2004* (c.3). Previously, ss.56-59, *Law Reform (Miscellaneous Provisions) (Scotland) Act, 1990*; ss.33-35, *Prisoners and Criminal Proceedings (Scotland) Act, 1993* (c.9); and s.271, *Criminal Procedure (Scotland) Act 1995* (c.46) as substituted by s.29 *Crime and Punishment (Scotland) Act 1997* (c.48); Canada: s.486.2 (1) of the *Criminal Code*, as inserted by *An Act to Amend the Criminal Code, 2005*, c.32, s.15; Australia: *Evidence Act 1995*; New Zealand ss.105 and 107 *Evidence Act 2006*; Previously, s.23E of the *Evidence Act 1908*, as inserted by s.3 of the *Evidence Amendment Act 1989*.

<sup>657</sup> *Law Reform Commission Report on Child Sexual Abuse* (LRC 32-1990) (1990) para.7.09 at p. 71.

<sup>658</sup> See *DO'D v DPP* [2010] 2 IR 605. In *DO'D* the High Court stated quashed the order allowing the use of video link in the case of two complainants who had an intellectual disability remitting the matter back to the trial judge to assess the necessity for the support measure. This was in an instance where the use of the support measure might have communicated to the jury that the complainants were incapable of giving consent which was in issue in this case. See also *DPP v Ronald McManus* (A.K.A. Ronald Dunbar) [2011] IECCA 32 which involved the use of a witness who was over 18 years of age.

### 5.3.0 *The Legislative Objective*

5.3.1 Although there is no outright goal included in the legislation itself, it is contended that minimising the trauma of the child witness is a significant and important aim of the legislation. This can be surmised by the Law Reform Commission *Report on Child Sexual Abuse*<sup>659</sup> by which the legislation was strongly influenced. Another purpose of it is to allow the child to give his or her testimony at trial. Echoing the Law Reform Commission's *Report*, Walsh remarks that prosecutions have been lost purely as a result of child witnesses not being able to cope with the demands of the criminal trial and that many more have not been pursued by the DPP on the basis that key child witnesses would not be able to cope with the challenge of confronting his or her abuser and giving evidence against him or her in the unfamiliar and intimidating environment of the criminal court.<sup>660</sup>

### 5.4.0 *Practical implementation*

5.4.1 A significant challenge in implementing s.13 has been the installation of video link facilities in the relevant circuits within the State. When the provision was first implemented the support measure was only available in the Dublin area. Video link facilities were installed in a room physically located away from the relevant court in Áras Uí Dhálaigh, a separate building still within the Four Courts complex.<sup>661</sup> Dedicated witness and video link suites with separate waiting areas were created in the Criminal Courts of Justice which commenced operation in 2010. Similarly to the facilities in Áras Uí Dhálaigh, the witness suite for children is decorated in a child friendly manner with bright colours with books, games and DVDS in the waiting area. The children's charity, Barnardos, was involved in its design and decoration.<sup>662</sup>

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<sup>659</sup> 'There is universal agreement that it is traumatic for children to give evidence of unpleasant experiences and that it is particularly disturbing when they have been victims of parental abuse and are required to confront the abusing parent in Court. This leads, understandably, to a desire to shield them from this experience and to a failure to report and/or prosecute the crime. This in turn encourages further abuse.' Law Reform Commission *Report on Child Sexual Abuse* (LRC 32-1990) para.7.01 at p. 66.

<sup>660</sup> Dermot Walsh, *Criminal Procedure* (Thomson RoundHall) (2002) para. 18-27 at p.883.

<sup>661</sup> For a description of the facilities available when the provision was implemented, see *White v Ireland* [1995] 2 IR 268 at 274.

<sup>662</sup> Personal communication to author from Mary Rose O'Sullivan, Court Officer, The Courts Service, May 2011 during visit to Witness Suite, 3<sup>rd</sup> Floor, Criminal Courts of Justice, Parkgate Street, Dublin 8.

5.4.2 The gradual increase in the installation of video link facilities is reflected in periodic commencement orders allowing for the giving of live video link evidence in the relevant courts.<sup>663</sup> If video link facilities are not available in the appropriate court room, proceedings must be transferred<sup>664</sup> to an appropriate courtroom where such facilities are available. This may involve delay and inconvenience to the defendant, to complainants, witnesses, their families as well as to the judiciary, court personnel and legal practitioners.<sup>665</sup>

5.4.3 A further modification of court procedure is continued in s.13(3) of the *Criminal Evidence Act 1992* which provides that while evidence is being given through a live television link neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.<sup>666</sup> This supposedly prevents the child witness from being upset or distracted by the unfamiliar garb traditionally worn by the judge and barristers in this jurisdiction.<sup>667</sup> The *Criminal Law (Sexual Offences) Bill 2015* proposes to include a new section within the *Criminal Evidence Act 1992* which would widen the removal of wigs and gowns to all circumstances when children are giving evidence.<sup>668</sup> However, it should

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<sup>663</sup> Section 13- Commencement Order for the Circuit Court sitting in Cork Circuit as of May 2, 2005 by the Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2005 (S.I. No. 221 of 2005).

Section 13 - Commencement Order for the District Court sitting in District No. 19 as of July 8, 2005 by the Criminal Evidence Act 1992 (Section 13) (Commencement)(No. 2) Order 2005 (S.I. No. 296 of 2005).

Section 13 commenced for the Circuit Court sitting in the South Eastern Circuit and the District Court sitting in District No.8 by the Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2007 (No. 52 of 2007) with effect from February 12, 2007.

Section 13 commenced for the Circuit Court sitting in the Midland Circuit and, the District Court sitting in District No. 9 by the Criminal Evidence Act 1992 (Section 13) (Commencement) (No. 2) Order (S.I. No. 572 of 2007) with effect from August 20, 2007.

<sup>664</sup> S. 17 Criminal Evidence Act 1992 provides for the transfer of proceedings if facilities are not available in the original district and if it is "desirable" that evidence be given through a live television link or by videorecording.

<sup>665</sup> See *DPP v AC para. 2.32.0.*

<sup>666</sup> *S. 13(3) Criminal Evidence Act 1992.*

<sup>667</sup> This provision appears to have its foundation in the Law Reform Commission Report on Child Sexual Abuse yet there is no reason given in the Report as to the objective to be achieved by the removal of wigs and gowns.

'Where possible, courts should sit in the smallest and brightest courtroom available and dispense with the wearing of wigs and gowns in these cases. If possible, judge, counsel and child witness should sit at the same table while the child gives evidence.'

Law Reform Commission Report on Child Sexual Abuse (LRC 32-1990) (1990) para.62 at p. 95.

McGrath states that this is a further measure to reduce the stress of giving evidence. Declan McGrath, *Evidence* (Thomson RoundHall 2014) at para 3-205 at p. 152.

<sup>668</sup> *S.35 Criminal Law (Sexual Offences) Bill 2015.*



be noted that there is empirical evidence in England and Wales to the effect that not all witnesses want the court to depart from its traditional way of dressing. It suggests that certain witnesses feel more comfortable if the judge and legal representatives are dressed in the way which is most familiar to them.<sup>669</sup> It is submitted that the removal of wigs and gowns is a gesture towards making the court environment more appropriate for vulnerable witnesses. While gowns are still mandatory, the wearing of wigs was made discretionary by s.49 *Court and Court Officer's Act 1995*. Section 49 states that "A barrister or a solicitor when appearing in any court shall not be required to wear a wig of the kind heretofore worn or any other wig of a ceremonial type".<sup>670</sup>

5.4.4 It is still the case that counsel at all levels of jurisdiction frequently wear wigs in court so the legislative provision for their removal in certain circumstances is therefore still relevant. The significance of the proposal to oblige practitioners to remove their wigs and gowns is questionable given that counsel must still wear tabs i.e. stiff white collars, and dark clothes even when they do not wear wigs and gowns.<sup>671</sup> Ordinary court dress is therefore quite austere in itself even without wigs or gowns and it is suggested that the usefulness of this aspect of the provision is negligible.

5.4.5 The provision under s.13 *Criminal Evidence Act 1992* for children is discretionary, in that the section states that evidence 'may' be given through a live television link. While there is no mandatory element in respect of the support measure in this jurisdiction it is submitted that its use has become almost automatic.

<sup>672</sup> There is minimal procedural guidance regarding its use and the guidance that

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'14B.- (1) Where a person under 18 years of age/a child is giving evidence in respect of an offence to which this Part applies, neither the judge nor the barrister or solicitor concerned in the examination of the witness shall wear a wig or gown.'

<sup>669</sup> *Achieving Best Evidence* (March 2011) para B.9.16 at p. 165.

<sup>670</sup> Despite certain members of the judiciary preferring counsel to wear wigs, the Court of Criminal Appeal stated that the Oireachtas had refrained from any attempt to specify the garb to be worn by professionals in court but that it did lay down that an advocate shall not be required to wear a wig.

See *People (Director of Public Prosecutions) v Anthony Barnes* [2007] 1 I.L.R.M. 350.

<sup>671</sup> 'Senior and Junior Counsel shall appear, when in court, habited in a dark colour, and in such robes and bands and with such wigs as have heretofore been worn by Senior and Junior Counsel respectively, and no Counsel shall be heard in any case during the sittings unless so habited.'

Order 119(3) of the Rules of the Superior Courts.

<sup>672</sup> Fennell notes that the "[T]his particular "exceptional" provision once introduced (the 1992 Act) and sanctioned (Donnelly) became normalised as the facility to give evidence through a live television link

does exist for prosecutors does not contain any obligation to canvass the views of the child witness or take them into consideration.<sup>673</sup> This is notwithstanding the increased emphasis in human rights law and practice on the importance of ascertaining the views of children in proceedings that concern them.<sup>674</sup> When examining the possible introduction of support measures the Law Reform Commission in its *Report on Child Sexual Abuse* considered whether video link should be mandatory.<sup>675</sup> The Commission was apparently divided and its ultimate recommendation fell short of a mandatory provision instead asserting ‘that the use of closed circuit television for children should be the rule unless the Court, for special reasons, saw otherwise.’<sup>676</sup>

### 5.5.0 Constitutionality of the giving of evidence via video link

5.5.1 Given that video link comprises a significant departure from court procedure, it was expected that there would be a constitutional challenge to the support measure. In fact, there were two. The first challenge was *White v Ireland*<sup>677</sup> where judicial review proceedings were taken in the High Court. Judicial review proceedings were also taken in the High Court in *Donnelly v Ireland*<sup>678</sup> and that decision was then appealed to the Supreme Court.<sup>679</sup> Both constitutional challenges to the use of the support measure ultimately failed but the judgments provide an opportunity to understand how the courts interpret the legislation and delineate its practical applications. The judgments also give an indication of how further

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granted to children and other vulnerable witnesses was extended by the Criminal Justice Act, s.39, to a person other than the accused with leave of the court.”

Caroline Fennell, *The Law of Evidence In Ireland* (Bloomsbury Professional, 3<sup>rd</sup> edn) (2009) para 5.28 at p. 201.

“Part III of the Criminal Evidence Act 1992 laid the foundations for the television link facility in the State and from which subsequent Acts drew selectively.”

John Healy, *Laws of Evidence* (Thomson RoundHall) (2004) para1-57 at p. 32.

673 “Where child witnesses are involved, are they likely to be able to give sworn evidence or evidence in accordance with the criteria in section 27 of the Criminal Evidence Act, 1992. How is the experience of a trial likely to affect them? In cases of sexual offences or offences involving violence, should the children’s evidence be presented by way of video link in accordance with section 13 of the Act?”

DPP Guidelines for Prosecutors (November 2010). (Office of the Director of Public Prosecutions.) Paragraph 4.12(m) at p.17.

674 See: Chapter II – The Rights of the Child Witness in Criminal Proceedings at para.2.0.0.

675 *Law Reform Commission Report on Child Sexual Abuse* (LRC 32-1990) (September 1990) para.7.11 at p. 72.

676 ‘Closed Circuit Television’ *Law Reform Commission Report on Child Sexual Abuse* (LRC 32-1990) (September 1990) .Recommendation 54 at p.93.

677 *White v Ireland* [1995] 2 IR 268.

678 *Donnelly v Ireland* [1998] 1 IR 321

679 *Donnelly v Ireland* [1998] 1 IR 321.

challenges to the introduction and operation of other support measures might be considered by the courts.

5.5.2 In *White v Ireland*,<sup>680</sup> the defendant was awaiting trial for sexual offences against a child and the complainant was to give evidence via video link under s.13 of the *Criminal Evidence Act 1992*. The defendant sought a declaration that s.13 was repugnant to the Constitution and also an injunction to prevent its use at trial. His application was grounded in the contention that the use of live video link under s.13(1)(a) for witnesses under 17 years of age<sup>681</sup> constituted an infringement of his right to cross-examine and confront his accuser in open court.<sup>682</sup> In order to determine whether the defendant's constitutional rights were being breached, Kinlen J examined the right to a trial in due course of law under Article 38.1 of the Constitution of Ireland as well as the right of every citizen to be treated equally under Article 40.

5.5.3 Kinlen J examined the principles set out in *State (Healy) v Donoghue*,<sup>683</sup> where Gannon J had affirmed that among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are:

the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given.<sup>684</sup>

5.5.4 Gannon J emphasised that the description of these rights was not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the

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<sup>680</sup> *White v Ireland* [1995] 2 IR 268.

<sup>681</sup> The age of eligibility at the time of the proceedings prior to the amendment of the Act by s.257 of the *Children Act 2001* which raised the threshold to 18 years of age.

<sup>682</sup> *White v Ireland* [1995] 2 I.R. 268 at 275.

<sup>683</sup> *State (Healy) v Donoghue* [1976] I.R. 325.

<sup>684</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

defence.<sup>685</sup> Kinlen J also noted that Gannon J's judgment had been approved by the Chief Justice<sup>686</sup> and again by the Supreme Court in *O'Callaghan v Judge Clifford*.<sup>687</sup> He went on to consider case law of the United States. It should be noted that a significant aspect of Kinlen J's judgment was the absence in Irish law of the constraint of a confrontation clause as exists in the Sixth Amendment to the Constitution of the United States.<sup>688</sup>

5.5.5 In *Coy v Iowa*,<sup>689</sup> the US Supreme Court determined that permitting two 13 year olds to testify from behind screens in a sexual assault case was unconstitutional in light of the protection afforded by the Sixth Amendment. Giving the judgment for the majority of the court, Scalia J stated that while the face-to-face presence of the defendant may upset the truthful rape victim or abused child, it may also confound the false accuser, or reveal the child coached by the malevolent adult.<sup>690</sup> While agreeing with the majority, O'Connor and White JJ believed that an alternative method of testifying would be permissible if it could be shown that it served an important public policy such as the protection of child witnesses.<sup>691</sup> In considering *Coy v Iowa*,<sup>692</sup> Kinlen J preferred Blackmun J's dissenting judgment, with which Chief Justice Rehnquist joined, as a more appropriate position. The main constitutional obstacle in the case of *Coy v Iowa*,<sup>693</sup> was that the complainant could not see the defendant. Blackmun J and Rehnquist CJ reiterated that 'the essence of the right to be protected is to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact.'<sup>694</sup> In his judgment, Blackmun J asserted that the vulnerability of the child witness allowed for a modification of the evidential process in limited circumstances. He stated that the fear and trauma associated with a child's testimony in front of the defendant may have two serious

<sup>685</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at 336.

<sup>686</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at 349.

<sup>687</sup> *O'Callaghan v. Judge Clifford* [1993] 3 I.R. 603.

<sup>688</sup> The Sixth Amendment to the US Constitution states :

"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him**; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of Counsel for his defence." (emphasis added).

<sup>689</sup> *Coy v Iowa* (1987) 487 U.S.1012

<sup>690</sup> *Coy v Iowa* (1987) 487 U.S.1012 at 1012.

<sup>691</sup> *Coy v Iowa* (1987) 487 U.S.1012 at 1025.

<sup>692</sup> *Coy v Iowa* (1987) 487 U.S.1012

<sup>693</sup> *Coy v Iowa* (1987) 487 U.S.1012

<sup>694</sup> *Coy v Iowa* (1987) 487 U.S.1012 at 1026.

identifiable consequences: it may harm the child and it may also prevent him or her from testifying effectively. He argued that the important public policy outlined by O'Connor and White JJ outweighed the narrow confrontation clause at issue, that issue being the "preference" for having the defendant within the witness' sight while the witness testifies.<sup>695</sup>

5.5.6 Kinlen J quoted from Blackmun J's judgment at length as he felt that it was a proper statement of the appropriate law assuming that a confrontation guarantee existed in Irish law. Kinlen J was not satisfied however that 'confrontation' is part of 'due process' as guaranteed by Art.38.1 of the Constitution. Even if he was wrong in that assertion, he believed that the form of technology used in video link was a form of confrontation.<sup>696</sup> Overall, Kinlen J considered the technological advances in the context of the rights both of the defendant and of the witness. If the defendant had a right to have the witness in the same room, that 'right' must yield to the 'rights' of a young child and he stated that the alleged diminution of the accused's right was so small in consideration of all the other rights he has that it must yield to the court's concern for the wellbeing of the child.<sup>697</sup> Kinlen J thus echoed the principles expressed in *Coy v Iowa*<sup>698</sup> by O'Connor and White JJ concerning the importance of a public policy to protect vulnerable witnesses. Kinlen J ultimately determined that there is no constitutional support for "eyeball to eyeball" confrontation in the Irish jurisdiction.<sup>699</sup>

5.5.7 In a comprehensive and innovative judgment, Kinlen J felt that the court should, subject to close scrutiny, avail itself of the technology<sup>700</sup> and that the jury probably has a better ability to judge the child by concentrating on his or her face.<sup>701</sup> He also underscored the importance of the trial judge who was in complete control of all the equipment and would act in accordance with constitutional and natural justice ensuring that fair procedures would be maintained.<sup>702</sup> He noted the utility of

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<sup>695</sup> *Coy v Iowa* (1987) 487 U.S.1012 at 1032.

<sup>696</sup> *White v Ireland* [1995] 2 IR 268 at 281.

<sup>697</sup> *White v Ireland* [1995] 2 IR 268 at 281.

<sup>698</sup> *Coy v Iowa* (1987) 487 U.S.1012 at 1025.

<sup>699</sup> *White v Ireland* [1995] 2 IR 268 at 282.

<sup>700</sup> *White v Ireland* [1995] 2 IR 268 at 281.

<sup>701</sup> *White v Ireland* [1995] 2 IR 268 at 282.

<sup>702</sup> *White v Ireland* [1995] 2 IR 268 at 281.

the support measure in circumstances where there might be personal cross-examination of the witness and observed that if the accused was defending himself the judge could decide whether or not to make his image available to his accuser.<sup>703</sup> He stated that in those circumstances his voice must personally be transmitted but not necessarily his image.<sup>704</sup>

5.5.8 The second challenge to s.13 *Criminal Evidence Act 1992* was heard in *Donnelly v Ireland*.<sup>705</sup> It proceeded by way of judicial review proceedings in the High Court which were then appealed to the Supreme Court. Similar arguments were asserted as those in *White v Ireland*.<sup>706</sup> The defendant in *Donnelly*<sup>707</sup> had been convicted of the sexual assault of a young boy in circumstances where the complainant's evidence had been given via video link under s. 13 and an appeal against conviction was brought separately before the Court of Criminal Appeal. In the judicial review proceedings, the defendant stated that the use of video link under s. 13 infringed his right to confront the witness. He asserted that this was an individual constitutionally protected right under Article 38.1. In the alternative, the defendant claimed that the right to physically confront a witness was one that was implicitly included in the right to cross-examination which had been recognised as enjoying constitutional protection in *In Re Haughey*.<sup>708</sup> The defendant stated that if the right of confrontation could be restricted, s.13(1)(a) went too far in pursuit of the legislative objective of protecting witnesses. Relying on *Coy v Iowa*,<sup>709</sup> the defendant further averred that s.13 created a 'legislatively imposed presumption of trauma' which 'placed an unconstitutional and unfair burden of proof on an accused who would have to prove that the child was capable of testifying in open court.'<sup>710</sup> Section 13 was unconstitutional, he submitted, as it interfered with fair procedures in that it did not require a case by case review by the trial judge of the effect of a

<sup>703</sup> This observation will be of less utility should the proposal to restrict personal cross-examination be commenced as per the *Criminal Law (Sexual Offences) Bill 2015*. See: "Protection against cross-examination by accused" New section 14C in Act of 1992. *Criminal Law (Sexual Offences) Bill 2015*.

<sup>704</sup> *White v Ireland* [1995] 2 IR 268 at 281.

<sup>705</sup> *Donnelly v Ireland* 1 IR 321.

<sup>706</sup> *White v Ireland* [1995] 2 IR 268.

<sup>707</sup> *Donnelly v Ireland* 1 IR 321.

<sup>708</sup> *In re. Haughey* [1971] I.R. 217.

<sup>709</sup> *Coy v Iowa* (1987) 487 U.S.1012

<sup>710</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 321 (HC).

physical confrontation in court on each witness whose evidence it is proposed to give by television link.<sup>711</sup>

5.5.9 The State responded to these arguments by noting that there is no express confrontation right under Article 38.1 of the Constitution. While *In Re Haughey*<sup>712</sup> outlined the basic requirements which must be afforded to every person accused of a 'serious offence',<sup>713</sup> including that of cross-examination, it did not include an express right to confront a witness.<sup>714</sup> The procedure under s.13 met the standards of constitutional justice required by the Constitution and laid out in *In Re Haughey*<sup>715</sup> which included (a) approximate physical presence, (b) oath, (c) cross-examination, (d) notification of the case to be made against the accused and (e) observation of the demeanour of the witness by the trier of fact. With regard to the onus of proof placed on the defendant to show that the witness can give evidence in the traditional manner, the State argued that the Constitution allows for different capacities and social function. Therefore the Constitution permits laws to be passed which facilitate the giving of evidence by children who may be traumatised by standard courtroom procedures and the physical presence of the accused person. The State denied that s.13 created an unfair burden of proof as an accused person was entitled to object to the use of video link in his or her particular case. The section therefore envisioned a case by case consideration where an accused objected to the use of video link in the interests of justice. The legislation permitted the trial judge to oversee the procedure so as to ensure that the powers conferred by the section were exercised fairly in any given case.<sup>716</sup>

5.5.10 In the High Court, Costello P dismissed the defendant's challenge to the use of video link. He noted the desire to minimise the trauma associated with the giving of evidence in a criminal trial and observed that these issues had been discussed in a Law Reform *Consultation Paper*<sup>717</sup> and *Report*<sup>718</sup> on *Child Sexual Abuse* which had

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<sup>711</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 330 (HC).

<sup>712</sup> *In re. Haughey* [1971] I.R. 217

<sup>713</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 330 (HC).

<sup>714</sup> *In re. Haughey* [1971] I.R. 217 at 263.

<sup>715</sup> *In re. Haughey* [1971] I.R. 217

<sup>716</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 332 (HC).

<sup>717</sup> Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August 1989).

<sup>718</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990).

directly led to the enactment of s.13(1)(a) *Criminal Evidence Act 1992*. Rather than attempting to analyse the rights of the defendant and the witness and consider which defendant rights had been restricted by a provision designed to uphold victim's rights, Costello P examined the requirements of a fair trial under Article 38.1 of the Constitution. He cited O'Higgins CJ judgment in *State (Healy) v Donoghue*<sup>719</sup> and noted the minimum guarantees to a trial in due course of law set out in that case.<sup>720</sup> Rather than contending that the issues involved a balancing of rights as Kinlen J had done in *White v Ireland*,<sup>721</sup> Costello P observed that if those guarantees to a trial in due course of law were breached then the section must be condemned.<sup>722</sup>

5.5.11 Examining the trial process which the defendant had been afforded, Costello P stated that what had to be considered was whether the trial was unfair because the children who accused the defendant did not give evidence in his presence. Observing that children may be manipulated by 'malevolent adults' or 'overzealous social workers' into making false accusations of sexual abuse, Costello P said it was obvious that fair procedures required that there were proper means to assess the credibility of all the testimony presented by the prosecution, including that of child witnesses.<sup>723</sup> In a trial where s.13 procedures were used, the jury would be able to see the witness at all times and the jury's evaluation would not be compromised by the fact that the witness would not see the accused when giving evidence. Costello P thus surmised that the procedures were not unfair and did not infringe the accused's right to fair procedures under Art.38.1. Because the procedures were not unfair, the requirement for a case by case evaluation did not arise and the Oireachtas was free to legislate as it saw fit.<sup>724</sup> Interestingly, Costello P shared the view of Kinlen J that the right to physical confrontation by an accused of his or her accusers was not a constitutionally protected right.<sup>725</sup>

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<sup>719</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

<sup>720</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

<sup>721</sup> *White v Ireland* [1995] 2 IR 268 at 282.

<sup>722</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 334 (HC).

<sup>723</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 334 (HC).

<sup>724</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 337 (HC).

<sup>725</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 336 (HC).



5.5.12 The Supreme Court dismissed the appeal. In affirming Costello P's judgment and approving that of Kinlen J in *White v Ireland*,<sup>726</sup> Hamilton CJ delivered a landmark judgment on behalf of unanimous Supreme Court. The judgment sets down the parameters within which the courts can assess the use of support measures which may be availed of by vulnerable witnesses. Hamilton CJ examined the constitutional right to a fair trial as it had been developed by the Court in *In Re Haughey*<sup>727</sup> and *State (Healy) v Donoghue*.<sup>728</sup> Hamilton CJ observed that these prior decisions did not limit the specific rights of an accused which are necessary to ensure his or her right to a fair trial or to provide an exhaustive list of these individual rights.<sup>729</sup> What the cases did establish was that the words 'in due course of law' in Article 38.1 of the Constitution make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures shall be fair and that the person accused will be afforded every opportunity to defend himself. An essential ingredient in the concept of fair procedures is that an accused person should have the opportunity to, in the words of Gannon J, 'hear and test by examination the evidence offered by or on behalf of his accuser.'<sup>730</sup>

5.5.13 Hamilton CJ also examined in detail the right to due process and confrontation as distilled in the jurisprudence of the US Supreme Court in *Coy v Iowa*<sup>731</sup> and *Maryland v Craig*.<sup>732</sup> In the latter case, the defendant had objected to the use of video link by a child witness and the US Supreme Court had approved its use where it was shown the child witness would not have been able to testify without it. Hamilton CJ observed that the utility of those cases in the discussion of the instant case was reduced by the fact they turned upon differently worded constitutional and statutory provisions.<sup>733</sup> However, he noted that in *Maryland v Craig*<sup>734</sup> the US Supreme Court had held that the confrontation clause did not

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<sup>726</sup> *White v Ireland* [1995] 2 IR 268 at 276.

<sup>727</sup> *In re. Haughey* [1971] I.R. 217

<sup>728</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

<sup>729</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 350 (SC).

<sup>730</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at 335 in *Donnelly v Ireland* [1998] 1 I.R. 321 at 350 (SC).

<sup>731</sup> *Coy v Iowa* (1987) 487 U.S.1012

<sup>732</sup> *Maryland v Craig* (1989)497 U.S. 836.

<sup>733</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 350 (SC).

<sup>734</sup> *Maryland v Craig* (1989)497 U.S. 836.

guarantee criminal defendants 'an absolute right to a face to face meeting with the witnesses against them at the trial.'<sup>735</sup>

5.5.14 Concerning that judgment, Hamilton CJ observed:

It is clear from the opinion of the majority of the court and in particular the said statements and observations, that though the confrontation clause is clear and specific, it does not give to criminal defendants the absolute right to a face-to-face meeting with witnesses against them, the central concern of the clause being to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.<sup>736</sup>

5.5.15 Returning to the Irish position, the Supreme Court held that the impugned provisions of the Act of 1992 did not restrict in any way the right of an accused person to a fair trial as established by *In Re Haughey*<sup>737</sup> and *State (Healy) v Donoghue*.<sup>738</sup> The Court was satisfied that the assessment of the credibility of all the testimony in the prosecution case including the testimony of child witnesses did not require that the witness be required to give evidence in the physical presence of the accused person and that there is no such constitutional right to physical confrontation.<sup>739</sup>

5.5.16 Hamilton CJ accepted that the reason for the legislative provisions was that persons under the age of 17 are likely to be traumatised by the experience of giving evidence in court and that its purpose is to minimise such trauma.<sup>740</sup> The Court thereby noted the public policy grounds which had given rise to the measure but the matter it had to consider was whether the giving of evidence in such a manner was unfair to the accused? Hamilton CJ noted in particular that a witness, while being

<sup>735</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 351 (SC).

<sup>736</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 356 (SC).

<sup>737</sup> *In re. Haughey* [1971] I.R. 217.

<sup>738</sup> *State (Healy) v Donoghue* [1976] I.R. 325.

<sup>739</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 357 (SC).

<sup>740</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 356 (SC).

cross-examined by counsel on behalf of the accused, will be clearly visible by way of monitors to the judge and jury trying the case, who will have ample opportunity to assess the reliability of the testimony.<sup>741</sup> There was therefore no unfairness to the accused.

5.5.17 The Supreme Court responded in a similar vein to specific arguments raised by the defendant. Firstly, the defendant asserted that it was well recognised that it is more difficult for a false accuser to lie successfully in the presence of the person wrongfully accused than in his or her absence. The Court did not accept this submission. While recognising, as Costello P had done,<sup>742</sup> that children may be manipulated, the court was satisfied that the assessment of credibility does not require that the witness should be required to give evidence in the physical presence of the accused persons and that:

the requirements of fair procedures are adequately fulfilled by requiring that the witness give evidence on oath and be subjected to cross-examination and that the judge and jury have ample opportunity to observe the demeanour of the witness while giving evidence and being subjected to cross-examination. In this way, an accused person's right to a fair trial is adequately protected and vindicated. Such right does not include the right in all circumstances to require that the evidence be given in his physical presence and consequently there is no such constitutional right.<sup>743</sup>

This conclusion was strengthened in the court's view by the fact that it was open to the trial judge not to permit the giving of evidence by a child by video link under s13(1)(a) if the accused establishes that 'there is good reason to the contrary': moreover the leave of the trial judge is required before any person other than a child may give evidence by video link under s.13(1)(b).<sup>744</sup> Secondly, the defendant had also contended that even if the accused had no constitutionally protected right to a physical confrontation, the trial was unfair because the procedures under s. 13 did

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<sup>741</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 357 (SC).

<sup>742</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 3334 (HC).

<sup>743</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 357 (SC).

<sup>744</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 357 (SC).

not require a case by case determination of whether the procedures should be applied and placed an unfair burden on an accused to require him to establish the witnesses' competence to undertake a face to face confrontation with the accused. But the court determined that once it is established that an accused person has no constitutional right to have a witness give evidence in his presence then the circumstances in which evidence is given other than in his presence is a matter for the Oireachtas. The court reiterated the importance of the upholding the rights of the defendant in observing:

5.5.18 It is well established in our constitutional jurisprudence that an accused person's right to a fair trial is one of the most fundamental constitutional rights accorded to persons and that in so far as it is possible or desirable to construct a hierarchy of constitutional rights it is a superior right.<sup>745</sup> The significance of the Supreme Court judgment in *Donnelly v Ireland*<sup>746</sup> cannot be overstated when one considers the question of how the courts may deal with the use of support measures for vulnerable witnesses. The judgment approved the support measure of video link for use by child witnesses in criminal trials for certain offences thereby facilitating the aspiration of the Oireachtas to improve the circumstances of the child witness. The caveat contained in s.13 i.e. that the court may allow the use of video link unless it sees good reason to the contrary, ensures that the trial judge will oversee and safeguard that the procedures are fairly conducted. Above all, the Supreme Court signalled that the Constitution does not prevent or inhibit the implementation and use of special measures in principle. The court developed the analysis of the constitutional right to a trial in due course of law under Article 38.1 which had been examined in *In Re Haughey*<sup>747</sup> and *State (Healy) v Donoghue*<sup>748</sup> and laid down the parameters within which the defendant's right to a fair trial could be protected while the traumatic effect of the court process on the child witness could be minimised. If a support measure breaches the defendant's right to a fair trial under the principles set out in the established case law in *In Re Haughey*<sup>749</sup> and *State (Healy) v*

<sup>745</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 348 (SC).

<sup>746</sup> *Donnelly v Ireland* [1998] 1 I.R. 321.

<sup>747</sup> *In re. Haughey* [1971] I.R. 217

<sup>748</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

<sup>749</sup> *In re. Haughey* [1971] I.R. 217

*Donoghue*<sup>750</sup> then it must fall. But if it does not breach the constitutional right to a fair trial then the Oireachtas is free to legislate to protect the child witness as it sees fit.

5.5.19 The introduction of support measures other than video link which may assist the child witness at trial may be examined through the prism of the above judgment. As yet, there has been no constitutional challenge to the use of recorded testimony under s.16 (1)(b) *Criminal Evidence Act 1992*. This may be due in part to the fact that it falls within the broad constitutional boundaries set down by the Supreme Court in *Donnelly v Ireland*.<sup>751</sup> The provision for intermediaries under s.14 *Criminal Evidence Act 1992* in this jurisdiction has been a so-called 'dead letter' for the two decades that the Act has been in force.<sup>752</sup> There is no reported case on point although, acting on its inherent jurisdiction the Circuit Court has granted an application for its use by an accused in one recent case. Without it the court felt that the defendant, who suffered from a mild intellectual disability, would not be able to participate fully in the trial process.<sup>753</sup> Regarding its use by child witnesses, the fact that the support measure is not widely used may relate to the risk it poses of interfering with the right to cross-examine the witness.<sup>754</sup> But whatever the reasons, it is likely that any future challenge to Section 14 will be grounded in the constitutional protection of Art.38.1.

5.5.20 The Supreme Court judgment in *Donnelly v Ireland*<sup>755</sup> is the starting point for the implementation of any other support measures that the Oireachtas may establish in the future. Although there are no proposals to do so at time of writing<sup>756</sup> future legislation could encompass the recording of the entire testimony of child witnesses prior to trial. Legislation for recorded cross-examination testimony is currently being piloted in England and Wales under s.28 *Youth Justice and Criminal Evidence Act 1999*. Along with s.27 of the same Act which provides for the recording of

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<sup>750</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

<sup>751</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 (SC).

<sup>752</sup> Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury 2014) para. 4.63 at p. 145.

<sup>753</sup> *DPP -v- Paul Merrigan* (Bill No.: 183/14).

<sup>754</sup> See Chapter VI– *The Support Measure of Intermediaries* at para. 6.0.0

<sup>755</sup> *Donnelly v Ireland* 1 IR 321; [1998] 1 ILRM 402 (SC); Unreported, High Court, December 9, 1996

<sup>756</sup> No provision for recording of cross-examination testimony is included in the *Criminal Law (Sexual Offences) Bill 2014* or the *Criminal Justice (Victims of Crime) Bill 2015*.

examination in chief evidence, the legislation allows for the recording of the complete evidence of a vulnerable witness prior to trial. Full pre-trial recording assists in the resolution of the issue of delay, one of the main problems a child witness faces in the criminal trial process.<sup>757</sup> Were similar legislation to be introduced in this jurisdiction, the Supreme Court might elucidate further that the recording of evidence on the principles of fair procedures set out in *Donnelly v Ireland*<sup>758</sup> if asked to assess the constitutionality of such an arrangement.

### 5.6.0 Observations on the use of Video Link

5.6.1 As an extremely innovative change in procedure, the use of video link and the *Donnelly*<sup>759</sup> judgment has been commented on by a number of observers. *Hogan and Whyte*<sup>760</sup> note that Costello P's judgment rejected any kind of proportionality approach.<sup>761</sup> Costello P's judgment does not attempt to reconcile a diminution of the right to a fair trial under Article 38.1 in order to facilitate the wellbeing of the child witness by allowing him or her to give evidence via video link. This is a very different approach to that taken by Kinlen J in *White v Ireland*<sup>762</sup> who sought to reconcile the right of the defendant as against the child witness. *Hogan and Whyte*<sup>763</sup> observe that the line taken by the judgments in *Donnelly*<sup>764</sup> is in contrast to the proportionality approach taken by the Supreme Court in *Heaney v Ireland*.<sup>765</sup> In that case it was held that the right to silence was a constitutionally protected right. The defendants had argued that a provision under s.52 *Offences against the State Act 1939* which made it a criminal offence not answer questions in relation to offences under the Act was a criminal offence was unconstitutional. The Supreme Court stated that s. 52 was a proportional restriction of the right to silence and that the right to silence must yield to the right of the State to protect itself.

<sup>757</sup> See Chapter VII – The Support Measure of Recorded Testimony at para. 7.0.0.

<sup>758</sup> *Donnelly v Ireland* 1 IR 321; [1998] 1 ILRM 402 (SC); Unreported, High Court, December 9, 1996

<sup>759</sup> *Donnelly v Ireland* [1998] 1IR 321.

<sup>760</sup> Gerard Hogan and Gerry Whyte (eds.) *Kelly, J.M The Irish Constitution* (4<sup>th</sup> edn, Lexis-Nexis Butterworths, 2003) at p.1046.

<sup>761</sup> *Donnelly v Ireland* [1998] I IR 321 at 332, 334

<sup>762</sup> *White v Ireland* [1995] 2 IR 268 at 281.

<sup>763</sup> Gerard Hogan and Gerry Whyte (eds.) *Kelly, J.M The Irish Constitution* (4<sup>th</sup> ed., Lexis-Nexis Butterworths, 2003) at p.1046.

<sup>764</sup> *Donnelly v Ireland* [1998] 1IR 321.

<sup>765</sup> *Heaney v Ireland* [1996] 1 IR 580.

5.6.2 Hogan and Whyte<sup>766</sup> note that the judgments of Costello P and Hamilton CJ in *Donnelly*<sup>767</sup> do not refer to any kind of proportionality test as set out in *Heaney v Ireland*.<sup>768</sup> The emphasis in their judgments was on the right to cross-examination and they considered that the new technology available to the criminal prosecution did not affect that right. As the Supreme Court ultimately determined that there was no breach of a constitutional right, it considered that the manner in which the provision was constituted was a matter for the Oireachtas. The requirement for a case by case assessment was therefore unnecessary.

5.6.3 Other commentators have remarked on the possible injustice of the section. Fennell suggests that the caveat contained in the provision of s.13 highlights its potential unfairness. Section 13 states that the evidence may be given via video link 'unless the court sees good reason to the contrary.' Fennell observes that, ironically, the legislation is 'saved' because the judiciary need not invoke it where it would be unfair to do so and thus it is potentially unfair.<sup>769</sup> This contention perhaps discounts the assertion in *Donnelly*<sup>770</sup> in respect of the responsibility and the ability of the trial judge to ensure fair procedures are upheld in the context of the individual circumstances before the court.<sup>771</sup> Fennell contends that Hamilton CJ's reasoning in *Donnelly*<sup>772</sup> echoes earlier terrorist cases as in *Heaney v Ireland*<sup>773</sup> in that the rights of the individual are underscored but the limited nature of the impugned provision is invoked to save it.<sup>774</sup>

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<sup>766</sup> Gerard Hogan and Gerry Whyte (eds.) *Kelly, J.M The Irish Constitution* (4<sup>th</sup> ed., Lexis-Nexis Butterworths, 2003) at p.1046.

<sup>767</sup> *Donnelly v Ireland* [1998] 1 IR 321.

<sup>768</sup> *Heaney v Ireland* [1996] 1 IR 580 at 589.

<sup>769</sup> Caroline Fennell, *The Law of Evidence in Ireland* (3<sup>rd</sup> Edition, Bloomsbury Professional) (2009) para.5.25 at pps. 199-200.

<sup>770</sup> *Donnelly v Ireland* [1998] 1IR 321.

<sup>771</sup> 'The accused person's right to a fair trial is further protected by the fact that it is open to the court not to permit the giving of evidence by a young person through a live television link if the accused person establishes that 'there is good reason to the contrary' and that the leave of the court is required before any other person may give evidence in this manner. A judge considering either of these issues will be obliged to have regard to the accused person's right to a fair trial.'

*Donnelly v Ireland* [1998] 1IR 321 at 357 (SC) per Hamilton CJ.

<sup>772</sup> *Donnelly v Ireland* [1998] 1IR 321.

<sup>773</sup> *Heaney v Ireland* [1996] 1 IR 580 at 589.

<sup>774</sup> Caroline Fennell, *The Law of Evidence in Ireland* (3<sup>rd</sup> edn., Bloomsbury Professional) (2009) para.5.25 at pps. 199-200.

5.6.4 It is submitted that Fennell's contentions might have more force if they concerned the use of other support measures such as the use of an intermediary under s.14 *Criminal Evidence Act 1992*. The use of an intermediary may have a significant impact on how counsel question the witness. This may be why the provision is so rarely used.<sup>775</sup> The constitutional discussions in *White*<sup>776</sup> and *Donnelly*<sup>777</sup> relate to the giving of evidence via video link. This support measure has minimal impact on traditional procedures and Fennell does not specify where the potential unfairness lies in allowing a child to give testimony via video link.<sup>778</sup> An examination of the support measure shows that the main departures from traditional procedures are that the witness does not see the accused and is physically distant from the body of the court. The Supreme Court had no difficulty in finding that there was no breach of constitutional rights. The court found that the defendant did not have a constitutional right to physically confront the witness and that the use of video link did not interfere with the constitutional right to cross-examination.<sup>779</sup>

5.6.5 The Supreme Court also determined that fair procedures did not require a case by case assessment to show the necessity for the use of the support measure.<sup>780</sup> Healy characterises this latter point as the defendant's strongest argument in *Donnelly*.<sup>781</sup> He observes that s.13 places an onus up the accused 'as to why the television link should not be used by the court'.<sup>782</sup> The Supreme Court ultimately side stepped this issue by stating that once it was established that there was no constitutional breach, it was a matter for the Oireachtas as to how the provision was enacted. Hamilton CJ did observe that it was generally accepted that persons under the age of 17 are likely to be traumatised by the experience of giving evidence in court and that its purpose is to minimise such trauma.<sup>783</sup>

<sup>775</sup> Heffernan describes the use of intermediaries under s.14 *Criminal Evidence Act 1992* as a 'so-called dead letter' provision. Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury 2014) para. 4.63 at p. 145.

<sup>776</sup> *White v Ireland* [1995] 2 IR 268.

<sup>777</sup> *Donnelly v Ireland* [1998] I IR 321.

<sup>778</sup> *This facility to give evidence through a live television link means that the witness can give his or her evidence without having to be physically present in the courtroom. Apart from that, however proceedings will follow their normal course*

Dermot Walsh, *Criminal Procedure (Thomson RoundHall)* (2002) para. 18-28 at p. 884.

<sup>779</sup> *Donnelly v Ireland* [1998] 1 I.R. 321 at 357 (SC).

<sup>780</sup> *Donnelly v Ireland* [1998] I IR 321 at 358 (SC).

<sup>781</sup> *Donnelly v Ireland* [1998] I IR 321.

<sup>782</sup> John Healy, *Laws of Evidence* (Thomson Round Hall) (2004) par 1-61 at p. 35.

<sup>783</sup> *Donnelly v Ireland* [1998] 11R 321 at 356 (SC) per Hamilton CJ.



5.6.6. Discussing the subsection in the context of the decision in *White*,<sup>784</sup> Duffy states that s.13(1)(a) is at best bad draftmanship on the part of the legislature at worst a constitutionally impermissible transfer of an onus of proof to the accused by requiring him to show why the proposed child witness should not testify under the subsection.<sup>785</sup> It is significant that over the course of time, that concern has been eroded. The use of video link is perhaps no longer seen as an indulgence for the child witness but as a useful measure which does not impinge on the right of the defendant. However, while s.13(1)(a) is a valid and a significant step in protecting the wellbeing of the vulnerable witness, its ubiquitous for child witnesses perhaps misses an opportunity to encourage an individual assessment in each case. A necessity for individual assessment would have circumvented the ‘normalisation’ of the support measure described by Fennell.<sup>786</sup> Normalisation of the support measure implies that there is a ‘one size fits all’ approach and this is perhaps unhelpful where each child witness will have different strengths and weaknesses which need to be assessed.

#### 5.7.0 *Effect of Constitutional Challenges on the use of Video Link*

5.7.1 The use of video link was challenged in *White v Ireland*<sup>787</sup> and *Donnelly v Ireland*<sup>788</sup> on the basis the fact that the child would be physically distant from the body of the court. From a defendant’s point of view this might mean that the witness would be better able to evade cross-examination. It might also mean that the jury would be inhibited in its ability to assess the credibility of the witness and ultimately, that the defendant would be at a disadvantage. Over the years that video link has been in use, this perception has changed significantly and some of the concerns that the technology might pose from the defence point of view have proved unfounded. For example, the physical distance between the witness and the court

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<sup>784</sup> *White v Ireland* [1995] 2 IR 268.

<sup>785</sup> Gordon Duffy, *Televised Testimony and Constitutional Justice* (1994) 4 ICLJ 178 at p.182.

<sup>786</sup> Fennell notes that “[T]his particular “exceptional” provision once introduced (the *1992 Act*) and sanctioned (*Donnelly v Ireland*) became normalised as the facility to give evidence through a live television link granted to children and other vulnerable witnesses was extended by the *Criminal Justice Act*, s.39, to a person other than the accused with leave of the court.”  
Caroline Fennell, *The Law of Evidence In Ireland* (3<sup>rd</sup> edn. Bloomsbury Professional 2009) para5.28 at p. 201.

<sup>787</sup> *White v Ireland* [1995] 2 IR 268.

<sup>788</sup> *Donnelly v Ireland* [1998] 1 IR 321.

may mean that the witness's testimony does not have the impact that it might have if delivered directly within the courtroom.<sup>789</sup>

5.7.2 In addition, the ubiquitous use of the measure has meant that it is now culturally and socially associated with the giving of testimony by child witnesses. Arguably, any prejudice has been eroded and the use of the support measure could be said to have gained a neutral status.<sup>790</sup> It might even be suggested that the accused benefits from the special measure of video link in a manner not envisaged when the measure was first introduced. The very distancing of the child witness allows for more robust questioning under cross-examination than might have been possible in the court environment. No defence counsel wishes to be seen to bully or harass an emotionally upset child and any measure which allows the child witness to remain as calm as possible may be welcomed by defence counsel who can then follow a more robust and trickier line of questioning.

5.7.3 While Kinlen J in *White v Ireland*<sup>791</sup> considered that the technology would allow the jury a great facility for examining the body language and demeanour of the child witness, it is submitted that the testimony of the child witness is in fact "flattened" to an extent through the mechanical intervention of the video link screens. While the jury may see the child witness in greater detail, what they are seeing is testimony delivered at a physical remove and potentially devoid of a natural emotional response to the questioning. This issue has been flagged by Charleton J who has suggested extra judicially that the further one gets from the live

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<sup>789</sup> 'There is some slender empirical support for the widespread belief in the legal professions in all our comparative jurisdictions that the video technology distances the jury from the complainant, making it more difficult to assess credibility.'

Laura Hoyano and Caroline Keenan, *Child Abuse, Law and Policy Across Boundaries* (Oxford University Press 2010) at p. 643.

<sup>790</sup> This is not the position with persons with an intellectual disability where that disability is under scrutiny and/ or where the issue of consent is in question. As mentioned above, see *O'D v D.P.P. and Judge Patricia Ryan* [2009] IEHC 559 where the complainants were afforded the measure. This was deemed to be prejudicial to the accused in light of the requirement to firstly establish whether the complainants were mentally impaired under the offence in respect of capacity to consent, a requirement under the offence allegedly committed ( S. 5 of the *Criminal Justice (Sexual Offences) Act 1993* ) – the offence of having sexual intercourse with a mentally impaired person.

<sup>791</sup> *White v Ireland* [1995] 2 IR 268 at 281.

appearance of a person ‘telling their story’ in court,<sup>792</sup> the more the prosecution case may be weakened.<sup>793</sup>

5.7.4 The Supreme Court in *Donnelly*<sup>794</sup> may not have been foreseen that the unquestioning acceptance of the presumption of trauma of a witness under the age of 17, would lead to the automatic use of video link. It was perhaps unforeseen that it would be difficult to argue against the use of the measure in the light of a lack of legislative description contained in the safeguard “unless the court sees good reason to the contrary”.<sup>795</sup> There is no reported case law where a court has refused an application in respect of the support measure and there is little to guide the defendant as to what standard he or she is being asked to meet.

5.7.5 It is ironic that the absence of any mechanism for assessment of the individual needs of the child witness may have led to a situation that may be disadvantageous to the child witness, the very person whom the support measure was designed to protect. It is possible that a prosecution counsel will feel obliged to apply for the support measure where a child witness is under 18 in order to ensure that he or she is protected from the court environment. If the prosecution counsel decides that it is not appropriate to apply for evidence to be given via video link, a defence counsel may apply for the support measure in an attempt to soften the impact of the evidence of the child witness. Yet there are minimal procedural guidelines as to which factors may be considered in deciding whether the support measure should or should not be used<sup>796</sup> and a large responsibility is placed on the trial judge to make an informed and fair decision as to its use.<sup>797</sup>

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<sup>792</sup> Charleton J, *Chairman’s Opening Speech, The Law Reform Commission Annual Conference 2011: Sexual Offences and Capacity* at p. 6.

<sup>793</sup> <http://www.lawreform.ie/fileupload/misc/AC11/CharletonJ.pdf> (Accessed 25<sup>th</sup> September 2015). Charleton J has observed that while video link can be extremely beneficial, it can also be problematic as it could create a distance between the victim and the jury which was less helpful. He also remarked, however, that without video link, on occasion, there would be no witness.

Charleton J, *Chairman’s Opening Speech, The Law Reform Commission Annual Conference 2011: Sexual Offences and Capacity* at p. 6.

<http://www.lawreform.ie/fileupload/misc/AC11/CharletonJ.pdf> (Accessed 25<sup>th</sup> September 2015).

<sup>794</sup> *Donnelly v Ireland* [1998] 1IR 321.

<sup>795</sup> S.13 (1)(a) *Criminal Evidence Act 1992*.

<sup>796</sup> For example, this is not mentioned at all in the guidelines for Prosecutors. DPP Guidelines for Prosecutors Paragraph 4.12(m) at p. 17 merely states:

“4.12(m) Where child witnesses are involved, are they likely to be able to give sworn evidence or evidence in accordance with the criteria in section 27 of the *Criminal Evidence Act, 1992*. How is the experience of a trial likely to affect them? In cases of sexual offences or offences involving violence,

### 5.8.0 Use of Section 13(1)(b) Criminal Evidence Act 1992

5.8.1 The judgment in *Donnelly*<sup>798</sup> focused on s.13(1)(a) Criminal Evidence Act 1992 and so the potential scope and application of s.13(1)(b) are open questions. Section 13(1)(b) allows the use of the measure to be used ‘ in any other case, with the leave of the court.’<sup>799</sup> This places a responsibility on the trial judge to ensure that the measure is utilised in accordance with the principles laid down in *State (Healy) v Donoghue*<sup>800</sup> and *In re. Haughey*.<sup>801</sup> The questions that need to be examined range from in what circumstances the section should be used to the timing of the application itself. Should the support measure be used in circumstances where the witness could not give evidence effectively or could not give evidence at all without it? In what circumstances would it be unfair not to grant the use of the special measure? Could the application be made after the witness has started giving evidence and shown they are in need of the special measure? The case of *DPP v Ronald McManus (AKA Ronald Dunbar)*<sup>802</sup> provides some guidance from the Court of Criminal Appeal regarding the factors the court will consider in allowing a witness to give evidence via video link. The case involved the use of use of video link under s.13 (1)(b) *Criminal Evidence Act 1992* by a female witness who had just turned 18 and who was to give evidence against the accused, her father, in a murder trial.

5.8.2 The defendant appealed his conviction inter alia on the ground that the learned trial judge had erred in fact and law in allowing the witness, a person over 18 years of age, to give evidence by way of video link. He submitted that when a witness gives evidence in the ordinary course of events i.e. from the body of the court, a jury

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*should the children’s evidence be presented by way of video link in accordance with section 13 of the Act?”*

*DPP Guidelines for Prosecutors* (November 2010). (Office of the Director of Public Prosecutions).

<sup>797</sup> This can be seen in the case in *DPP v Dunbar* [2011] IECCA 32 in which the support measure was used under s.13 (1)(b)*Criminal Evidence Act 1992* and which is discussed at para. 4.8.1.

<sup>798</sup> *Donnelly v Ireland* [1998] 1IR 321.

<sup>799</sup> ‘*The accused person’s right to a fair trial is further protected by the fact that it is open to the court not to permit the giving of evidence by a young person through a live television link if the accused person establishes that ‘there is good reason to the contrary’ and that the leave of the court is required before any other person may give evidence in this manner. A judge considering either of these issues will be obliged to have regard to the accused person’s right to a fair trial.*’

*Donnelly v Ireland* [1998] 1IR 321 at 357 (SC) per Hamilton CJ.

<sup>800</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

<sup>801</sup> *In re. Haughey* [1971] I.R. 217.

<sup>802</sup> *DPP v Ronald McManus (A.K.A. Ronald Dunbar)* [2011] IECCA 32.

has the greatest possible opportunity to assess the demeanour, deportment and reaction of such a witness in examination and cross-examination. The appellant also submitted that departure from the standard procedure could be only be lawfully made on the basis of ‘strong evidence’. The application was based on evidence by a social worker who stated that the witness was afraid that she would freeze while giving evidence and that she would be unable to confront her father face to face. In addition, the witness did not wish to give evidence in front of a crowd.

5.8.3 The Court of Criminal Appeal stated that, regarding s.13(1)(b) which allows the use of video link with the leave of the court, ‘no conditions are imposed in respect of that leave, and no restriction is set down in respect of the exercise by the trial judge of his discretion.’<sup>803</sup> The court outlined the factors which had warranted the use of the provision. These included (i) the witness had certain communication difficulties ii) she had only just turned 18 years of age (iii) she was giving evidence in a murder trial against her own father about events that occurred when she was 15 years of age and (iv) she was, on the evidence of her social worker, a vulnerable person. The Court stated that the defendant was not restricted in his defence by the use of the support measure and had been able to cross-examine the witness at length in accordance with the principles in *State (Healy) v Donoghue*.<sup>804</sup> Ultimately, the Court found that there had been no evidence adduced on behalf of the defendant on which it could be found that there had been a real or serious risk of an unfair trial by reason of the trial judge exercising his discretion to allow the use of video link. On that and other grounds, the appeal was dismissed.

5.8.4 The judgment enforces the point made by the Supreme Court in *Donnelly*<sup>805</sup> that once fair procedures have been afforded the accused and have been overseen by the trial judge, then the use of video link may facilitate the witness to give his or her testimony. The CCA did not specify what criteria would be necessary for the support measure to be used. For example, would it be necessary to use video link where if the witness would be hindered in giving evidence by being physically present in court. Alternatively, would it be necessary if he or she could not give evidence at all

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<sup>803</sup> *DPP v Ronald McManus (A.K.A. Ronald Dunbar)* [2011] IECCA 32.

<sup>804</sup> *State (Healy) v Donoghue* [1976] I.R. 325.

<sup>805</sup> *Donnelly v Ireland* [1998] I IR 321.

without the use of the video link. Echoing the judgment in *Donnelly*,<sup>806</sup> the Court did not refer to these operational issues once it was satisfied that the use of the support measure did not breach fair procedures in principle.

### 5.9.0 Other legislative provisions

5.9.1 The giving of evidence via video link is also provided for under s.39 *Criminal Justice Act 1999* for any offence, violent or sexual, where the witness may be in fear or subject to intimidation. For child witnesses, this widens the use of the support measure to contexts beyond trials of offences referenced in *Criminal Evidence Act 1992*. The provision does give the court wider latitude to facilitate the testimony of a child complainant or child witness at trial as it is probable that a child will be in fear when giving evidence. The accused is excluded from applying for use of the provision but an application may be made for both defence and prosecution witnesses. There is no restriction regarding the type of offences to which the support measure may apply but provision is limited to any proceedings on indictment thereby excluding proceedings in the District Court.

5.9.2 Most significantly, the provision under s.39(2) is only available, after an examination and assessment by the court of the extent of fear and intimidation on the part of the witness as well as how the use of the support measure may diminish the fear or intimidation of testifying. There is no stipulation as to what the necessary evidential basis for the application e.g.: a medical report from a medical practitioner or a report from a member of An Garda Síochána. In addition, similar to s.13 *Criminal Evidence Act 1992* there is no provision that the court may apply the special measure of its own motion. It is suggested that the court through its inherent jurisdiction may suggest an application where it considers that one would be appropriate.

5.9.3 The inconsistencies and limitations between the two provisions (S.39 *Criminal Justice Act 1999* and s.13 *Criminal Evidence Act 1992*) may result in confusion. It is suggested that the goals of the two sections be consolidated into a single legislative provision which would dispense with the offence and jurisdiction limitations

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<sup>806</sup> *Donnelly v Ireland* [1998] I IR 321.

imposed on the witness who seeks to give evidence via video link. This has been achieved in England and Wales under the provisions of ss.16, 17 and 24 of the *Youth Justice and Criminal Justice Act 1999* in England and Wales.

5.9.4 The influence of s.13 *Criminal Evidence Act 1992* is evident in ss.5 and 6 of the *Criminal Procedure Act 2010*. These sections amend s.5 of the *Criminal Justice Act 1993* providing for the giving of victim impact statements by children and persons with an intellectual disability via video link<sup>807</sup> and via an intermediary.<sup>808</sup> Under s. 5, use of the support measure is age-eligible as well as offence-eligible. The provision applies to a child, defined as a person under 18 under s.5(6) of the Act or a person with a mental disorder.<sup>809</sup> With minimal differences in the offence eligibility of the provision,<sup>810</sup> for all extents and purposes the section mirrors s.13 *Criminal Evidence Act 1992*. It includes measures that the evidence may be given from within or outside the State via live television link, that the evidence shall be video recorded and that while evidence is being given, counsel and judge will not wear robes or wigs.

5.9.5 It is noteworthy that the content of the 2010 provision reflect no progressive development as there appear to be no evolution in the policy provisions for the support measures. For example, there were no stipulations as to how the choice of measures would be presented to the witness and how his or her preference might be assessed, legislative steps which have been taken in other jurisdictions such as in England and Wales.<sup>811</sup>

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<sup>807</sup> 'In respect of video link evidence only, any other person with the leave of the court.'

S. 5A of the *Criminal Justice Act 1993* as amended by s. 5 of the *Criminal Procedure Act 2010*.

<sup>808</sup> S.5B of the *Criminal Justice Act 1993* as amended by s. 6 of the *Criminal Procedure Act 2010*.

<sup>809</sup> It is difficult to comprehend the insertion of an outdated term as "mental disorder" into the legislation, a term not very different from that of "mental handicap" within the *Criminal Evidence Act 1992*.

<sup>810</sup> The section applies to a sexual offence within the meaning of the *Criminal Evidence Act 1992*, an offence involving violence or the threat of violence to a person, an offence under the Non-Fatal Offences Against the Person Act 1997, an offence under section 2, 3 or 4 of the Criminal Justice (Female Genital Mutilation) Act 2012, and an offence consisting of attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b) or (c).

<sup>811</sup> See ss.16,17 and 24 *Youth Justice and Criminal Evidence Act 1999*.

### 5.10.0 *Use of video link in practice*

5.10.1 The use of video link generally follows a conventional procedure where the witness gives evidence from a different location to that of the court room and the court communicates with him or her via video link. Within that framework, a certain flexibility of practice may be initiated through the inherent jurisdiction of the court. In Ireland, guidance for the judiciary is available in the *Equal Treatment of Persons in Court Bench Book* but this is not publicly available and so its content is not widely known.<sup>812</sup> In England and Wales, *The Equal Treatment Bench Book*,<sup>813</sup> which contains guidance for the judiciary in England and Wales, includes a specific chapter on *Children and Vulnerable Adults*. The guidance states that courts and tribunals are expected to modify and adapt normal trial procedure to facilitate the effective participation of witnesses, defendants and litigants.<sup>814</sup> To this end, the guidance gives examples of cases where judges have been flexible in their approach as to the manner in which children gave evidence. In one case, the trial judge ordered the prosecution and defence advocates to move to the live link room for cross-examination of a five-year-old who struggled to communicate through the live link at a practice session. The court-appointed intermediary had recommended this solution and the judge ruled that the live link room could be considered an extension of the courtroom.

5.10.2 In other instances, the cross-examination of children was paused to relieve the child's stress. Without leaving the live link room, the child was allowed to go under a table, behind a curtain or under a blanket. In the case of a child with urinary urgency, she was permitted to leave the room, without prior permission, to use the toilet. In another case, permission was granted to an eight-year-old to calm herself quickly by taking herself out of sight of the main live link camera, although she remained still visible to the judge on the overview camera. The child and court appointed intermediary practised these 'in room' breaks beforehand, using a large 30-second egg timer. The judge requested everyone to wait, rather than adjourning

<sup>812</sup> Personal communication from Mr. Justice Edwards, Secretary, Association of Judges of Ireland, 22<sup>nd</sup> July 2015.

<sup>813</sup> *Equal Treatment Bench Book*, November 2013.

<sup>814</sup> *Equal Treatment Bench Book*, November 2013 para. 2 at p. 2.



the court. The child took around 15 brief breaks (two or three ‘egg timer’ intervals lasting around 60-90 seconds) across two hours of evidence. Only one adjournment was required.<sup>815</sup> This flexibility and creativity on the part of the judiciary is welcome and reflects a willingness on the part of judges to use the inherent jurisdiction of the courts to facilitate the giving of testimony of child witnesses. It is possible that such solutions may be used in Ireland but there is no data as to how judges may deal with individual situations.

### 5.11.0 *Court Ushers / Video Link Assistants*

5.11.1 It is important to maintain standards that ensure that evidence given via video link is wholly that of the witness and untainted by the influence of any other person. The role of court ushers, also known as video link assistants, was comprehensively examined in *White v Ireland*.<sup>816</sup> Kinlen J stated that the court usher is a very important officer and should be situated within the camera in the room with the child witness. He suggested that while the picture can be switched off, it was important that the sound link should not be broken so the parties and the judge should be able, if necessary by earphones, to hear the conversation between the witness and the usher. Kinlen J stated that such conversations should be recorded and played back as required and that it is essential that there should be constant eavesdropping of what is happening in the room. The goal of this is to prevent intentional or unintentional tutoring of the child witness.<sup>817</sup>

5.11.2 Going even further, in the Appendix of his judgment, Kinlen J set out a procedure for the court usher derived from the guidance issued in England at that time.<sup>818</sup> It indicated that the usher should refrain from prompting the child in any way, offering him or her any explanation, interpretation or guidance and from making comments or signals to the child, except to direct the child's attention to the questioner if the child appeared not to be concentrating.

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<sup>815</sup> Equal Treatment Bench Book, November 2013, Judicial College, para 6 at p. 3.

<sup>816</sup> *White v Ireland* [1995] 2 IR 268 per Kinlen J at p. 282.

<sup>817</sup> *White v Ireland* [1995] 2 IR 268 per Kinlen J at p. 282.

<sup>818</sup> *White v Ireland* [1995] 2 IR 268 per Kinlen J at p. 284.

5.11.3 The Courts Services<sup>819</sup> oversee the functions of the court usher or ‘video link assistant’ which is the term the Courts Services now use. Brian Batell, Principal Officer in the Criminal Courts of Justice supervises the day to day management of the service. He states that there are four video link assistants on a national basis with two based in the Dublin area. The video link assistants are trained by Barnardos and are expressly told that they must not touch or speak to the witnesses. Mr. Batell stated that current guidance for the video link assistants is being revised and must be approved by the board of the Courts Services before being distributed and so is not available at present.

5.11.4 Prior to the witness giving evidence, the video link assistant takes an oath administered by the registrar of the court. The oath is as follows:

I swear by Almighty God that I shall well and truly keep this witness, that I shall not speak to him or her or allow any person to speak to him or her on any matter in connection with this trial.

5.11.5 In the recent case of *DPP v AH*<sup>820</sup> before the Central Criminal Court in June 2015, the defendant was charged with offences including 64 counts of anal, vaginal and oral rape of his daughter dating from when the child was four years of age to eleven years of age. The trial was personally observed by the author. At the end of the cross-examination by defence counsel, and prior to re-examination on matters arising by the prosecution counsel, the court usher, who was with the child complainant in the witness suite said to her, in full hearing of the court and the jury: ‘That’s the worst part – the other solicitor is going to be nice to you.’

5.11.6 The words spoken by the video link assistant in *DPP v AH*<sup>821</sup> may appear innocuous but it is poor practice, quite apart from being factually incorrect in so far as the counsel in question were barristers not solicitors. It does give rise to questions

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<sup>819</sup> Personal communication with Brian Batell, Principal Officer, The Courts Services (23<sup>rd</sup> July 2015).

<sup>820</sup> *DPP v AH*, Central Criminal Court, June 2015.

Aaron Rogan and Fiona Ferguson, *Man (35) who began sexually abusing his daughter when she was seven years old is jailed for 15 years*, The Irish Independent, 31<sup>st</sup> July 2015

<http://www.independent.ie/irish-news/courts/man-35-who-began-sexually-abusing-his-daughter-when-she-was-seven-years-old-is-jailed-for-15-years-31418611.html> (Accessed 25th September 2015).

<sup>821</sup> *DPP v AH*, Central Criminal Court, June 2015.

as to what else has been said by the video link assistant to the child complainant when not within the hearing of the court. In this particular case, while the comment was perhaps intended to be supportive, it may have had a deleterious effect on the evidence for the prosecution. It was noticeable that the manner of the thirteen year old child complainant was very different in her response to the defence counsel as opposed to the prosecution counsel which is natural in the circumstances. However, this attitude might also have been encouraged by the video link assistant. In this case, the prosecution relied solely on the testimony of the child complainant and her ability to give details of times and locations of the offences. Her evidence, which was recorded under s.16(1)(b) *Criminal Evidence Act 1992*, did not have great detail in this respect. The recordings when admitted at trial as her examination in chief evidence were sealed and could not be revisited. In cross-examination, the complainant gave monosyllabic answers in respect of the details of the locations and times perhaps due to the belief that she was being helpful to the prosecution. On re-examination, she was much more open to answering in detail but this was not sufficient to prevent a successful application to cut approximately half the counts on the indictment before they went to the jury as there was no evidence to support them. The defendant was eventually convicted on 22 counts and received a concurrent custodial sentence of 15 years on each one. However, the case is likely to be appealed<sup>822</sup> and it is possible that the points will include the above comment by the video link assistant.

5.11.7 The above case highlights an important issue. The evidential issues in any given criminal case may be extremely complex. It is therefore vital to maintain neutral court procedures to ensure that the best evidence is admitted at trial. Peripheral procedures surrounding the use of the support measure must be rigorously maintained at all times to ensure a fair trial.

### 5.12.0 *Effectiveness of provision*

5.12.1 With the use of video link, as with the use of all support measures, it is submitted that there are certain benchmarks by which their success may be evaluated. Firstly, is the child less traumatised by giving evidence via video link?

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<sup>822</sup>

Personal communication by counsel to the author. (July 2015).

Secondly, is the child witness able to give evidence, improved or indeed, at all, due to the use of video link. Thirdly, does the child witness feel protected and better able to testify through the use of the support measure and is there any connection between that and the effective prosecution of offences against children in respect of reporting, attrition, plea, acquittal and conviction rates? The dearth of research and data in Ireland hinders any analysis of these issues in this area. Some light may be shed through consideration of the data which has been gathered in England and Wales and in Australia. *'Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings'*, a study undertaken by Plotnikoff and Wilson on behalf of the Nuffield Foundation and the NSPCC, indicates that there are significant practical issues from the point of view of the child witness in respect of giving evidence via live link there. These issues included being able to see the defendant, not being able to see the questioner as well as frequent equipment problems and delays.<sup>823</sup>

5.12.2 Hoyano and Keenan also examine various studies in respect of the effectiveness of the evidence given via video link. However, they note that empirical studies about the perceived impact of video link on juries yields mixed results.<sup>824</sup> One Western Australian study with actual jurors showed that most of them felt that the video link did not hinder their assessment of the child's credibility.<sup>825</sup> As Hoyano and Keenan note that it is probably impossible to resolve the issue of the impact of the technology on English juries, since the *Contempt of Court Act 1981*, s.8 prohibits research using actual jurors.<sup>826</sup> While there is no similar restriction in the relevant legislation in Ireland,<sup>827</sup> it is unlikely that the judiciary would sanction such research.

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<sup>823</sup> Joyce Plotnikoff and Richard Woolfson, *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (Plotnikoff & Woolfson/The Nuffield Foundation/ NSPCC July 2009) Chapter 8 at pps. 88-98. Joyce Plotnikoff and Richard Woolfson, *Young witnesses in Criminal Proceedings-A Progress Report on Measuring Up?* (Lexicon Limited/The Nuffield Foundation/ NSPCC June 2011).

<sup>824</sup> Laura Hoyano and Caroline Keenan, *Child Abuse, Law and Policy Across Boundaries* (Oxford University Press 2010) at p. 643 (n281).

<sup>825</sup> C O'Grady, *Child Witnesses and Jury Trials : an Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (Ministry of Justice, Government of Western Australia, Perth, Jan 1996)

<sup>826</sup> Laura Hoyano and Caroline Keenan, *Child Abuse, Law and Policy Across Boundaries* (Oxford University Press 2010) at p. 644.

<sup>827</sup> *The Juries Act 1976*.

5.12.3 The usefulness of the support measure in practice is in little doubt, however. Cashmore's research indicates that the use of live link, while not perfect, is effective.<sup>828</sup> New facilities in court rooms in this jurisdiction<sup>829</sup> reflect a greater capacity for child witnesses to give their evidence without having to enter the body of the court and be in the physical presence of the defendant. In this jurisdiction, there appears to be no data relating to how many times proceedings must be transferred to another jurisdiction for trial where facilities are not available and adequate in the home jurisdiction.<sup>830</sup> In addition, there is no research as to what operational difficulties exist in the course of the child witness giving evidence via live television link. Nor is there any analysis of how well practitioners deal with the technology. In certain cases observed by the author, practitioners could not maintain eye contact with the witness through video link while questioning him or her. This may be because, unfamiliar with the technology, they are looking at the screen when they should be looking at the camera. Newer technology in the Criminal Courts of Justice means that this is less of a problem as the positioning of the camera is improved in these courts. Certain practitioners tend to consult their notes rather than engage with the witnesses. This may make the witness feel further distanced from proceedings and uncomfortable while giving evidence. Whether this is unfamiliarity with the use of the support measure on the legal practitioner's part or a means by which the witness can be made uncomfortable cannot be determined. Yet it is something which the trial judge and prosecution counsel may need to be aware of and to intervene if necessary.

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<sup>828</sup> Cashmore, *Innovative Procedures for Child Witnesses* in H Westcott, G Davies and R Bull (eds) *Children's Testimony: a Handbook of Psychological Research and Forensic Practice* (John Wiley & Son, Chichester 2002) at p. 208.

<sup>829</sup> The Commencement Orders providing for the use of video link in various jurisdictions reflect the growing availability in the courts around the country:

*Section 13- Commencement Order for the Circuit Court sitting in Cork Circuit as of May 2, 2005 by the Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2005 (S.I. No. 221 of 2005).*

*Section 13 - Commencement Order for the District Court sitting in District No. 19 as of July 8, 2005 by the Criminal Evidence Act 1992 (Section 13) (Commencement)(No. 2) Order 2005 (S.I. No. 296 of 2005).*

*Section 13 commenced for the Circuit Court sitting in the South Eastern Circuit and the District Court sitting in District No.8 by the Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2007 (No. 52 of 2007) with effect from February 12, 2007.*

*Section 13 commenced for the Circuit Court sitting in the Midland Circuit and, the District Court sitting in District No. 9 by the Criminal Evidence Act 1992 (Section 13) (Commencement) (No. 2) Order (S.I. No. 572 of 2007) with effect from August 20, 2007.*

<sup>830</sup> The transfer of proceedings for the use of video link provided for under s.17 *Criminal Evidence Act 1992*.

5.12.4 Present legislative proposals do not include significant revision to current provisions to video link under s.13 *Criminal Evidence Act 1992*, s39 *Criminal Justice Act 1999* or ss 5 and 6 *Criminal Procedure Act 2010*. While there are proposals to amend other sections of the *Criminal Evidence Act 1992* with respect to the removal of wigs and gowns under as s.14 and recorded testimony under s.16, it appears from the *Criminal Law (Sexual Offences) Bill 2015* that there will be no revision to the current provision for video link. In addition, there does not seem to be any proposal for revision of the section in the *Criminal Justice (Victims of Crime) Bill 2015*. As it is now over twenty years since the introduction of the support measure, it is submitted that evaluation of video link would assist in understanding its efficacy in the prosecution of offences involving child witnesses. This could incorporate the use of screens in tandem with the use of video link.

### 5.13.0 *Screens and the use of video link*

5.13.1 The use of screens is permissible in this jurisdiction on the basis of the common law precedent of *R v Smellie*.<sup>831</sup> However, this facility has not been put on a statutory footing as yet. There is a proposal to do so under *Criminal Law (Sexual Offences) Bill 2015* which would insert a provision for the use of screens into Part III *Criminal Evidence Act 1992*.<sup>832</sup> The use of screens is quite similar video link and yet they may provide alternative solutions to the difficulties a child witness faces at trial. If the child witness is assessed as being of a sufficient age and maturity to be able to give evidence from the body of the court, it may be advantageous to use screens to shield the child witness from the sight of the defendant. The physical presence of the child witness in court may give better information to the judge and jury and prevent the ‘deadening’ effect which the video link may produce. It is important that a ‘one size fits all’ approach is not taken and that an assessment of the abilities of the child witness informs the discussion whether to provide support measures and, if so, what kind. It is also vital to take the witness’s views into account and to explain to him or her how the support measures work and what effect they will have in the courtroom. Unfortunately in this jurisdiction there is no

<sup>831</sup> The case of *R v Smellie* (1919) 14 Cr App R 128 (CA) established the precedent that screens may be used in order to shield the witness from sight of the accused.

<sup>832</sup> *New section 14A in Act of 1992 (Giving evidence from behind a screen) Criminal Law (Sexual Offences) Bill 2015.*

guidance similar to that published in England and Wales. *Achieving Best Evidence in Criminal Proceedings* observes that the views of the witness are likely to be of great importance in deciding which of the two very similar measures is most suitable.<sup>833</sup> It is also suggested / recommended that the witness should be informed that the defendant will be able to see the witness if video link is used.<sup>834</sup> The new provision contained within s.47 *Criminal Law (Sexual Offences) Bill 2015*<sup>835</sup> states that the defendant should be able to see and hear the witness. But it is submitted that the proposal is too restrictive and should be revised to allow for circumstances where the defendant has no difficulty with not being able to see the child witness when the latter gives his or her evidence. Where the witness feels unable to testify if he or she will be seen by the defendant, it could then be possible to use both screens and video link as appropriate.<sup>836</sup> This could mean that screens would be placed around the defendant so that the witness's demeanour may still be evaluated by the judge and jury while he or she gives evidence via video link and the witness may be heard by the defendant. There is no reported recent use of screens in Ireland and current guidance for child witnesses going to court refers to the use of video link alone.<sup>837</sup>

5.13.2 Equivalent guidance to *Achieving Best Evidence in Criminal Proceedings*<sup>838</sup> is required in this jurisdiction as current protocols and guidance in Ireland is neither

<sup>833</sup> 'Choosing between live link and screens.  
The views of the witness are likely to be of great importance in deciding which of the two very similar measures is most suitable.'

*Achieving Best Evidence in Criminal Proceedings*  
(March 2011)(Ministry of Justice) Para B.9.9 at p. 164.

See also s.19(3)(b) Youth Justice and Criminal Evidence Act 1999 which allows for the court to take the views of the witness in particular into consideration when deciding on the use of support measures.

<sup>834</sup> '...it should be carefully explained to the witness that the defendant will usually be able to see them on the television screen in the court (which may be a large plasma screen). This should be pointed out during the pre-trial visit to enable the witness to make an early and informed choice.'

*Achieving Best Evidence in Criminal Proceedings*  
(March 2011) (Ministry of Justice) Para B.9.9 at p. 164.

<sup>835</sup> '(2) A direction under subsection (1) shall ensure that the witness can see and hear, and be seen and heard by, (a) the judge and the jury, where there is a jury, (b) legal representatives acting in the proceedings, and (c) any interpreter, intermediary appointed under section 14, or other person appointed to assist the witness, and can be seen and heard by the accused.'

47. New section 14A in Act of 1992 (Giving evidence from behind a screen)  
*Criminal Law (Sexual Offences) Bill 2015*.

<sup>836</sup> 'It is possible, in appropriate cases, to have both live link and screens/ obscured monitors. For example, where a child witness is to give evidence by live link, but is distressed at the thought of being watched by the unseen defendant.'

*Achieving Best Evidence in Criminal Proceedings*  
(March 2011) (Ministry of Justice) para B.9.10 at p. 164.

<sup>837</sup> *Going to Court A DVD and booklet for young witnesses* The Courts Service.

<sup>838</sup> *Achieving Best Evidence in Criminal Proceedings* (Ministry of Justice) (March 2011).

comprehensive nor adequately detailed.<sup>839</sup> Full and comprehensive guidance is important so that all agencies and actors are aware of the difficulties involved using video link for the child witness.<sup>840</sup>

#### 5.14.0 Conclusion

5.14.1 The support measure of video link has been tremendously significant in assisting the child witness to give better evidence at trial as well as facilitating the child witness to give evidence at all in circumstances where being in the presence of the defendant may have proved overwhelming. The likelihood of trauma on the part of the child witness is now accepted as a realistic concern that needs to be addressed at trial. Whereas the support measure of video link has done a great deal to ensure that child witnesses are protected from the more difficult aspects of giving evidence, it has disadvantages which should be considered in each individual case. The desirability of alternatives should be assessed, such as the use of screens or giving evidence from the body of the court. The Law Reform Commission's observation that it is generally preferable to conduct trials in the traditional manner should be remembered.<sup>841</sup> It is also submitted that the revised legislation should require that the views of the child witness inform the decision as to which support measures are used at trial. The use of video link as a support measure, while helpful for child witnesses at trial in criminal proceedings, does not solve all the problems that they may face. An assessment of its actual efficacy in practice is required. The results of this evaluation may then feed into improvement in facilities and resources. They may also ground the drafting of comprehensive guidance and training for practitioners and all personnel who are involved with child witnesses. Consistent evaluation and ongoing revision of the appropriate guidance is required to ensure

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<sup>839</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children /Child Welfare, 2<sup>nd</sup> edn, 2013; *Going to Court A DVD and booklet for young witnesses* (The Courts Service). *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences*. An Garda Síochána, (July 2003).

<sup>840</sup> It is important therefore to be sensitive to the circumstances and the needs of the child witness and automatic assumptions as to the efficacy of certain support measures may not be helpful. For example, it may be particularly important in circumstances where offences have involved filming of the witness such as with pornography or sexual exploitation offences under the *Child Trafficking and Pornography Act 1998*. The very act of filming or of being filmed will itself be a source of trauma. Appropriate guidance should assist the practitioner's awareness of as many circumstances as possible.

<sup>841</sup> *Law Reform Commission Report on Child Sexual Abuse* (LRC 32-1990) (1990) para.7.09 at p. 71.



that the use and implementation of video link reflects the needs of the child witness as closely as possible.

## 6.0.0 Chapter VI - The Support Measure of Intermediaries

### 6.1.0 Introduction

6.1.1 The use of an intermediary in criminal proceedings is arguably one of the most controversial<sup>842</sup> and problematic of the support measures available. This may be due to the fact that it requires the creation of a new persona with the trial process.<sup>843</sup>

S. 14 *Criminal Evidence Act 1992* states:

(1) Where—

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 18 years of age is giving, or is to give, evidence through a live television link,

the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

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<sup>842</sup> ‘Apart from the provisional proposal to admit hearsay without cross-examination but with corroboration, this (the use of a child examiner) was perhaps the most controversial proposal in our Consultation Paper. Certainly lawyers attending our Seminar appeared to be quite exercised about it.’

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.21 at p. 76.

<sup>843</sup> ‘There is no getting around the fact that English intermediaries are little short of revolutionary. This is the first time anyone other than the judge or opposing counsel has had the power to interrupt and query counsel’s examination in a criminal trial, let alone to be involved in discussions over pre-trial directions as opposed to merely giving evidence at counsel’s behest. The intermediary is the first new, active role to be introduced into the criminal trial in two centuries, and could be seen as a potential threat to the principle of party control of the evidential process.’

Emily Henderson, “A very valuable tool”: judges, advocates and intermediaries discuss the intermediary system in England and Wales, *International Journal of Evidence & Proof* (2015), 19(3), 154-171 at p. 155.

(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

The intermediary acts as a conduit between the court and the vulnerable witness in order to facilitate improved communication between the latter two. Since its commencement on 3 March 1997,<sup>844</sup> s. 14 of the *Criminal Evidence Act 1992* has permitted the use of intermediaries in this jurisdiction, yet remarkably there has been no reported case in which the special measure has been invoked. Writing in 1999, Charleton *et al* state: “The writers are not aware of any case, apart from where a child has had an especial handicap such as deafness, where a child examiner has been used.”<sup>845</sup> It appears that in the intervening time that position has not changed. Houston confirms that Section 14 is never used and does not feature in the public information materials on special measures in Ireland.<sup>846</sup> The use of intermediaries under s.14 in this jurisdiction has also been described as a ‘dead letter’ provision for the two decades that the Act has been in force.<sup>847</sup> In a noteworthy development, the Circuit Court acting on its inherent jurisdiction granted an application for the use of an intermediary for an accused. Without the benefit of an intermediary the court felt that the defendant, who suffered from a mild intellectual disability, would not be able to participate fully in the trial process.<sup>848</sup> In relation to child complainants, in December 2013, an application for an intermediary was observed by the author in *DPP v AG*.<sup>849</sup> The case involved the prosecution of sexual offences against a complainant who had a mild intellectual disability. The application was refused by the judge in Court 5 in the Dublin Circuit Courts in the Criminal Court of Justice. Court 5 is the ‘administration court’ where pre-trial issues may be resolved prior to the case commencing before the trial judge. The judge in this matter stated that any difficulties regarding communication issues at the trial, which was to commence 3 days later, could be dealt with by counsel. He added that if this proved to be inadequate, an application could be made to the trial judge for the use of an

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<sup>844</sup> March 3, 1997 (reg. 2 of the *Criminal Evidence Act 1992 (Sections 14 and 19) (Commencement) Order, 1997, (S.I. No. 66 of 1997)*).

<sup>845</sup> Charleton, McDermott and Bolger, *Criminal Law* (Butterworths 1999) Para 8.82 at p.600.

<sup>846</sup> Anne Houston, *Children’s Understanding of Questioning in Court* Scottish Criminal Law SCL 522 (2008).

<sup>847</sup> Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury 2014).para. 4.63 at p.145.

<sup>848</sup> *DPP v Paul Merrigan* (Bill No.: 183/14).

<sup>849</sup> *DPP v AG*, Dublin Circuit Court, December 2013

intermediary. When the trial had begun and the time came for the complainant to give evidence via video link, the video link system malfunctioned. In the ensuing delay, the defendant pleaded to a lesser charge thus obviating the need for the complainant to give evidence.<sup>850</sup>

6.1.2 The use of an intermediary clearly inserts an additional, potentially complex layer into the questioning of a witness at trial. The risk of interference in the examination of the witness by counsel may explain the historical ambivalence that the measure has generated in Ireland. Elsewhere, concerns surrounding the use of the measure have prompted resistance to its enactment in legislation and its use in the criminal courts.<sup>851</sup> Yet the position in Ireland contrasts with the active use of the support measure in certain countries such as South Africa<sup>852</sup>, Israel<sup>853</sup> and particularly in England and Wales.<sup>854</sup> In the latter jurisdiction, the use of intermediaries has become widespread and routine in criminal proceedings involving vulnerable witnesses and has been a catalyst in a cultural change in the trial process since its first use in pilot projects in 2004. Even though intermediaries have only been operational within the criminal justice system in England and Wales since 2004, the changes that the provision has initiated are ground-breaking. Practitioners and judges appear to be incorporating the expertise of the intermediary into the trial process.<sup>855</sup> Intermediaries have contributed to the modification of overly complex

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<sup>850</sup> The author has been informed that two trials, which will take place in 2016, will involve an application for an intermediary. These applications will take place in October 2015. Both cases involve sexual offences against very young children one taking place in the Circuit Court and the other in the Central Criminal Court. These two recent cases may reflect a greater willingness on the part of practitioners to consider availing of the special measure and this may presage the belated implementation of intermediaries at the coalface of criminal practice.

<sup>851</sup> As Hoyano and Keenan note, intermediaries have not become an established feature of adversarial trials in Australia, New Zealand, Canada or the United States. See Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy Across Boundaries* (Oxford University Press 2010) pg. 665. In addition, the support measure was not included in the range of measures made available to child witnesses in the *Vulnerable Witnesses Act (Scotland) 2004* nor in the *Witnesses and Victims Act (Scotland) 2014*.

<sup>852</sup> In South Africa, the eligibility requirement for an intermediary under s.170A of the *Criminal Procedure Act 1977*, for any witness under the age of 18 in any criminal proceedings which might cause undue mental stress and suffering to the witness.

<sup>853</sup> *The Law of Evidence Revision (Protection of Children) 5718-1955* (Israel) which came into force on the 20<sup>th</sup> September 1955. The role of 'youth interrogator' in Israel will be examined in detail below but while the role is similar in aspects to the function of intermediaries in South Africa and England and Wales in that the interrogator acts as an interface between the investigation and trial agencies, it must be mentioned that it is dissimilar in a particular aspect i.e. the interrogator may give evidence wholly on behalf of the witness where he or she deems this to be appropriate.

<sup>854</sup> 'S.29 Examination of witness through intermediary.'  
*Youth Justice and Criminal Evidence Act 1999*.

<sup>855</sup> Plotnikoff and Woolfson note this shift in perception by practitioners within the criminal justice system:

cross-examination and to the facilitation of child witnesses being more fully heard within the criminal process. The use of ground rule hearings have become a mainstay of cases in that jurisdiction<sup>856</sup> involving vulnerable witnesses. This has been discussed previously<sup>857</sup> and below in terms of the evolution of protections where the court may rely on its inherent jurisdiction to shield the child witness from the stresses of the trial process.<sup>858</sup>

6.1.3 In this chapter, the origins and scope of the legislative provision for intermediaries in this jurisdiction will be examined. The causes of the under utilisation will also be explored. The use of corresponding measures in Israel and South Africa will be considered. However, law and practice in England and Wales will form a particular focus in the chapter given the profound impact that intermediaries have exerted on the position of vulnerable witnesses in that jurisdiction.

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*“The evaluation of the intermediary scheme saw a sea-change in attitude among judges and advocates after their first experience of using Registered Intermediaries. For example, a barrister commented, “A defence advocate is naturally suspicious of doing anything like this. As it was, I ended up being the one who was surprised - by the extreme difficulty the complainant had in understanding what I thought were the simplest questions”*

Joyce Plotnikoff and Richard Woolfson, *“Kicking and Screaming - The Slow Road To Best Evidence” Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at pg. 31.

*‘The intermediaries’ own responses also indicate that the system is a success. The intermediaries gave multiple instances of cases in which they had facilitated the evidence of a wide range of people with serious communication difficulties. Although they report that some judges and advocates remain resistant to their presence, they were optimistic that overall judges and advocates are improving both in their skills in handling such cases and in their awareness of and ability to make the most of intermediaries. There are signs that the intermediaries are becoming more confident and proactive and they report that their growing confidence is enabling them to better fulfil their role.’*

Emily Henderson, *“A very valuable tool”: judges, advocates and intermediaries discuss the intermediary system in England and Wales*, *International Journal of Evidence & Proof* (2015), 19(3), 154-171 at pps. 168-9.

<sup>856</sup> *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr.App.R.2 at para 22 at p. 16; The Court of Appeal endorsed a recommendation of the Advocacy Training Council report, *Raising The Bar* (2011). See also *R v Cokesix Lubemba*; *R v JP* [2014] EWCA Crim 2064.

<sup>857</sup> See above at Para 2.18.4

<sup>858</sup> See Para 5.11.4

## 6.2.0 The role of the intermediary

6.2.1 The functions of an intermediary may vary in relation to the parameters set down by the legislative provision.<sup>859</sup> The level of involvement of the intermediary at trial will also depend on the capacity of the child witness to engage in criminal proceedings as well as the skill of counsel to ask questions which the child will understand.<sup>860</sup> The intermediary is a conduit between the court and the child witness, and may assist the child witness to overcome any communication difficulties he or she may have.<sup>861</sup> These difficulties may be due to the individual age, educational, cognitive, psychological, emotional or physical characteristics of the child witness.

6.2.2 In theory, an intermediary may fulfil a range of functions but due to policy and practice these functions may range from one jurisdiction to another. The use of an intermediary may have the benefit of protecting the child witness from the stress and trauma of examination in chief and cross-examination questioning in a trial process as he or she forms a barrier between the interlocutor and the child witness. This protection may be furnished by the intermediary where he or she merely repeats the questions of counsel or the unrepresented defendant in an appropriate manner to the child witness. Additional advantage may flow where the intermediary goes further and explains the language of the questions to the child witness. In certain jurisdictions, the intermediary assumes a more proactive role. He or she may be able to assess the child witness and explain the parameters of linguistic ability, educational limitations and emotional needs to the court so that a framework for

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<sup>859</sup> For example in this jurisdiction s.14 *Criminal Evidence Act 1992* provides that questions put to the witness may be 'translated' so that the witness may understand them but there is no provision for the answers of the witness to be translated by the intermediary for the benefit of the court. S.29 *Youth Justice and Criminal Evidence Act 1999* in England and Wales allows for the meaning of both the questions and the answers to be interpreted by the intermediary for the benefit of the court.

<sup>860</sup> 'A couple of advocates also commented that the extent to which intermediaries intervene relates to counsel's skill rather than the intermediary's overzealousness. When training I do say 'if you do your job properly the intermediary won't have to utter a word'.'

Emily Henderson, "A very valuable tool": judges, advocates and intermediaries discuss the intermediary system in England and Wales, *International Journal of Evidence & Proof* (2015), 19(3), 154-171 at p.164.

<sup>861</sup> "Intermediaries are trained professionals who facilitate communication with vulnerable witnesses in police interviews and when giving evidence in court."

Joyce Plotnikoff and Richard Woolfson, *Young Witnesses in Criminal Proceedings – A Progress Report to Measuring Up?*

(Lexicon Limited; The Nuffield Foundations – June 2011) *Para. 7 at p. 4.*

'A Registered Intermediary's primary responsibility is to enable complete, coherent and accurate communication between the witness and the court.'

*Code of Practice for Intermediaries* (2005) Home Office.

questioning may be agreed that respects the necessary boundaries. The intermediary may also be able to intervene at trial where any questioning breaches these parameters and alert the court when he or she perceives that the child witness is in need of a break or requires assistance.

6.2.3 In this jurisdiction, the principal goal of the support measure is to allow the witness to give evidence in a manner within the benchmark of competency of s.27 of the *Criminal Evidence Act 1992* which is consistent with the witness being capable of giving an intelligible account of events which are relevant to the proceedings.<sup>862</sup>

### 6.3.0 *The provision for intermediaries in criminal trials*

6.3.1 Statutory provision for the use of an intermediary for child witnesses in criminal proceedings was enacted in 1992 but only entered into force in 1997.<sup>863</sup> Section 14 of the *Criminal Evidence Act 1992*<sup>864</sup> provides for the use of intermediaries where a witness, under 18 years of age, is giving evidence via video link in criminal proceedings where a person is accused of an offence to which the section applies.<sup>865</sup> The offences in question are predominantly of a sexual and

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<sup>862</sup> In England and Wales, the link with competency is provided for legislatively in s.54(3) of the *Youth Justice and Criminal Evidence Act 1999* which states that in determining the competence of a witness the court shall treat the witness as having the benefit of any directions under section 19 of the Act which the court has given, or proposes to give, in relation to the witness.

<sup>863</sup> (Section 14 and 19) (Commencement) Order, 1997, (S.I. No.66 of 1997).

<sup>864</sup> 'S.14. Evidence through intermediary,

(1) Where—

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 18 years of age is giving, or is to give, evidence through a live television link, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.'

*Criminal Evidence Act 1992.*

<sup>865</sup> 'S12.

*This Part applies to—*

(a) a sexual offence,

(b) an offence involving violence or the threat of violence to a person,

(c) an offence under section 3, 4, 5 or 6 of the *Child Trafficking and Pornography Act 1998*,

(d) an offence under section 2, 4 or 7 of the *Criminal Law (Human Trafficking) Act 2008*, or

(e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c) or (d).'

violent nature. S.14 allows the intermediary to either repeat the question to the child witness or, in a manner appropriate to his or her age and mental condition, convey to the child witness the meaning of the questions being asked.<sup>866</sup> The section stipulates that the intermediary shall be appointed by the court but does not specify who may act as an intermediary beyond stating that ‘it shall be a person competent to act as such.’<sup>867</sup>

6.3.2 In many ways, section 14 is, perhaps, more significant for what it does not do as opposed to what it does do. It does not specify what qualifications the intermediary must have. It does not specify the person or persons to whom the intermediary owes his or her duty. It does require the intermediary to take an oath, affirmation or declaration to the court before participating in the court process. It does not envisage an expert role for the intermediary in the sense of assessing the individual characteristics of the child witness prior to trial and submitting a report to the court detailing any potential limitations that the child witness may have in giving evidence. The provision allows the intermediary to repeat questions to the child but it does not allow the intermediary to explain to the court any answer given by the child witness which is not readily understood by the court. The section does not specify the physical location the intermediary should occupy while the child is giving evidence. It does not allow the child witness to give evidence other than via video link. Indeed, the coupling of the special measures has the effect of automatically excluding recourse to an intermediary in the case of the giving of evidence by a child defendant.<sup>868</sup>

#### **6.4.0 Background and impetus for the provision**

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*Criminal Evidence Act 1992.*

S.14 (2) *Criminal Evidence Act 1992.*

S.14 (3) *Criminal Evidence Act 1992.*

‘13. Evidence through television link

(1) In any proceedings [(including proceedings under section 4E or 4F of the Criminal Procedure Act, 1967)] for an offence to which this Part applies a person **other than the accused** may give evidence, whether from within or outside the State, through a live television link—

(a) if the person is under 18 years of age, unless the court sees good reason to the contrary,

(b) in any other case, with the leave of the court.

(2) Evidence given under subsection (1) shall be video recorded.

(3) While evidence is being given through a live television link pursuant to subsection (1) (except through an intermediary pursuant to section 14 (1)), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.

*Criminal Evidence Act 1992.*

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6.4.1 The foundations of section 14 have their basis in the Law Reform Commission's *Consultation Paper on Child Sexual Abuse of 1989*<sup>869</sup> and its subsequent *Report on Child Sexual Abuse of 1990*.<sup>870</sup> The *Consultation Paper* first mentions the concept of a child examiner in Chapter Seven, in relation to its examination of proposals for reforms to assist the child witness in giving evidence.<sup>871</sup> In making these proposals, the Commission stated that: "...the relief of trauma to the child is the Commission's paramount objective in making provisional recommendations in this Paper."<sup>872</sup> The Commission went on to outline its provisional recommendation in relation to the use of child examiners, as it was called in the Paper. The *Consultation Paper* outlined a recommendation for a 'child examiner' or intermediary to act as a conduit and to establish and maintain rapport and ease of communication with the child witness.<sup>873</sup>

6.4.2 After receiving written submissions from appropriate and interested parties as well as holding a public seminar on the 25<sup>th</sup> November 1989, which allowed the opinions of judges, lawyers, doctors, psychologists, social workers, officers of the Departments of Health and Justice and other representatives of interested organisations and parties to be considered, the Commission published its *Report on Child Sexual Abuse* in September 1990. The recommendation for the use of a child examiner was ultimately retained.<sup>874</sup>

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<sup>869</sup> Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August,1989).

<sup>870</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990).

<sup>871</sup> Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August,1989) Para. 7.035 D: Options for Reform at pg. 145.

<sup>872</sup> Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August,1989) Para. 7.036 at p. 145.

<sup>873</sup> 'During the prosecution and, if possible, the investigation of these offences, the child should be questioned by disinterested but skilled child examiners who are experienced in child language and psychology, and are appointed by the court. The examiner would act as the conduit for all questions from the lawyers in the case, from the court or from the accused if he or she is representing himself or herself. The examiner's role would be to establish and maintain rapport and ease of communication with the child witness while remaining detached from the issues in the case.'

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August,1989). Chapter 10 - Summary of Provisional Recommendations - C. *The Law of Evidence*, (No.44) at p. 206.

<sup>874</sup> 'In a prosecution for child sexual abuse, the court should have power to appoint an examiner, for special reason, on the application of the DPP. The accused, however, should continue to be entitled to cross-examine the alleged victim himself or through his counsel or solicitor at the deposition stage and (when the presence of the child is required) at the trial, except where the court is satisfied that, having regard to the age and/or mental condition of the alleged victim, the interests of justice require that the cross-examination be conducted through a child examiner, in which event the examiner should be required to put to the alleged victim any question permissible under the rules of evidence by the defence.'

6.4.3 The Report helpfully contains far more information in relation to the reasoning behind the recommendation for the use of a child examiner and confirms that the issue of the unrepresented defendant acted as a catalyst in relation to the suggestion of the child examiner.

Despite every effort to shield the complainant by screens or the use of closed-circuit television, where an accused represented himself, as happened, for example in the case of *DPP v T*,<sup>875</sup> the complainant would hear his voice and would have to answer his questions which would undoubtedly be couched in intimate and upsettingly familiar technology. Since we did not consider it practicable or desirable to compel accused persons to avail of legal representation, we recommend the use of an intermediary in such circumstances.<sup>876</sup>

6.4.4 In acknowledging that the provisional recommendation went further than the use of the measure where the defendant was representing him or herself, the authors of the Report indicated that they envisaged the use of a child examiner at the investigation and prosecution of the offences where the examiner would act as a conduit for all questions from lawyers and as stated above, that his or her role would be to establish and maintain rapport and ease of communication with the child witness while remaining detached from the issues in the case.<sup>877</sup>

6.4.5 The Report outlined why the proposal, which was termed “radical” by the Commission<sup>878</sup> was made.<sup>879</sup> It observed that the adversarial nature of the legal

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*Child examiners should be experienced at interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence.*  
Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 9: Summary of Recommendations. Recommendation No. 57 at p. 95.

<sup>875</sup> *DPP v T*, Unreported, Court of Criminal Appeal, 27<sup>th</sup> July 1988.

<sup>876</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.21 at p. 76.

<sup>877</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.22 at p. 77.

<sup>878</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.23 at p. 76.

system in this jurisdiction means that the defence counsel is under an obligation to his or her client to use every legitimate means to secure the acquittal of his or her client.<sup>880</sup> The Report also highlights the human frailties inherent in the adversarial legal system:

[...] there will always be defending advocates who will seek to harass or bully a child witness in a way which is not only psychologically harmful to the child but may also be damaging to their own client's case.<sup>881</sup>

6.4.6 The Report states that the nature of cross-examination as described above, led the Commission to conclude that too high a price was being paid for the right to conduct a wholly uninhibited and "direct" cross-examination of a child witness. However, the Commission was unsure as to whether the use of a child examiner should be a universal support measure made available to all child witnesses giving evidence or whether it should be made available on a case by case basis. The Commission had concerns with the concept of whether the accused should be deprived of the right of cross-examination in the trial of every offence and felt that it would be necessary to make an application for the use of a child examiner in every instance where the child witness was eligible for the support measure.<sup>882</sup> The court

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<sup>879</sup> The word radical is also used by Fennell who states that provisions under Part III of the Criminal Evidence Act 1992, including s.14 are "*quite radical in departing from oral testimony being given by witnesses in the presence of the accused, subject to the sanction of the oath and cross-examination.*" Fennell does point out that the use of an intermediary is mandated within the provision, on the basis of the 'interests of justice', Caroline Fennell, *The Law of Evidence In Ireland* (Bloomsbury Professional, 3<sup>rd</sup> edn.) (2009) para.5.18 at p.197.

<sup>880</sup> 'While he must not mislead the court of trial in any way, it is not his duty to ensure that the enquiry in which he is participating arrives at the truth. Hence, he is perfectly entitled to conduct a cross-examination which is designed to unsettle a child witness alleged to have been the victim of an offence by his client and reduce his or her credibility as a witness to the lowest possible level.'

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.23 at p. 77.

<sup>881</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.23 at p. 77.

<sup>882</sup> *We have, however, had more difficulty in arriving at a conclusion as to whether the accused should be deprived of the right of cross-examination in the trial of every such offence, without regard to the circumstances of the particular case with which the court is concerned. While we are satisfied, as with the "American exceptions" to the Rule against Hearsay, and the proposal to admit "out of court" videos without the child being available, that the proposal to use an examiner in all cases where use of closed circuit television facilities was authorised would not necessarily be unconstitutional, nevertheless, after further consideration, we are not disposed to recommend the universal use of examiners at this time.*

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.25 at p. 78.

could then consider the individual factors of the case and determine whether the use of a child examiner was warranted in the particular circumstances. It is significant that although the Commission did not feel that the use of a child examiner would invariably be unconstitutional, it was uncertain whether the accused should be deprived of the right of cross-examination in the trial of every such offence, without regard to the circumstances of any particular case.

6.4.7 While not explicitly outlining the training or qualifications which might be necessary to carry out the functions of a child examiner, the Commission noted: 'It will take time to train examiners, whether they be lawyers acquiring psychological skills or vice versa.'<sup>883</sup>The Report went on to state that child examiners should be experienced in interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence.<sup>884</sup> There is no detail as to who might provide the training or what kind of training might be involved.

6.4.8 The Commission recommended that cross-examination through the defence counsel should be the normal procedure although the court should have the power to appoint an examiner, for a special reason, on the application of the Director of Public Prosecutions. An intermediary should be appointed to facilitate the evidence of the child witness only where it was considered necessary by the court. The Report stated that the accused should continue to be entitled to cross-examine the alleged victim himself or through defence counsel:

except where the court is satisfied that, having regard to the age and/or mental condition of the alleged victim, the interests of justice require that the cross-examination be conducted through a child examiner, in which event the examiner would be required to

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<sup>883</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)*. (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.26 at p. 78.

<sup>884</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.26 at p. 78.

put to the alleged victim any question permissible under the rules of evidence requested by the defence.<sup>885</sup>

6.4.9 The need to protect the child witness where the defendant is unrepresented is not expressly contained in the final legislation and it remains the case that a child witness in this jurisdiction may be personally examined by a defendant. Current proposals will amend this position if legislated for under the *Criminal Law (Sexual Offences) Bill 2015*<sup>886</sup> and this will follow legislative positions in other jurisdictions.<sup>887</sup>

6.4.10 The Report limits the support measure to cases of prosecution for child sexual abuse<sup>888</sup> and states that the court should have power to appoint an examiner, for special reason, on the application of the Director of Public Prosecutions. However, there is no reference to the criteria which the court must consider regarding the application other than the age and/or mental condition of the witness. To whom the examiner owes his or her duty is a question that remains unanswered not only in the recommendation of the Report<sup>889</sup> but also in section 14 of the *Criminal Evidence Act 1992*.<sup>890</sup> If the child examiner owes his or her duty to the

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<sup>885</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)*. (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.26 at p. 78 and Chapter 9: Summary of Recommendations. Recommendation No. 57 at p. 95.

<sup>886</sup> New section 14C in Act of 1992, "Protection against cross-examination by accused" s.35 *Criminal Law (Sexual Offences) Bill 2015*.

<sup>887</sup> Ss. 34, 35 or 36 of the *Youth Justice and Criminal Evidence Act 1999*; *Restrictions on cross-examination of witness*, Criminal Procedure Rules at para. 31.1. (*England and Wales*); S.106G *Cross-examination of protected witness by unrepresented accused (Australia)*; S. 95. *Restrictions on cross-examination by parties in person Evidence Act 1906* (New Zealand).

<sup>888</sup> "In a prosecution for **child sexual abuse** (emphasis added), the court should have power to appoint an examiner, for special reason, on the application of the DPP."

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)*. (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.26 at p. 78 and Chapter 9: Summary of Recommendations. Recommendation No. 57 at p. 95.

<sup>889</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)*.

<sup>890</sup> S.29(5) *Youth Justice and Criminal Evidence Act 1999* requires the Registered Intermediary to make a declaration.

In England and Wales the declaration of the Registered Intermediary is:

"I solemnly, sincerely and truly declare that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding."

s.29.7 *Criminal Procedure Rules* England and Wales (2014)

See also *The Registered Intermediary Procedural Guidance Manual* (Victims and Witnesses Unit, Ministry of Justice) (February 2012) para.1.56 at p.19.

The intermediary in England and Wales is deemed to be an officer of the court and not an expert witness. "Intermediaries are officers of the court, not expert witnesses, but they do provide the court with expertise from different disciplines, principally speech and language therapy."

court, the role is non-partisan and the goal of the special measure must surely be to maximise the evidence for both prosecution and defence.

### 6.5.0 Research in England and Wales

6.5.1 By the time of the publication of the *Report on Child Sexual Abuse*, the Law Reform Commission was in a position to benefit from the research of the Home Office in the United Kingdom. The Home Office had set up an *Advisory Group on Video Evidence* to examine the efficacy of innovative support measures for vulnerable witnesses. The *Report of the Advisory Group on Video Evidence*,<sup>891</sup> also known as the “Pigot Report”, chaired as it was by HH Thomas Pigot QC, also recommended the use of a child examiner or intermediary.<sup>892</sup> This was commented on by the authors of the Law Reform Commission *Report on Child Sexual Abuse*.

We have also noted that, since we made our provisional recommendations, a majority of those subscribing to the Pigot Report recommended that the trial judge should have a discretion at all times to appoint an examiner where a witness was very young or very disturbed.<sup>893</sup>

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Joyce Plotnikoff and Richard Woolfson, “*The Challenge of Questioning Children at Court*” Presentation delivered on 21 February 2011 in Middle Temple Hall, London at p. 6.

<sup>891</sup> Home Office, *Report of the Advisory Group on Video Evidence* (1989, London: Home Office).

<sup>892</sup> ‘2.32 A majority of the group has concluded, particularly in view of the recommendations which we will make subsequently about the competence of child witnesses, that the trial judge should be able to make special arrangements for the examination of very young or very disturbed children at the preliminary hearing if he thinks this is appropriate. The majority propose that the judge’s discretion, which we have already permitted, should extend where necessary to allowing the relaying of questions from counsel through a paediatrician, child psychiatrist, social worker or person who enjoys the child’s confidence. In these circumstances, nobody except for the trusted party would be visible to the child, although everyone with an interest would be able to communicate, indirectly, through the interlocutor.

2.33 We recognise that this would be a substantial change and we realise that there will be unease at the prospect of interposing a third party between advocate and witness. Clearly some of the advocate’s forensic skills, timing, intonation and the rest, would be lost, and it is, of course possible that a child might be confused by being subjected to testing questioning from someone regarded as a friend. Nevertheless, we do not find these objections conclusive. Where it is absolutely impossible for counsel to communicate successfully with a child there is, in our view, no great difference of principle between the use of someone who can do so and the employment of an interpreter where a witness cannot speak English. Neither technique is entirely satisfactory but both can prevent the loss of crucial evidence without which the court cannot do justice.’

Home Office, *Report of the Advisory Group on Video Evidence* (1989, London: Home Office) para 2.32 and 2.33 at p. 24.

<sup>893</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Chapter 7: *Making It Easier for Children To Give Evidence* para. 7.24 at p. 77.

6.5.2 The reasoning behind the suggestion of an interlocutor in the Pigot Report was noted by Ellison:

The use of intermediaries was first proposed in 1989 by the Pigot Committee which recommended that the court should have discretion to order exceptionally that questions an advocate wishes to put to a child witness should be relayed through a person approved by the court who enjoys the child's confidence, such as a child psychiatrist or social worker. Preventing the loss of potentially crucial evidence was the primary perceived advantage of the scheme.<sup>894</sup>

6.5.3 This factor i.e. the loss of potentially crucial evidence is not contained in the reasoning of the Law Reform Commission in either its *Consultation Paper*<sup>895</sup> or *Report on Child Sexual Abuse*.<sup>896</sup> While the risk of psychological damage and trauma to the child witness was one of the factors that influenced the Commission i.e. the capturing of evidence which might prove crucial in the prosecution of the offences was an important objective behind the Pigot Report's recommendation albeit in exceptional circumstances and for only very young and very disturbed witnesses.

6.5.4 The current legislation in England and Wales, s. 29 of the *Youth Justice and Criminal Evidence 1999* has as its background the goal of maximising the quality of the evidence.<sup>897</sup> This creates a different context for the court's decision to appoint or

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<sup>894</sup> Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press 2001) (n50), pp.125-126.

<sup>895</sup> "...the relief of trauma to the child, is the Commission's paramount objective in making provisional recommendations in this Paper."

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989) Para. 7.036 at p. 145.

<sup>896</sup> Para 7.01, Chapter Seven of the Law Reform Commission Report on Child Sexual Abuse states: ... *there is a universal agreement that it is traumatic for children to give evidence of unpleasant experiences which may lead to further circumstances which culminate in a failure to report and/or prosecute the crime which may encourage further abuse.*

Law Reform Commission of Ireland, *Report on Child Sexual Abuse* (September, 1990) Para. 7.01 at p. 67.

<sup>897</sup> 'S.19 Special measures direction relating to eligible witness.

'(2)Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—

not to appoint of the child examiner or intermediary. It places on the court an onus not only to assist the witness as far as possible but to see such assistance as a means of ensuring a fair trial for all parties through maximizing the evidence available to the court. While the courts in this jurisdiction have a similar obligation under Art.38.1 of the Constitution of Ireland, the express criteria contained in the English provision provides greater detail as to what objective the court must consider when considering an application for support measures.

### 6.6.0 Concerns regarding intermediary legislation prior to commencement

6.6.1 An analysis of the Dáil debates prior to the passing of section 14 may give some indications as to why the provision has not been used in this jurisdiction to any extent to date. The reservations of the opposition parties to the introduction of intermediaries predominantly focused on the lack of specific detail contained in the section with regard to the function and training of the intermediary.

6.6.2 The impetus for the new legislation was outlined in the Bill by Mr. Pádraig Flynn, Minister for Justice, at a second reading of the Bill on the 3<sup>rd</sup> March 1992.<sup>898</sup> The risk of perpetuation of offences against children due to the difficulties of prosecution where a child witness would find it difficult or impossible to give evidence was clearly an important factor in the introduction of the proposed legislation, as was the need to limit, as far as possible, the harm caused to the child

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(a)determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and

(b)if so—

(i)determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and

(ii)give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.’

*Youth Justice and Criminal Evidence Act 1999.*

See also Rule 1.1.Overriding Objective *Criminal Procedure Rules 2014* (Part 1 as in force on 6 October 2014).

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‘At present there are serious difficulties where children are required as prosecution witnesses in cases of physical or sexual abuse. The child may be too young to give evidence at all and no prosecution can be taken. Even where the child can give evidence the court appearance may be disturbing and harmful. It involves facing the accused again in the atmosphere of a crowded courtroom. It involves the ordeal of examination and cross-examination. There is sometimes the need to denounce a loved relative and also, perhaps, the possibility of a future threat from the accused. Understandably, there is a desire to shield children from such an experience, often leading to a failure to report or prosecute the crime. That situation encourages further abuse.’

Mr. Pádraig Flynn, Minister for Justice, 416 Dáil Debates col. 1284 (3 March 1992).



witness by the giving of his or her evidence in court. The significance of these proposed innovations and the need for legislative development in light of the degree of physical and sexual abuse of children, in Ireland and other countries, was acknowledged by the then Minister for Justice.<sup>899</sup>

6.6.3 However, the procedural mechanics of the role of the intermediary were not outlined by Mr. Flynn. This absence of legislative clarity and detail was seized upon by Alan Shatter, then Fine Gael Front Bench spokesman, concerning the introduction of intermediaries.<sup>900</sup> Mr. Shatter raised a range of questions regarding the proposed persona of the intermediary:

Will the intermediary be a member of the legal profession? Will it be a social worker, a barrister, a friend or relation of the victim? Presumably it will not be a friend or relation of the accused. What qualifications will an intermediary have? Will it be an ordinary GP? Should it be a child psychiatrist? What is their function? Will they repeat questions which the prosecution or the defence want to ask? When this Bill is passed I should not like to see that there are sections in it which are unworkable.<sup>901</sup>

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<sup>899</sup> *‘These are very substantial changes in the law of evidence in criminal proceedings. They are however paralleled in many other countries where, as here, the extent of physical and sexual abuse of children has been underestimated and where the existing law has made it difficult, and in many cases impossible, to bring offenders to justice. The new provisions provide a challenge to judges and the legal profession but I have no doubt that they will surmount any initial difficulties in the operation of the new legislation.’*  
416 Dáil Debates col. 1287 (3 March 1992).

<sup>900</sup> *‘If someone is accused of a serious offence, of an assault or sexual assault, and their counsel has instructions to cross-examine someone to elicit the truth, and that person is denying that he or she has committed this assault, if a series of questions is to be put to a witness to tease out the truth, will the counsel for the accused whisper questions to an intermediary who will ask them in exactly the same language? Will the counsel for the accused provide a series of written questions for the intermediary to put to the witness? In what way can the questions be followed up? If a reply comes back that no one has anticipated, how does the instant cross-examination take place? I have already said I am concerned about some of the pressures put on people who have been the victims of these appalling events but there is substantial concern that we could, by doing that, wrongly send people to jail for offences they have not committed. I do not know how this proposal in relation to an intermediary will work in practice and I have considerable worries and reservations about it’.*

<sup>901</sup> Alan Shatter, Fine Gael Front Bench spokesman, 416 Dáil Debates col. 1305 (3 March 1992).  
416 Dáil Debates col. 1306 (3 March 1992).

Mr. Shatter highlighted concerns regarding the constitutionality of the section.<sup>902</sup>In addition, he raised questions concerning the financial implications of the appointment a consideration which has not been addressed to date.<sup>903</sup>

6.6.4 The constitutionality of the provision in respect of the defendant's right to a fair trial, the lack of clarity of the role, the training and the appointment of the intermediary, as well as the practical aspects of the cost and payment of the intermediary, are issues that were not ultimately addressed by the Minister for Justice, Pádraig Flynn, nor the Minister of State, Willie O'Dea. While the difficulties with the provision were highlighted in the Dáil debates, they were ultimately not resolved when the Bill was passed.

6.6.5 With the benefit of hindsight, it seems that many of Mr. Shatter's points were valid and prophetic. It appears that the lack of clarity and detail within the legislation has led to the section becoming redundant or at best underused. The enactment of intermediaries in England and Wales suggests that the difficulties encountered in Ireland could and perhaps should have been overcome. Aside from the matters noted above, the absence of best practice in the appointment and training of intermediaries would in any event undermine the special measures in practice. Early assessment by the Gardaí in the course of the investigation of the complaint is necessary and this in turn assumes awareness on the part of the investigating member of the availability of

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<sup>902</sup> 'I have a very real and serious concern that section 13 (as it was in the Bill), though well intended, first, will not work and, second, may be unconstitutional and violate Article 38 of the Constitution in the context of the due process provisions. I would also be seriously concerned that if this section came into force and it was applied, and someone was convicted of a sexual offence — who should rightly be convicted because they actually did it — did not find that the charges against them were set aside on appeal due to a higher court taking the view that either this section could not operate in the way it did or that it was unconstitutional.'

Alan Shatter, Fine Gael Front Bench spokesman, 416 Dáil Debates col. 1307 (3 March 1992).

<sup>903</sup> 'If the Minister intends to keep the section in the Bill, a great deal more substance will have to be given to it. For example, it is not even clear who will pay for the intermediary. Will the intermediary be paid by the State? If, as a lawyer, I represent someone who is the victim of sexual abuse, the State will be prosecuting, the alleged offender will be defending and the victim would not have a right of appearance or audience before the court through their lawyer. What will happen if the victim's parents say they want their daughter to be questioned through an intermediary? Can they ask the court to do that? Do we have to wait to see if such a request is sought by the prosecution or the defence? I cannot imagine a defence lawyer ever seeking that facility. This matter will have to be teased out as it is dangerous and could give rise to huge problems.'

Mr. Alan Shatter, Fine Gael Front Bench Spokesman, 416 Dáil Debates cols. 1308-1309 (3 March 1992).

the support measure and the propriety of its use in any particular case.<sup>904</sup> The quality of service provided by intermediaries would have to be of a high standard and sufficiently consistent to assuage concerns about the possible tainting of evidence in the examination of witnesses.

### ***6.7.0 The role of the intermediary in Ireland***

6.7.1 The absence of reported case law renders all the more difficult the task of interpreting Section 14 and predicting the scope and application of its terms in future practice. Outlined in a minimal and terse provision on its face, section 14(2) of the *Criminal Evidence Act 1992* states:

Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age or mental condition the meaning of the questions being asked.

6.7.2 The subsection allows for two possibilities. In the first instance, the intermediary uses the words used by the questioner repeating verbatim the question to the child witness. In the second instance, the question can be put to the child witness using alternative language in a way that conveys the meaning of the question appropriate to his age and mental condition. Although not expressly outlined in the subsection, the ability of an intermediary to repeat the questions to the child witness may be used in circumstances where the defendant insists on personal cross-examination. The subsection includes a provision where the question can be interpreted for the witness in a manner that will accommodate the child witness's communication abilities.

6.7.3 It is noteworthy that the interpretative role of the intermediary is entirely 'one

<sup>904</sup>

There is no mention of the use of an intermediary in An Garda Síochána document '*Garda Síochána Policy on the Investigation of Sexual Crime, Crimes against Children, Child Welfare*' 2<sup>nd</sup> Edition, 2013. <http://www.garda.ie/Documents/User/Policy> (Accessed 29th September 2015).

The use of an intermediary is mentioned briefly in the training guidance for Specialist Interviewers who conduct recordings under s.16 (1)(b) Criminal Evidence Act 1992. See: *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences*. An Garda Síochána, (July 2003) at para. 2.65 at pps.25 and 26.

way' limited as it is to the phrasing of questions. There is no provision for the intermediary to explain to the court any answer given by the witness which the court may find difficult to understand.<sup>905</sup> Yet even this limited provision was radical in so far as it was perceived as potentially compromising to the defendant. Healy notes that the restating or rephrasing of questions has a potentially intrusive effect and 'will naturally be a cause for concern in the trial'.<sup>906</sup> Given that pace and pressure are intrinsic to effective cross-examination, the trial judge may come under particular pressure to ensure that the defence is not unduly hampered in the course of its challenges to the veracity and credibility of its accusers.<sup>907</sup>

### 6.8.0 *Qualifications for the role of intermediary*

6.8.1 In relation to the qualifications necessary for the role, s.14(3) of the *Criminal Evidence Act 1992* as amended, states that the intermediary "shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such." The Law Reform Commission's recommendation<sup>908</sup> that the child examiner "should be experienced at interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence"<sup>909</sup> was not specifically incorporated in the legislation, the Oireachtas preferring the court to appoint "a person who, in its opinion, is competent to act as such."<sup>910</sup> The legislation confers responsibility for assessing the proficiency of the proposed intermediary on the trial judge. Without standardised, accredited training for the role of intermediary, the court may risk appointing an intermediary unfamiliar with the rules of evidence of court.

<sup>905</sup> This is contrast to s.29 *Youth Justice and Criminal Evidence Act 1999* (as amended by the *Coroners and Justice Act 2009*) which allows the intermediary to explain any questions put to the child witness and also to explain to the court any answers which the child witness may give.

<sup>906</sup> John Healy, *Irish Laws of Evidence* (Thomson Round Hall 2002) Para.1-58 at p. 33.

<sup>907</sup> The term 'intermediary' has been used in legislative provisions other than s.14 *Criminal Evidence Act*. The role itself appears to have no clear definition, not only regarding the role of the intermediary but also the qualifications which might be appropriate in fulfilling that role. In civil proceedings, McGrath notes that s. 22 (1)*Children Act 1997* is drafted in similar terms to s.14 of the 1992 Act. However, one point of departure is that under s.22(1), the court may direct questions to be put through an intermediary of its own motion. McGrath observes that this reflects the more inquisitorial nature of many child care proceedings.

<sup>908</sup> See Declan McGrath, *Evidence* (Thomson Round Hall 2014) para 3-226 at p.159.

<sup>909</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990)

<sup>909</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990)

Chapter 9: Summary of Recommendations. Recommendation No. 57 at p. 95.

<sup>910</sup> S.14(3) of the *Criminal Evidence Act 1992*.

6.8.2 The implementation of the support measure in England and Wales in s.29 of the *Youth Justice and Criminal Evidence Act 1999*, was prefaced by the publication by the Home Office of detailed guidance as to how the measure would be used both at an investigative and trial stage in the form of the *Intermediary Procedural Guidance Manual*.<sup>911</sup> In relation to the assessment of witnesses at an investigative stage, the publication by the *Association of Chief Police Officers (ACPO)*, *When to Use an Intermediary: 2 Stage Test*<sup>912</sup> gave detailed guidance to police officers who may encounter witnesses with communication needs which may be met by an intermediary. In 2008 the Office for Criminal Justice Reform (now the Criminal Justice Reform Directorate) published *What's My Story? A Guide to Using Intermediaries to Help Vulnerable Witnesses*.<sup>913</sup> The Ministry of Justice in England and Wales regularly revises its guidance on interviewing witnesses with the use of special measures in its publication, *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures*<sup>914</sup> which includes comprehensive guidance for multi-agency personnel on the use of support measures for vulnerable witnesses including the use of intermediaries. In Northern Ireland, even though the order allowing for the use of the support measure was only recently commenced,<sup>915</sup> guidance was drafted which dealt with use of the support measure through the inherent jurisdiction of the courts.<sup>916</sup>

6.8.3 The *Criminal Procedure Rules* in England and Wales had previously been amended to include the declaration made by the intermediary prior to the testimony being given in court thus establishing the duty owed to the court by the intermediary.<sup>917</sup> In October 2013, revised practice directions incorporated the use of

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<sup>911</sup> *Intermediary Procedural Guidance Manual* (Ministry of Justice, February 2012).

<sup>912</sup> Association of Police Officers of England, Wales and Northern Ireland Victims and Witnesses Portfolio Group *When to Use and Intermediary: 2 Stage Test* (August 2005).

<sup>913</sup> *What's My Story? A Guide to Using Intermediaries to Help Vulnerable Witnesses*. Office for Criminal Justice Reform (2008).

<sup>914</sup> *Achieving Best Evidence in Criminal Proceeding :Guidance on interviewing victims and witnesses, and guidance on using special measures* (Ministry of Justice) (March 2011).

<sup>915</sup> *Article 17 Criminal Evidence (NI) Order 1999* was commenced on the 15<sup>th</sup> April 2015.

<sup>916</sup> *Achieving Best Evidence Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy*. (Criminal Justice System Northern Ireland/ Dept of Justice Northern Ireland) (January 2012).

<sup>917</sup> *Criminal Procedure Rules* (as in force 6<sup>th</sup> October 2014)  
Declaration by intermediary

29.7.—

an intermediary in a comprehensive manner<sup>918</sup> as well as establishing the requirement for a ‘ground rules’ hearing.<sup>919</sup> Further revision to the *Criminal Practice Directions*<sup>920</sup> and *Criminal Procedure Rules*<sup>921</sup> indicates a consistent motivation to revise procedural practice where appropriate. English case law also signifies that there is a significant change in how child witnesses are being treated in criminal proceedings. This is mainly due to the use of intermediaries under *s.29 Youth Justice and Criminal Evidence Act 1999* and these modifications are being upheld by the Court of Appeal.<sup>922</sup>

6.8.4 Unfortunately there is no similar guidance for An Garda Síochána in Ireland or other agencies on the use of an intermediary either at a pre-trial investigative stage or during the course of the trial. It will be the responsibility of a member of An Garda Síochána, when a complaint is made, to consider whether the witness has cognitive or communication needs that will require an intermediary to facilitate communication for the giving of pre-trial testimony under *s.16(1)(b) Criminal Evidence Act 1992* or in the course of giving evidence at trial. The assessment of the child witness and the use of an intermediary in the taking of any witness statement by a member of An Garda Síochána appears to rely solely on the individual Garda’s assessment of the needs of the witness and the Garda’s awareness of the available provisions.<sup>923</sup> Where a vulnerable witness is identified following the making of a complaint or reporting of an offence, a request will be made for a Specialist Interviewer of An Garda Síochána, if the witness is eligible. A “clarification”

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(3) *The declaration must be in these terms—*

*“I solemnly, sincerely and truly declare [or I swear by Almighty God] that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding.”*

<sup>918</sup> See: S.3F *General Matters: Intermediaries*, *Criminal Practice Directions* [2013] EWCA Crim (3<sup>rd</sup> October 2013).

<sup>919</sup> See S.3E (General Matters: Ground Rules Hearings to plan the questioning of a vulnerable witness or defendant.) *Criminal Practice Directions* [2013] EWCA Crim 1631.

<sup>920</sup> *Criminal Practice Directions* [2014] EWCA Crim 1569.

<sup>921</sup> *Criminal Procedure Rules* 2014

<http://www.legislation.gov.uk/ukxi/2014/1610/contents/made>  
(Accessed 29<sup>th</sup> September 2015).

<sup>922</sup> *R v B* [2010] EWCA Crim 4; *R v Wills* [2011] EWCA Crim 1938 and *R v Lumbeba and JP* [2014] EWCA Crim 2064.

<sup>923</sup> Further and more detailed assessment will be necessitated by the *Criminal Justice (Victims of Crime) Bill 2015* if commenced as drafted. *Head 6 Assessment of a victim where a complaint has been made* provides for the assessment of An Garda Síochána of a victim of crime.

interview with the witness as to what may have occurred will follow.<sup>924</sup> From this, a decision is made as to whether it is appropriate to take a recorded statement under s.16(1)(b) *Criminal Evidence Act 1992* as amended, which may then be admitted later at trial. It seems that the use of an intermediary is not specifically addressed in the training of Specialist Interviewers.<sup>925</sup> The use of an intermediary is mentioned in the *Good Practice Guidelines* regarding the use of s.16(1)(b) *Criminal Evidence Act 1992*<sup>926</sup> but no reference is made to s.14 of the *Criminal Evidence Act 1992* as amended or to the fact that an application will have to be made to the court for the appointment of the intermediary at trial. Only child complainants under 14 years of age are eligible to have their statements recorded under s.16(1)(b) *Criminal Evidence Act 1992*.

6.8.5 At the trial stage, the use of an intermediary may depend on the assessment of the needs of the child witness by legal counsel but this will very much depend on the awareness of counsel of the available provision. It is submitted that only where the communication needs are extreme and where a person such as a family member, a speech and language therapist or social worker is already assisting the child to communicate that the need for an intermediary will be transparent and/or communicated to the investigating officer or legal counsel. Thus a person who may be a candidate to act as an intermediary for the witness at trial may already be fulfilling that function at an investigative stage. However, if the interview is recorded under s.16(1)(b) of the *Criminal Evidence Act 1992*, an application for his or her presence at trial must be considered at a much later stage, such as when a file

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<sup>924</sup> Personal communication with Sgt. Jennifer Molony, Specialist Interviewer, Garda Síochána, 7<sup>th</sup> October 2011.

<sup>925</sup> Personal communication with Sgt. Jennifer Molony, Specialist Interviewer, Garda Síochána, 7<sup>th</sup> October 2011.

<sup>926</sup> '2.65 Where an intermediary is engaged due to the specialist nature of the complainant's communication system or his/her particular needs (e.g. the complainant may be very young or very distressed), it may be more appropriate for the intermediary to lead the interview. In such cases, the presence and role of the interview team member should be clearly agreed at the planning stage. In addition to clarifying the role of an interpreter/intermediary prior to the interview, the legal and confidential requirements should also be discussed and clarified. The consideration of emotional support for the interpreter/intermediary after the interview should also be addressed.

2.66 The intermediary/interpreter should be skilled in relaying questions in a precise way so as not to misrepresent the question being asked by the interviewer.'

*Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences.* An Garda Síochána, (July 2003) at paras. 2.65 and 2.66 at pps.25 and 26.

has been sent to the Director of Public Prosecutions, when counsel has been briefed by the Chief Prosecution Solicitor or at trial when the attendant difficulties mentioned above regarding the requirement of an intermediary's presence may become apparent. If the trial court rules against the application for an intermediary, the recorded testimony may be deemed inadmissible and the witness will then be required to give examination in chief and cross-examination testimony live at trial.

### **6.9.0 Other uses of the intermediary support measure in criminal proceedings**

6.9.1 Section 14 of the *Criminal Evidence Act 1992* has been mirrored in subsequent legislation. S.6 *Criminal Procedure Act 2010*<sup>927</sup> allows for the giving of a victim impact statement for a child via an intermediary. The measure is drafted in the same terms as those under s.14 *Criminal Evidence Act 1992*. The scope of the provision and the statutory limitations are essentially the same. The intermediary is only able to repeat the questions put by the interlocutor to convey the question to the witness in a manner appropriate to his age or mental condition. The provision regarding appointment of the intermediary is the same. In fact, it appears that the entire provision has been replicated from s.14 *Criminal Evidence Act 1992* which indicates a lack of knowledge of the use of the role of the intermediary in the criminal justice system since it was commenced in 1997.

### **6.10.0 Potential reform**

6.10.1 On the 18<sup>th</sup> May 2011,<sup>928</sup> Pearse Doherty T.D., asked the then Minister for Justice, Equality and Defence, Mr. Alan Shatter, whether the measures adopted for vulnerable witnesses providing court testimony in the state were in accordance with the *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses*

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'(1) Where a child or a person with a mental disorder is giving, or is to give evidence through a live television link, pursuant to section 5A, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his or her age and mental condition, the meaning of the questions being asked.

(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.'

S5B *Criminal Justice Act 1993* as inserted by s.6 of the *Criminal Procedure Act 2010*.

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732 Dáil Debates col. 740 (18 May 2011).



of *Crime*<sup>929</sup> and asked him if he would make a statement on the matter. In a written answer, Mr. Shatter stated that the *Criminal Evidence Act 1992* contained a range of measures designed to protect vulnerable victims and witnesses. Mr. Shatter described the measures that are currently available to the child witness under the *Criminal Evidence Act 1992* and the *Criminal Procedure Act 2010* such as pre-trial recorded witness statements and live television link. In addition to these, Mr. Shatter stated that:

Section 14(1) (of the *Criminal Evidence Act 1992*) provides that, in the case types mentioned (sic), where such persons are giving evidence, the court may, on the application of the prosecution or the accused, direct that questions be to a witness (sic) be put through an intermediary is satisfied that, having regard to the age or mental condition of the witness, the interests of justice require.

....I am informed by the Courts Service that they comply with the relevant UN Guidelines in respect of child victims and witnesses of crime and provides (sic) the necessary video link facilities as required under the 1992 Act.<sup>930</sup>

6.10.2 *The EU Directive on Establishing Minimum standards on the Rights, Support and Protection of Victims of Crime*<sup>931</sup> obliges all EU countries to establish a specific standard of legislative statutory protections for victims by 16<sup>th</sup> November 2015. However, the Directive does not expressly provide for the use of intermediaries. Arguably, there is implicit provision in Article 23 (b) which states that, as a measure available to the victims with specific protection needs identified in accordance with Article 22, interviews with the victim will be carried out by, or through, professionals trained for the purpose.<sup>932</sup> It could be argued that this

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<sup>929</sup> UN *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime Resolution* 2005/20 22 July 2005.

<sup>930</sup> Dáil Debates (18 May 2011) Vol 732 Col. 740.

<sup>931</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA - Official Journal L 315 , 14/11/2012 P. 0057 – 0073* (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:01:EN:HTML>)

<sup>932</sup> Article 23 - ‘... (b) interviews with the victim being carried out by or through professionals trained for that purpose;’

provision necessitates the use of an intermediary although it is contended that this is a far reach given that the use of police officers and social workers would fulfil the general condition laid down in the Directive. Article 22(4)<sup>933</sup> automatically includes children in the category of victims with specific protection needs. It should be noted however that the EU Directive<sup>934</sup> is designed to protect victims and as a result the needs of the defendant and of the child who is a witness to a crime but not a victim are not catered for in the Directive.

6.10.3 Present legislative proposals do not include significant revision to the status quo. While there are propositions to amend other sections of the *Criminal Evidence Act 1992* with respect to the removal of wigs and gowns under and the prohibition of personal cross-examination by the defendant,<sup>935</sup> it appears from the *Criminal Law (Sexual Offences) Bill 2015* that there will be no revision of the current provision for intermediaries. Nor does there seem to be any proposed refinement of the section in the General Scheme of the *Criminal Justice (Victims of Crime) Bill 2015*.<sup>936</sup> There has been extensive evidence that proper implementation of intermediaries can have significant benefits for achieving better evidence at trial. It is unfortunate that present proposals appear to miss an opportunity to revise section 14 of the *Criminal Evidence Act 1992*. It also seems disingenuous to commend a provision that is on the statute books, as Mr. Shatter has done, which appears to be of assistance when it appears to be so underused.<sup>937</sup>

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*Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315 , 14/11/2012.*

<sup>933</sup> Article 22(4) – ‘Individual assessment of victims to identify specific protection needs’

*Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315 , 14/11/2012.*

<sup>934</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, (emphasis added) and replacing Council Framework Decision 2001/220/JHA, OJ L 315 , 14/11/2012.*

<sup>935</sup> Head 49 ‘New section 14C in Act of 1992, “Protection against cross-examination by accused’ *Criminal Law (Sexual Offences) Bill 2014.*

<sup>936</sup> Head 15 -Special measures during investigation and Head 16- Special measures during trial *Criminal Justice (Victims of Crime) Bill 2015.*

<sup>937</sup> Dáil Debates (18 May 2011) Vol 732 Col. 740.

### 6.11.0 *England and Wales*

6.11.1 The introduction of intermediaries in England and Wales has greatly highlighted the difficulties of child witnesses in effectively communicating with the court and resolved many of those difficulties. It has also shown the level of statutory detail, procedural guidance and judicial endorsement necessary to implement the measure successfully. Where an intermediary has assessed the child witness and informed the court of his or her particular needs, the legal practitioner will need to adapt his or her questioning. If the practitioner is unable to do this adequately the intermediary may intervene and suggest alternative approaches or particular vocabulary. This has yielded admirable results in terms of achieving better evidence. The use of intermediaries has highlighted the inadequacies of traditional advocacy. There is need for a cultural sea change concerning the ability of practitioners and judiciary to facilitate participation by vulnerable witnesses within the criminal justice system.<sup>938</sup> It has also raised these issues regarding vulnerable defendants<sup>939</sup> for whom intermediary legislation is still to be commenced.<sup>940</sup>

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<sup>938</sup> See: Intermediary Podcast Interviews with Professor Penny Cooper, The City Law School, London With Intermediaries, Rosemary Wyatt (Spring 2012) and Emily Phibbs (Spring 2012). <http://www.city.ac.uk/law/courses/continuing-professional-development/in-house-courses/intermediary-training>. (Accessed 29<sup>th</sup> September 2015).

<sup>939</sup> City Law School – interview with intermediary for vulnerable defendant. Intermediary Podcast Interviews with Penny Cooper, The City Law School, London  
Professor Penny Cooper, Barrister, Professor of Law, Associate Dean, Director of CPD and Director of Knowledge Transfer  
Alan Hendy – re. Intermediary for a defendant – Spring 2010  
Mr. Hendy describes cases from March 2008 where he was appointed as intermediary for a defendant through the inherent jurisdiction of the courts.  
Brendan O’Mahony – re. Intermediary for a defendant –

- Instances of very late appointment and consequently assessments.
- Defendant didn’t know whether he was the victim or defendant.
- Trying to explain the trial to the defendant.
- Facilitating exchanges between defence counsel and defendant which prompted a guilty plea, then attended probation meetings.
- Sexual offenders register – defendant didn’t understand the implications of it – re. obligation to notify change of address.
- Translating the word “stills” and asking the counsel to slow down to allow the defendant to follow for both prosecution and defence.
- Defendant Central Criminal Court, The Old Bailey, although convicted, was grateful for the opportunity to have had his oral testimony heard at trial.
- Difference of attitudes in respect of witnesses and defendants – ethical dilemmas – what works for the defence as opposed to what works best for the defendant.
- The importance of reflective practice.

6.11.2 The use of intermediaries has extensive statutory and procedural foundations. While S.29 of the *Youth Justice and Criminal Evidence Act 1999* outlines the parameters of the support measure, the *Criminal Procedure Rules* outline the declaration to be taken by the intermediary.<sup>941</sup> The *Criminal Practice Directions* sets out the requirement to have a pre-trial “ground rules” meeting in which the intermediary submits his or her report regarding the child witness. *The Registered Intermediary Manual* was drafted in 2005 and updated in February 2012 by the Ministry of Justice<sup>942</sup> and contains comprehensive procedural guidance for the use of intermediaries at trial.

6.11.3 The City Law School, the institution which established courses for training intermediaries, organised continuing internet access for intermediaries for updating annual feedback reports as well as ongoing feedback interviews with working intermediaries. The Advocacy Training Council in conjunction with the NSPCC established an internet resource called *The Advocate’s Gateway*<sup>943</sup> which contains legislative and procedural guidance including case law and legislation for anyone

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<http://www.city.ac.uk/law/courses/continuing-professional-development/in-house-courses/intermediary-training>. (Accessed 29<sup>th</sup> September 2015).

<sup>940</sup> ‘There is currently no statutory provision in force for intermediaries for defendants. Section 104 of the Coroners and Justice Act 2009 (not yet implemented) creates a new section 33BA of the Youth Justice and Criminal Evidence Act 1999. This will provide an intermediary to an eligible defendant only while giving evidence. A court may use its inherent powers to appoint an intermediary to assist the defendant’s communication at trial (either solely when giving evidence or throughout the trial) and, where necessary, in preparation for trial: *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin), [2012] Crim L.R. 478; *R v H* [2003] EWCA Crim 1208, Times, April 15, 2003; *R (C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin), [2010] 1 All E.R. 735; *R (D) v Camberwell Green Youth Court*, [2005] UKHL 4, [2005] 1 W.L.R. 393, [2005] 2 Cr. App. R. 1; *R (TP) v West London Youth Court* [2005] EWHC 2583 (Admin), [2006] 1 W.L.R. 1219, [2006] 1 Cr. App. R. 25.’

<sup>941</sup> Criminal Practice Directions [2013] EWCA Crim 1631. (As in force 6<sup>th</sup> October 2014.)  
Criminal Procedure Rules (as in force 6<sup>th</sup> October 2014)

Declaration by intermediary  
29.7.—

(3) *The declaration must be in these terms—*

*“I solemnly, sincerely and truly declare [or I swear by Almighty God] that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding.”*

<sup>942</sup> The Registered Intermediary Procedural Guidance Manual (Ministry of Justice) (February 2012)  
[http://www.cps.gov.uk/publications/docs/ri\\_proceduralguidancemanual\\_2012.pdf](http://www.cps.gov.uk/publications/docs/ri_proceduralguidancemanual_2012.pdf) (Accessed 29<sup>th</sup> September 2015).

<sup>943</sup> The Advocate’s Gateway (Hosted by the Advocacy Training Council and supervised by a Committee whose representatives include The Advocacy Training Council, Chartered Institute of Legal Executives, Criminal Bar Association, Crown Prosecution Service Judicial College Kingston University, The Law Society, Ministry of Justice, Solicitors’ Association of Higher Courts Advocates)  
[www.advocatesgateway.org](http://www.advocatesgateway.org) (Accessed 29<sup>th</sup> September 2015).

dealing with vulnerable witnesses and defendants in the criminal justice system. The NSPCC and the Ministry of Justice established an internet forum, *Witness Intermediary Scheme SmartSite*, which facilitated pooling of information for Registered Intermediaries. The collected information from this website was published as *Registered Intermediaries in Action*<sup>944</sup> by Lexicon Limited and was funded by the NSPCC and the Ministry of Justice. The Advocacy Training Council published the report *Raising the Bar*, in 2011, containing guidance for barristers on intermediaries. The Equal Treatment Bench Book includes guidance for judges in criminal trials as to the use of intermediaries.<sup>945</sup>

6.11.4 The concept of a ‘Ground Rules Hearing’ (GRH) was devised during registered intermediary training and was not included in the original legislation nor in the *Criminal Procedure Rules* or in the *Criminal Practice Directions*. In 2005 the first *Intermediary Procedural Guidance Manual*<sup>946</sup> noted that Registered Intermediaries should “request a meeting with the Crown Prosecution Solicitor and advocates to discuss and agree ground rules for trial.”<sup>947</sup> Cooper et al state that Registered Intermediaries reported back to their trainers, Penny Cooper and David Wurtzel, and said that despite meeting advocates for discussion, ‘ground rules’ were not being adhered to during the trial. The Registered Intermediaries were advised to be more assertive and to ask for what were called a ‘Ground Rules Hearing’, with the trial judge and advocates. As Cooper et al observe:

These GRHs moved from theory to practice when RIs began to insist on what was in effect a judge-advocate-intermediary meeting

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<sup>944</sup> *Registered Intermediaries in Action* (NSPCC/Ministry of Justice/ Lexicon Limited) (2011).

<sup>945</sup> ‘Assessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority.’

Equal Treatment Bench Book, Judicial College (November 2013) at p.48.

<sup>946</sup> The manual has now been updated and the last revised version was published in 2012 by the Ministry of Justice Victims and Witnesses Unit, Ministry of Justice. The *Registered Intermediary Procedural Guidance Manual* (Ministry of Justice) (February 2012). It sets out the Ground Rules Hearing as follows: *In accordance with the Application for a Special Measures Direction (part 29, Criminal Procedural Rules 2010), ground rules hearings for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, to establish (a) how questions should be put to help the witness understand them, and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break.*

<sup>947</sup> Penny Cooper, David Wurtzel. *Home Office Intermediary Procedural Guidance Manual* (2005). An overview of the Registered Intermediary’s involvement in a criminal case, para. 1.24(n), Fn 13, at p. 13. Home Office Intermediary Procedural Guidance Manual (2005) at para. 8 at p. 8.

where the judge would chair a discussion with the intermediary's report recommendations acting as a suggested agenda.<sup>948</sup>

6.11.5 The intermediary's report informed the court of the characteristics of the vulnerable witness which may affect the giving of evidence but gradually, it was seen that there was significant value in having a hearing where all parties participated in the establishment of procedures for the giving of the evidence throughout the trial. In *R v Wills*<sup>949</sup> Cooper et al observe that the Court of Appeal endorsed the good sense of there being a 'practice note/trial protocol' recording the court's directions about how the advocate should question the vulnerable witness.<sup>950</sup>

6.11.6 The *Criminal Practice Directions* were revised on the 7<sup>th</sup> October 2013 to include the overriding objective of allowing the trial to search for truth and not allowing procedural issues to be used as tools to win as if the trial were a game.<sup>951</sup> The Ground Rules Hearing has become an important procedural mechanism and was placed on an even stronger footing in the *Criminal Practice Directions* in 2013<sup>952</sup> which state in relevant part:

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<sup>948</sup> Penny Cooper; Paula Backen, Ruth Marchant *Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court*. Crim L.R. 2015, 6, 420 – 435 at p.424.

<sup>949</sup> *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr.App.R.2 at para 22 at p. 16; The Court of Appeal endorsed a recommendation of the Advocacy Training Council report, *Raising The Bar* (2011).

<sup>950</sup> Penny Cooper; Paula Backen, Ruth Marchant *Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court*. Crim L.R. 2015, 6, 420 – 435 at p. 424.

<sup>951</sup> Part 1 The overriding objective  
CPD General matters 1A

'1A.1 *The presumption of innocence and an adversarial process are essential features of English and Welsh legal tradition and of the defendant's right to a fair trial. But it is no part of a fair trial that questions of guilt and innocence should be determined by procedural manoeuvres. On the contrary, fairness is best served when the issues between the parties are identified as early and as clearly as possible. As Lord Justice Auld noted, a criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent.*

1A.2 *Further, it is not just for a party to obstruct or delay the preparation of a case for trial in order to secure some perceived procedural advantage, or to take unfair advantage of a mistake by someone else. If courts allow that to happen it damages public confidence in criminal justice. The Rules and the Practice Direction, taken together, make it clear that courts must not allow it to happen.'*

Criminal Practice Directions [2013] EWCA Crim 1631 As before the Lord Chief Justice of England and Wales.

<sup>952</sup> Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters) [2013] EWCA Crim 1631; [2013] 1 WLR 3164 (CPD) in particular at 'General Matters 3E: Ground Rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant'. (As in force 6<sup>th</sup> October 2014).

Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary before the witness gives evidence.<sup>953</sup>

6.11.7 The overriding objective states that cases should be ‘dealt with justly’,<sup>954</sup> facilitating:

the participation of any person includes giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questions are to be conducted through an intermediary.’<sup>955</sup>

6.11.8 The evolution from good practice to mandatory practice is a significant step and suggests that that a high level of engagement between trainers, practitioners and the judiciary can lead to substantial procedural reform. The needs of vulnerable witnesses are incorporated within the *Criminal Practice Directions*<sup>956</sup> and the court is required to take every reasonable step to facilitate the witness to give ‘their best evidence’.<sup>957</sup>

6.11.9 It is also apparent that the objectives of the *Criminal Procedure Rules* and the *Criminal Practice Directions* are being actively applied in the courts. In 2010, in *R v Barker*,<sup>958</sup> the Court of Appeal in England and Wales found a witness of 4 and half years of age to be competent and upheld a conviction for anal rape where the prosecution’s case was predominantly based on her testimony. In 2013, in *R v Wills*<sup>959</sup> and in 2014, in *R v Lumbeba and JP*,<sup>960</sup> the Court of Appeal upheld the decisions of trial judges where steps were taken to modify the length and manner in which vulnerable witnesses were cross-examined. These modifications were made

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<sup>953</sup> Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters) [2013] EWCA Crim 1631; [2013] 1 WLR 3164 (CPD) in particular at ‘General Matters 3E: Ground Rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant’. (As in force 6<sup>th</sup> October 2014).

<sup>954</sup> Criminal Procedure Rules 2014 (SI 2014/1610) (L.26) r.1.1(1).

<sup>955</sup> Criminal Procedure Rules 2014 (SI 2014/1610) (L.26) r.1.1(1).

<sup>956</sup> CPD I General matters 3D: *Vulnerable People in the Courts*, Criminal Practice Directions [2014] EWCA Crim 1569.

<sup>957</sup> Para. 3D.2, Criminal Practice Directions [2014] EWCA Crim 1569.

<sup>958</sup> *R v Barker* [2010] EWCA Crim 4.

<sup>959</sup> *R v Wills* [2011] EWCA Crim 1938. [2012] 1 Cr.App.R.2.

<sup>960</sup> *R v Lumbeba and JP* [2014] EWCA Crim 2064

on the basis of the intermediary's report to the court. The fact that Ireland has a written constitution may mean that similar attempts to modify cross-examination will prompt constitutional challenges under Article 38.1 of the Constitution.

### **6.12.0        *The use of a child interrogator/intermediary in other adversarial jurisdictions***

6.12.1 Analysis of the Israeli use of the 'youth interrogator' is problematic as the role is not, in essence, that of an intermediary; the youth interrogator essentially examines the child witness and may give evidence on his or her behalf where the youth interrogator feels it is appropriate to do so. However, there are similarities concerning the role in that the child interrogator's function is to attempt to reduce, in as far as possible, the difficulties a child witness will face in the course of a prosecution of a particular offence.<sup>961</sup> The "child interrogator" (formerly "youth interrogator") assists both in the investigation and trial of involving a child under 14. The child interrogator may be appointed to act as an intermediary during questioning<sup>962</sup> and may be cross-examined on the evidence that the witness has given in the course of the investigation. Witnesses may only give evidence with the permission of the child interrogator to prevent the witness from experiencing emotional harm by giving evidence. The accused, however, may not be convicted on the uncorroborated testimony of the child interrogator.<sup>963</sup> Evidence taken in the course of the investigation such as on video or audio tape and interview reports is admissible in court. It should be noted that while the criminal justice system in Israel is modelled on the adversarial system, there are no juries in Israeli trials.

6.12.2 Criticisms of the use of youth interrogators in Israel have led to audio and video taping of all interviews.<sup>964</sup> These criticisms included allegations that interviews were unsystematic, leading and biased. There were also concerns

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<sup>961</sup> The relevant offences under s.9 of the *Law of Evidence Revision (Protection of Children) Law 1955* relate to offences involving, violence, prostitution or vice as well as parental abuse or neglect.

<sup>962</sup> *Child Witnesses In The New Zealand Criminal Courts: A Review Of Practice And Implications For Policy* (Kirsten Hanna, Emma Davies, Emily Henderson, Charles Crothers, Clare Rotherham) (The Law Foundation, New Zealand, The Institute of Public Policy, Auckland University, 2010 ) at pg. 144.

<sup>963</sup> See David Reifen *The Juvenile Court in a Changing Society* (University of Pennsylvania Press 1973) at pg.72.

<sup>964</sup> *Child Witnesses In The New Zealand Criminal Courts: A Review Of Practice And Implications For Policy* (Kirsten Hanna, Emma Davies, Emily Henderson, Charles Crothers, Clare Rotherham) (The Law Foundation, New Zealand, The Institute of Public Policy, Auckland University, 2010 ) at p.145.



regarding the long delays before interrogators conducted interviews. In addition, youth interrogators themselves had complaints regarding poor training and infrastructure.<sup>965</sup> It remains highly unlikely that such a method of protecting the child witness would be introduced in this jurisdiction as it would undoubtedly interfere with the constitutional right to a trial in due course of law under Art. 38.1 of the Irish Constitution. Another factor that hinders its introduction is the low conviction rates that the procedure produces.<sup>966</sup> However, the fact that Israel has adopted such an extreme measure in order to protect children in the courts is a significant cultural change within another adversarial criminal justice system. The constitutional right to a fair trial under Article 38.1 including a vibrant right to cross-examine<sup>967</sup> would perhaps render the introduction of a role akin to the Israeli youth interrogator as a step too far. But the jurisprudence of the Supreme Court indicates that the right to cross-examination may be modified and to some degree that the parameters of that modification have not been set definitively.<sup>968</sup>

6.12.3 While the model for youth interrogators may not fit into the Irish constitutional framework, the South African intermediary procedure provides a better example of the support measure in practice. In order to combat a high rate of offences against children, s. 170A *Criminal Law Amendment Act 135 of 1991* amended the *Criminal Procedure Act 51 of 1977*. It allows children to testify through intermediaries at trial as well as providing other special measures for witnesses under 18 giving evidence in certain criminal proceedings. It should be mentioned that like Israel, there is no jury in criminal trials in South Africa.<sup>969</sup> These measures also include video-link facilities as well as holding proceedings *in camera*. Section 170A commenced on 30 July 1993. The *Sexual Offences Amendment Act of*

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<sup>965</sup> See *Child Witnesses In The New Zealand Criminal Courts: A Review Of Practice And Implications For Policy* ( Kirsten Hanna, Emma Davies, Emily Henderson, Charles Crothers, Clare Rotherham) (The Law Foundation, New Zealand, The Institute of Public Policy, Auckland University, 2010 ) at pg. 144.

<sup>966</sup> The necessity of corroboration being a significant factor in the procedure. See *Child Witnesses In The New Zealand Criminal Courts: A Review Of Practice And Implications For Policy* ( Kirsten Hanna, Emma Davies, Emily Henderson, Charles Crothers, Clare Rotherham) (The Law Foundation, New Zealand, The Institute of Public Policy, Auckland University, 2010 ) at pg. 144.

<sup>967</sup> *State (Healy) v Donoghue* [1976] I.R. 325; *In re Haughey* [1971] I.R.;

<sup>968</sup> *Donnelly v Ireland* 1 IR 321; [1998] 1 ILRM 402 (SC);

<sup>969</sup> "There is no jury, although expert lay assessors may sit with the judge in limited instances." *Child Witnesses In The New Zealand Criminal Courts: A Review Of Practice And Implications For Policy* (Kirsten Hanna, Emma Davies, Emily Henderson, Charles Crothers, Clare Rotherham) (The Law Foundation, New Zealand, The Institute of Public Policy, Auckland University, 2010 ) at pg. 118.

2007 amended the 1977 Act by inserting the words “mental or biological” before the words “age of eighteen years” of the original act.

6.12.4 Under the provision, the use of an intermediary is allowed for a witness under 18 where he or she would be exposed to undue mental stress or suffering through testifying in court. The provisions of the *Criminal Procedure Act 1977* were introduced to combat the particularly harsh cross-examination techniques in South African courts. One South African judge is quoted as saying:

Cross-examination, intended as a scalpel to excise the tumour of untruth, has become a bludgeon with which justice is slowly clubbed to death.<sup>970</sup>

6.12.5 There have been difficulties with the practical implementation of the special measure. Issues concerning training and accreditation, the exact role of the intermediary in court as well as the difficulty of resourcing intermediaries in some of the regional courts has led to a constitutional challenge by the High Court in Gauteng, an appeal of which was heard in the Constitutional Court in November 2008. On the 1<sup>st</sup> April 2009, the Constitutional Court of South Africa handed down judgment in a matter in which the Director of Public Prosecutions sought confirmation of orders of constitutional invalidity made by the North Gauteng High Court, Pretoria, in relation to certain provisions of the Criminal Procedure Act 51 of 1977. The High Court, in two cases involving charges of rape,<sup>971</sup> has considered that certain provisions regarding the use of intermediaries, video-link evidence and *in camera* proceedings fell short of the Constitutional guarantee that:

A child’s best interests are of paramount importance in every matter concerning the child.<sup>972</sup>

<sup>970</sup> Para [38.3.1] South African Law Commission Sexual Offences: Process and Procedure (Discussion Project 102, Project 3.

<sup>971</sup> *S v Albert Phaswane and Aaron Mokoena* Case No. CC192/2007, North Gauteng High Court, Pretoria, 14 August 2007, unreported.

<sup>972</sup> S.28(2) of the *Constitution of South Africa*.

6.12.6 Paragraph 5 of the judgment set out the main issue before the court which included whether the provisions were being implemented in accordance with the Constitution and the extent of the duty of the courts to ensure that these measures were being implemented.<sup>973</sup> Ultimately, the Constitutional Court held that, properly interpreted and applied, the provisions could sufficiently protect the interests of the child and so were constitutionally adequate. However, the real issue was the lack of means to implement the provisions. While the High Court was not entitled, as it had done, to make declaratory, supervisory and mandatory orders regarding these provisions and their unconstitutionality, the Constitutional Court did order the Department of Justice and Constitutional Development to provide the Court with a report detailing the requirements and resources in respect of intermediaries, video-link facilities and separate rooms from which children may testify in the Regional Courts.

6.12.7 The difficulty of implementation of a support measure is a consistent problem in this and other jurisdictions. It has been noted in the *Joint Oireachtas Committee on Child Protection Report*<sup>974</sup> that many of the protective measures called for by children's organisations and civil right group are already in place but they have failed to be implemented in full. As Mr Geoffrey Shannon, the Special Rapporteur on Child Protection,<sup>975</sup> stated in response to a question from the Minister of State at the Department of Health and Children, Deputy Brian Lenihan:

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<sup>973</sup> "But, as the judgment of the High Court (in the case of *S v Mokoena* 2008 (5) SA 578 (T)) and the submissions made by the parties in these cases amply demonstrate, behind these legal questions lies the core issue concerning the administration of justice. Specifically, two questions arise in this regard. First whether the provisions of the CPA [Criminal Procedure Act] that were enacted to protect child complainants from the mental stress and anguish associated with testifying in criminal proceedings are being interpreted and implemented consistently with the Constitution. Second, the duty of all superior courts including this Court (as the upper guardian of all minors) – if any- to investigate any failure to implement these provisions which deny child complainants the protections they constitutionally deserve, once any failure to do so is brought to the Court's attention"

The Director of Public Prosecutions, *Transvaal v The Minister of Justice and Constitutional Development, Albert Phaswane, Aaron Mokoena and Others* (the Centre for Child Law; Childline South Africa, Resources aimed at the Prevention of Child Abuse and Neglect (RAPCAN), Operation Bobbi Bear, Children First, People Opposing Women Abuse and The Cape Mental Health Society as *amici curiae*) Case CCT 36/08 [2009]ZACC 8 at para. 5.

<sup>974</sup> *Joint Oireachtas Committee Report on Child Protection* (November 2006)

<sup>975</sup> 'Dr Geoffrey Shannon is the current Special Rapporteur on Child Protection. He was appointed by Government decision on the 9th July 2013, to serve for a period of three years. Dr Shannon was originally appointed as one of two Rapporteurs in 2006 and reappointed following a government decision of 10th April, 2010. Professor Finbarr McAuley was the other appointed Rapporteur and provided a report for the year 2006.'

The legislation is good, but we must examine its resourcing and the training in and use of equipment. From a survey, our procedures compare favourably to those of other jurisdictions, but it is in resourcing and usage that difficulties arise.<sup>976</sup>

6.12.8 For example, as noted above, the use of an intermediary under s.14 *Criminal Evidence Act 1992* is conditioned by the requirement that that testimony be given via video link. Concerning video link evidence, any courthouse in Ireland that does not have these facilities must send any cases involving child witnesses to the nearest jurisdiction that has them.<sup>977</sup> The availability of video link facilities has greatly improved over recent years the *Joint Oireachtas Committee Report* noted the Courts Services submission in this regard.<sup>978</sup> Since that Report the Criminal Courts of Justice which has courtrooms where video link facilities are widespread, has been opened. But it remains the fact that if video link facilities are not available, an intermediary may not be used at trial without the use of video link even if that support measure is considered redundant unnecessary at trial. Therefore, the trial must be transferred to a court house which does have video link facilities thus causing more stress and inconvenience for all concerned in the trial.

### 6.13.0 Conclusion

6.13.1 Even though intermediaries have only been operational within the criminal justice system in England and Wales since 2004, the changes that the provision has initiated are ground-breaking. Practitioners and judges appear to be incorporating the

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[http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/Child\\_Welfare\\_Protection/SpecialRapporteurChild\\_Protection.htm](http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/Child_Welfare_Protection/SpecialRapporteurChild_Protection.htm) (Accessed 29<sup>th</sup> September 2015)

<sup>976</sup> *Joint Oireachtas Committee Report on Child Protection (November 2006)* at para 11.7.3 at p.69.

<sup>977</sup> See *DPP v AC*, Circuit Court, July 2011 at para. 2.32.0.

<sup>978</sup> “The necessary physical infrastructure for the full implementation of these provisions is not yet in place. The Committee has been informed by the Courts Service that the necessary practical arrangements are in place in the Four Courts complex in Dublin, the Washington Street courthouse in Cork, and in the recently refurbished courthouses in Nenagh, Co. Tipperary and Longford. The Committee understands that the Courts Service is upgrading the facilities in Dublin and in the process of procuring the provision of facilities in at least one venue in each of the eight Circuit Court circuits nationwide. It must be noted that such a level of service provision might still entail some inconvenience and significant travel for child witnesses and complainants. It must also be recognised that, if full effect is to be given to the provisions for video recording of evidence on deposition, video link facilities will have to be provided in District as well as Circuit Courts.”

*Joint Oireachtas Committee on Child Protection 2006* at para 11.7.3 at p.69.

expertise of the intermediary into the trial process.<sup>979</sup> Intermediaries have contributed to the modification of overly complex cross-examination and to the facilitation of child witnesses being more fully heard within the criminal process. This has not been an easy, seamless process. Resistance to the use of intermediaries was seen in a comment by David Ogg QC at the Director of Public Prosecution Conference in Dublin in November 2008. Referring to the use of “intermediaries” in court to assist child witnesses or those suffering from a learning or mental disability, Dr. Ogg said that the use of intermediaries resulted from a failure of the legal profession to “skill up” to the degree necessary to examine children with the sensitivity and productivity essential to them telling their stories. He stated:

We have to show that we are the best people to do it: that we understand how children process grammar and ideas at different ages; how they form memories; how they use tenses; how to interpret their body language; how they articulate embarrassment, shame, guilt; what (sic) techniques are never justifiable because they are positively harmful.<sup>980</sup>

6.13.2 While Mr. Ogg’s suggestion that all practitioners should be trained in questioning children at trial is a positive one, it is one that is not easily reconciled with the practical and ethical obligations of the Bar. A barrister will not necessarily

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<sup>979</sup> Plotnikoff and Woolfson note this shift in perception by practitioners within the criminal justice system: “The evaluation of the intermediary scheme saw a sea-change in attitude among judges and advocates after their first experience of using Registered Intermediaries. For example, a barrister commented, “A defence advocate is naturally suspicious of doing anything like this. As it was, I ended up being the one who was surprised - by the extreme difficulty the complainant had in understanding what I thought were the simplest questions”

Joyce Plotnikoff and Richard Woolfson, “Kicking and Screaming - The Slow Road To Best Evidence” *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at pg. 31.

‘The intermediaries’ own responses also indicate that the system is a success. The intermediaries gave multiple instances of cases in which they had facilitated the evidence of a wide range of people with serious communication difficulties. Although they report that some judges and advocates remain resistant to their presence, they were optimistic that overall judges and advocates are improving both in their skills in handling such cases and in their awareness of and ability to make the most of intermediaries. There are signs that the intermediaries are becoming more confident and proactive and they report that their growing confidence is enabling them to better fulfil their role.’

Emily Henderson, “A very valuable tool”: judges, advocates and intermediaries discuss the intermediary system in England and Wales, *International Journal of Evidence & Proof* (2015), 19(3), 154-171 at pps. 168-9.

<sup>980</sup> Carol Coulter, ‘Expert highlights flaws in video-link evidence’. *The Irish Times*. 24<sup>th</sup> November 2008. <http://www.irishtimes.com/news/expert-highlights-flaws-in-video-link-evidence-1.913981> (Accessed 29th September 2015).

deal with cases with child witnesses on a consistent basis. Cases that involve child witnesses and child complainants are very often dealt with by Senior Counsel and Junior Counsel may not have many opportunities to question children at trial. Specialist Interviewers who are trained in taking statements from vulnerable witnesses including child witnesses have been in place since 2008 in this jurisdiction. However, the individuals who train Specialist Interviewers state that these skills need to be used regularly or they become defunct within a short space of time.<sup>981</sup> There is a possibility that a barrister who does not use what training he or she may have in questioning child witnesses may not be able to conduct enough cases to maintain best practice. One suggestion is to ‘ticket’ counsel so that only experienced and trained counsel will engage with children. Defendants would no doubt challenge this on the basis that it would interfere with a constitutional right to cross-examine under the principles set out in *State (Healy) v Donoghue*<sup>982</sup> and *In Re Haughey*.<sup>983</sup> It would be possible for prosecution counsel to be ticketed so that only experienced and trained counsel would prosecute cases involving child witnesses and child complainants. This may in due course be extended to publicly funded defence counsel as is currently proposed in England and Wales.<sup>984</sup>

6.13.3 The simpler and possibly more effective alternative is to use intermediaries who are specifically trained in communicating with child witnesses and who can inform the court of the child witness’s communication strengths and weaknesses. It is likely that there will be similar resistance to any overhaul and redevelopment of the provision of the intermediary in this jurisdiction. Detailed legislation, a high standard of training and consistent review of practice will minimise allegations of influence by the intermediary of any evidence given by the child witness.

6.13.4 There are clear indicators that the use of an intermediary, properly trained and utilised at court, can assist the giving of best evidence by the vulnerable witness.<sup>985</sup>

<sup>981</sup> Personal communication from Sgt. Marie Daly, Templemore Garda Training College, An Garda Síochána. July 2011.

<sup>982</sup> *State (Healy) v Donoghue* [1976] I.R. 325 at p.335.

<sup>983</sup> *In re. Haughey* [1971] I.R. 217

<sup>984</sup> Catherine Baksi, ‘Advocates to have specialist training for sex cases’ Law Society Gazette. 15 September 2014.

<sup>985</sup> Emily Henderson, “A very valuable tool”: judges, advocates and intermediaries discuss the intermediary system in England and Wales, *International Journal of Evidence & Proof* (2015), 19(3), 154-171 at p. 155.

It is submitted that legal practitioners and the judiciary do not, despite best intentions, have the requisite skills and training to appreciate or resolve the difficulties facing the child witness who gives evidence at trial. The intermediary may be a solution to many of the problems which the child witness and the courts face in the prosecution of offences involving child complainants and witnesses.

6.13.5 As Healy has indicated, defence counsel may take issue with the modification of the pace and/or interference of the method of cross examining the witness imposed by the specifications of the intermediary in his or her examination of the child witness.<sup>986</sup> However, one of the significant factors of the current method of cross-examination is that at present, the defence may legitimately use techniques such as inappropriate pace, confused chronology, complicated sentence construction, tag questions, overly authoritarian tone and skilful body language, to overwhelm a child witness. In those circumstances, it is surely possible to assert that child witnesses should be allowed a means by which they will understand the questions, in the same way as we would allow a person who does not speak the language of the court, to avail of an interpreter.

6.13.6 Without diminishing the right of the defendant to a fair trial, the use of an intermediary may diminish the harsher aspects of cross-examination. Moves towards this goal require a change in the mindset of the courts and practitioners alike together with an awareness of the nature of the cognitive and educational development and abilities of the individual witness. This is an area in which the intermediary can assist the court. It remains, however, wholly redundant and somewhat hypocritical to have a special measure on the statute books such as s.14 *Criminal Evidence Act 1992* which contributes a false impression that the criminal justice system has a full and wide range of measures which facilitate the child witness in circumstances when it is so flawed in content and implementation, that there is not one recorded instance of it being used to assist a child in court.

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John Healy, *Irish Laws of Evidence* (Thomson Round Hall 2002) Para.1-58 at p. 33.

## 7.0.0 Chapter VII – The Support Measure of Recorded Testimony

### 7.1.0 Introduction

7.1.1 This chapter will consider how testimony, recorded prior to but admissible at trial, may assist the child witness give evidence in court. Recorded testimony has traditionally been seen as one of the solutions that may improve the circumstances of the child witness.<sup>987</sup> The benefit of recorded testimony is that the child witness may not have to come into court and give his or her evidence live at trial. This will depend on a number of factors such as the extent to which the testimony is recorded, be it examination in chief, cross-examination or both. Even if all the testimony is recorded pre-trial, there may still be a necessity for the child to come into court if new issues arise at trial.

7.1.2 One of the clear benefits of recording evidence close to the time of the incident is that the child will be able to better remember the relevant details of what occurred. In addition, if a child has to come into court, he or she may be so overwhelmed by the stressful atmosphere of a trial process that he or she may not be able to 'swear up' at trial at all i.e. relate his or her testimony in line with statements previously given, in part or at all. The recording of testimony, even partially recorded testimony, and its subsequent admission at trial may assist in resolving this problem.

7.1.3 This loss of children's evidence poses significant risks for the prosecution of offences and may lead to the withdrawal of the prosecution or an unwarranted acquittal of a defendant. To alleviate these concerns, Ireland has implemented the admission of recorded examination in chief evidence of child witnesses in recent years.<sup>988</sup> S. 16 Criminal Evidence Act 1992 states:

(1) Subject to subsection (2)

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<sup>987</sup> Home Office, *Report of the Advisory Group on Video Evidence (1989, London: Home Office)*; Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse (August, 1989)*; Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990).

<sup>988</sup> S.16(1)(b) *Criminal Evidence Act 1992*.



(a) a videorecording of any evidence given, in relation to an offence to which this Part applies, by a person under 18 years of age through a live television link in proceedings under Part IA of the Criminal Procedure Act, 1967, and] shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video recording mentioned in paragraph (b), the person whose statement was video recorded is available at the trial for cross-examination.]

(b) a videorecording of any statement made during an interview with a member of the Garda Síochána or any other person who is competent for the purpose—

(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed), or

(ii) by a person under 18 years of age (being a person other than the accused) in relation to an offence under—

(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or

(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008,

(2)

(a) Any such videorecording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the videorecording concerned or that part ought not to be so admitted.

(b) In considering whether in the interests of justice such videorecording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to any statement contained in such a video recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) In this section “statement” includes any representation of fact, whether in words or otherwise.

As will be examined, this section has been amended recently in 2013 to extend the offences eligible for recorded testimony to include offences under the *Child Trafficking and Pornography Act 1998* and the *Criminal Law (Human Trafficking)*

Act 2008, it appears that this protection will extend to all witnesses under 18 where the offence is a sexual offence should the *Criminal Law (Sexual Offences) Bill 2015* become law. While s.16 *Criminal Evidence Act 1992* will be the chapter's focus, consideration will also be given to other forms of evidence recorded prior to trial which are not used as frequently such as pre-trial depositions.

7.1.4 An influential development that prefaced the recent move towards the consideration and implementation of recorded testimony was the report of the Home Office Advisory Group on Video Evidence, chaired by HH Judge Thomas Pigot QC, which was published in 1989 ("The Pigot Report").<sup>989</sup> This included a recommendation that video recorded interviews, conducted by a police officer or social worker should be used as a substitute for the child's live testimony at trial. Following on from this, in Ireland, the Law Reform Commission in its *Consultation Paper*<sup>990</sup> and *Report*<sup>991</sup> on *Child Sexual Abuse* recommended the use of depositions and recorded out-of-court statements to be admitted as evidence. These recommendations were taken up by the Oireachtas and enacted as s.16(1)(b) *Criminal Evidence Act 1992*. Surprisingly, however, this statutory provision was not commenced until October 2008. A deposition procedure is also available through ss.4F and 4G of the *Criminal Procedure Act 1967*.

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<sup>989</sup> Home Office, *Report of the Advisory Group on Video Evidence (1989, London: Home Office)*

<sup>990</sup> 'Provision could be made for admitting a video-recording of the child's evidence provided the child was made available for cross-examination at the trial. A video-recording could be admissible in total substitution for the child's participation at the trial, provided a general reliability or trustworthiness requirement such as is built into the child abuse or residual hearsay exceptions in the United States was also built into this exception, or a requirement of sufficient corroboration.'

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse (August,1989)* Recommendation 47 at p.206.

'The Commission provisionally recommends, as its preferred option for trials on indictment, that the *Criminal Procedure Act, 1967* should be amended to provide for the video-recording of District Court depositions in cases going forward for trial by jury, at the election of the DPP. The video-recording would be presented as the child's evidence at all trials on indictment, as the normal procedure, unless the Court decided after application by the accused that, in the interests of justice and fair procedures, the child should give evidence at the trial. In that event, the evidence could be given from behind a screen or on closed circuit television.'

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse (August,1989)* Recommendation 48 at p.206.

<sup>991</sup> 'We recommend that provision be made for the admission in evidence of a video-recorded interview with a child, recorded out of court and conducted by an appropriate person e.g. an appropriately qualified child examiner, a doctor, a psychologist, a Ban Garda, or a social worker, provided the child is available for cross-examination.'

Recommendation No. 7.20, Chapter 7: *Video-recording Out of Court Statements*, Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) at pg. 76.

7.1.5 At present, in this jurisdiction, there are two methods for the recording of children's evidence which may be subsequently admitted at trial. There is a deposition process, by which the child is brought into a District Court and a recording of his or her examination in chief and cross-examination evidence is recorded in the presence of the defendant and a District Court judge. The second manner is the recording of a statement by the complainant which may be admitted as examination in chief testimony at trial. This statement is recorded in a less formal setting, away from and prior to the trial, the interview being conducted by specially trained interviewers. Subject to the court's ruling, this recording may then be admitted at trial taking the place of live examination in chief testimony. The complainant must then be available for cross-examination.

7.1.6 The purpose of this chapter is to examine how recorded testimony has evolved in this jurisdiction in respect of both out of court witness statements and the deposition process. The chapter will consider how the relevant statutory provisions have been implemented and developed through case law. It will examine the scope of the legislation at present in this jurisdiction. Section s.16(1)(b) allows for examination in chief evidence to be admitted at trial but does not extend to the admission of cross-examination evidence. Examination of the available provisions in England and Wales will be examined and case law which has parsed the provision there will be considered. In addition, the chapter will include an analysis of proposed future legislative changes under the *Criminal Law (Sexual Offences) Bill 2015* and the *Criminal Justice (Victims of Crime) Bill 2015*. The latter bill embodies draft legislation to satisfy the requirements of the *EU Directive Establishing Minimum Standards of Support on the Rights, Supports and Protection of Victims*.<sup>992</sup> Whether the proposed legislation adequately fulfils EU requirements in terms of recorded testimony for child witnesses in criminal proceedings will be considered.

### **7.2.0 Depositions and recorded statements**

7.2.1 Historically, the *Children Act of 1908* facilitated the child witness by giving the court power to take and admit depositions as evidence at trial where a medical

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<sup>992</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14/11/2012.*

practitioner had stated that ‘the attendance before a court would involve serious danger to the life or health of the child or young person’.<sup>993</sup> The deposition could then be admitted at trial provided that it was signed by the justice before whom it was taken, that reasonable notice had been served upon the defendant and ‘that the person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition.’<sup>994</sup> This deposition procedure applied to the offence of cruelty as well as offences under Schedule 1 of the Act which were predominantly sexual and violent offences. Thus the contemporary legislation facilitating the admission of recorded testimony follows a tradition that has been in place for some time.

7.2.2 The deposition procedures of the *Children Act 1908* were superseded by the provisions of the *Criminal Procedure Act 1967*. The 1908 Act was repealed in full in Ireland by the *Children Act 2001* and, currently, the principal statutory basis for the admission of the recorded testimony of child witnesses is s.16(1)(b) *Criminal Evidence Act 1992*.

7.2.3 In addition, Section 16 *Criminal Justice Act 2006*<sup>995</sup> allows for the admission of witness statements as evidence at trial where the witness refuses to give evidence, denies having made the statement or gives evidence which is materially inconsistent with it. It is only relevant where the accused has been sent forward for trial for an arrestable offence and the focus of the section was the tacking of ‘gangland crime’ and not the facilitation of child witnesses. However, the admission of recorded statements under this provision will also be examined.<sup>996</sup>

### 7.3.0 Pre-trial depositions

7.3.1 A deposition is defined as a statement on oath of a witness in a judicial proceeding<sup>997</sup> and it may be admitted as evidence at trial only in specific

<sup>993</sup> S. 28 *Children Act 1908*.

<sup>994</sup> S. 29 *Children Act 1908*.

<sup>995</sup> S. 16 *Criminal Justice Act 2006*.

<sup>996</sup> See: *DPP v Michael O’Brien* [2010] IECCA 103<sup>996</sup> where the provision was used in a case of child sexual abuse in circumstances where the child witness did not swear up in court and her video recorded statement was deemed admissible at trial. The appeal was dismissed and the conviction upheld.

<sup>997</sup> ‘The statement of witnesses in criminal matters before the committing justice: RSC O 86 r 1. Generally a deposition may not be given in evidence at a trial without the consent of the party against whom it may

circumstances. The general legislative procedure for the taking and admission of pre-trial depositions is contained in ss.4F and 4G of the *Criminal Procedure Act 1967*. This includes a specific provision for the admission of a child complainant's evidence under ss.4F and 4G and s. 255 of the *Children Act 2001* where a judge of the District Court is satisfied on the evidence of a medical practitioner 'that the attendance before a court of any child, would involve serious danger to the safety, health or wellbeing of the child.'<sup>998</sup>The s.255 provision was undoubtedly prompted by the loss of the deposition procedure with the repeal of s.28 *Children Act 1908* as well as the previous recommendation for the taking of depositions outlined in the Law Reform Commission *Report on Child Sexual Abuse*.<sup>999</sup>

7.3.2 Section 16 (1)(a) of the *Criminal Evidence Act 1992* provides that any evidence by a person under 18 years of age given through a live television link in proceedings under Part IA of the *Criminal Procedure Act 1967* (which includes ss.4F and 4G) will be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible. Section 4G(3) *Criminal Procedure Act 1967* mirrors s.16(1)(a) *Criminal Evidence Act 1992*. It permits a video recording of evidence given through a live television link in proceedings under section 4F to be admitted at the trial of the offence with which the accused is charged. The recording is evidence of any fact stated therein of which direct oral evidence by the witness would be admissible. The provision contains a stipulation that it will be admitted unless the court is of the opinion that in the interests of justice the video recording ought not to be admitted. There is a further caveat that the recording will only be admissible if the accused was present at the taking of the evidence and an opportunity was given to cross-examine and re-

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*be offered, unless the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the trial: RSC O 39 r. 17. If the deponent refused to sign the deposition, it must be signed by the examiner: RSC O 39 r 11, 15. For examination of a witness in commercial proceedings, see RSC O 63A r6(1) (xi) inserted by Rules of the Superior Courts (Commercial Proceedings) 2004 (SI No 2 of 2004).*

<sup>998</sup>

<sup>999</sup>

*S.255 Children Act 2001.*

*'We recommend that the Criminal Procedure Act, 1967 should be amended to provide for the video-recording of any District Court deposition taken from a witness aged under 17 years in these cases, unless the Court, for special reason, rules that the deposition be taken in the ordinary way. The video-recording would be presented as the child's evidence at all trials on indictment, as the normal procedure, unless the court decides, on an application by the accused that, in the interests of justice and fair procedures, the child should give evidence at the trial. In that event, the evidence could be given on closed circuit television or from behind a screen.'*

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Recommendation 7.14, at pg. 73.

examine the witness. Both the provisions contained in 4G(3) *Criminal Procedure Act 1967* and s.16(1)(a) *Criminal Evidence Act 1992* indicate that the deposition procedure under ss.4F and 4G *Criminal Procedure Act 1967* is restricted to indictable offences and therefore does not apply to the District Court. This and the fact that s.255 *Children Act 2001* limits the eligibility of the provision to a child complainant<sup>1000</sup> are significant limitations to the provision. It is important to note that perjury offences attach to the provision.<sup>1001</sup>

7.3.3 The procedure s. 4F(3) of the Act includes the requirement that evidence must be taken in the presence of the accused and a District Court judge.<sup>1002</sup> The section affirms that the witness may be cross-examined and re-examined.<sup>1003</sup> Where the evidence is taken by way of sworn deposition, the deposition itself and any cross-examination and re-examination of the deponent (the person who has made the deposition shall be recorded), read to the deponent and signed by the deponent and the judge.<sup>1004</sup> The procedure highlights a legislative attempt to adapt s.255 *Children Act 2001* and s.4G(3) *Criminal Procedure Act 1967* into a process that is more child friendly. There are no reported cases of the provision having been used and it appears the provision is rarely invoked.<sup>1005</sup> This may be due to a number of factors. The legislation is complex and involves the application of three separate legislative provisions. It is limited in its application applying only to indictable offences. There may also be a reluctance on the part of practitioners to sever the testimony from the trial. In addition, it is submitted that the pre-trial deposition procedure available at present under the *Criminal Procedure Act 1967* is of no real assistance to the child witness. The pre-trial deposition procedure has all the characteristics of a formal trial. The procedure comprises a formal District Court setting including judge, prosecution and defence counsel as well as the presence of the accused. It is only

<sup>1000</sup> ‘...any child, in respect of whom an offence under this Part, or any offence mentioned in Schedule 1, is alleged to have been committed...’  
s.255 *Children Act 2001*.

<sup>1001</sup> ‘(5) If any child whose evidence is taken as aforesaid makes a statement material in the proceedings concerned which he or she knows to be false or does not believe to be true, the child shall be guilty of an offence and on being found guilty shall be liable to be dealt with as if he or she had been guilty of perjury.’  
s.255(5) *Children Act 2001*.

<sup>1002</sup> S.4F(3)(a) *Criminal Procedure Act 1967*.

<sup>1003</sup> S.4F(3)(c) *Criminal Procedure Act 1967*.

<sup>1004</sup> S.4F(3)(d) *Criminal Procedure Act 1967*.

<sup>1005</sup> Information personally communicated to the author by Shane Costello SC and Pauline Walley SC-March 2014.

with the commencement of s.16(1)(b) *Criminal Evidence Act 1992* that recorded testimony in any meaningful form has begun to be utilised in respect of vulnerable witnesses and children. This is a legislative provision which was drafted with the child witness directly in mind as its focus.

7.3.4 It should be noted, nevertheless, that there are substantial advantages to the deposition procedure. The taking of the evidence of the child witness in its entirety firstly provides greater opportunities for more detailed evidence to be admitted at trial if such evidence was taken closer to the time of the incident. Secondly it allows the child witness to put the incident itself behind him or her; the child will not have to wait to give evidence at trial and therapy could take place if appropriate. Even so, there is considerable scope to enhance the letter and operation of the current procedure. Reform of the deposition procedure is a moot point, however, in so far as the procedure has been overtaken by the enactment of s.16(1)(b) *Criminal Evidence Act 1992*.

#### **7.4.0 Background to s.16 (1)(b) Criminal Evidence Act 1992**

7.4.1 The rise in reporting of sexual offences in the latter part of the last century, particularly against children and those with an intellectual disability, coupled with law and policy developments in the UK and the influence of the 'Pigot Report',<sup>1006</sup> prompted calls for the Law Reform Commission to examine the means by which these vulnerable witnesses could best be assisted to give evidence. The LRC Report on *Child Sexual Abuse*<sup>1007</sup> and the LRC Report on *Sexual Offences against the Mentally Handicapped*,<sup>1008</sup> both published in 1990, were landmarks on the road to policy reform and contained many specific recommendations for the support of vulnerable witnesses giving evidence. It was the Commission's position that legal changes could be introduced without undermining the right of the accused to a

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<sup>1006</sup> The 'Pigot Report': Home Office, *Report of the Advisory Group on Video Evidence (1989, London: Home Office.)*

<sup>1007</sup> The Law Reform Consultation Paper on *Child Sexual Abuse* (Sept 1989) "Summary of Recommendations, Depositions" para 7.14 paras 7.074 to 7.084.  
The Law Reform Consultation Paper on *Child Sexual Abuse* (Sept 1989) *Out of Court Video*, Para 7.20 paras 7.053 to 7.073. Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) Recommendation No. 7.20, Chapter 7: *Video-recording Out of Court Statements* at p. 94.

<sup>1008</sup> The Law Reform Commission Report on *Sexual Offences against the Mentally Handicapped*. (LRC 33-1990).

fair trial. The Commission recommended inter alia the taking of full pre-trial depositions and the admission of recorded witness statements.

7.4.2 In relation to the recording of children's evidence, the Commission noted that a single interview with a child may not be sufficient to encapsulate all the information that may comprise his or her evidence. This is due to the fact that children's disclosure of abuse is generally progressive.<sup>1009</sup> In addition, the taking of multiple interviews may be upsetting for the witness. It may also raise the suggestion of possible coaching of the witness which may be challenged by the defence. Multiple interviews may also invite challenges on the basis of any inconsistencies in the testimony given over the course of a number of sessions, as noted by the Commission in its *Consultation Paper*.<sup>1010</sup>

7.4.3 The Commission also envisioned that the statement could be utilised where the witness recants.<sup>1011</sup> This was a circumstance which was later legislated for under s.16 of the *Criminal Justice Act 2006*<sup>1012</sup> which provides for the admission of certain pre-trial witness statements. The Commission's Consultation Paper also suggested that the use of the recorded interview may assist in the facilitation of early pleas.<sup>1013</sup>

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<sup>1009</sup> 'A child's disclosure of abuse is generally progressive. The report is rarely complete at the initial interview, even if skilled professionals are involved. Difficulties can arise as to when the disclosure process is completed. An interview obtained later in the disclosure process may be challenged when it is realised how long it took to elicit the information from the child.' Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989) Para 7.055 (ii) at p.159.

<sup>1010</sup> 'If a video-taped statement contains a denial, a recantation or is incomplete, it can be used to attack the child's credibility by showing alleged prior, inconsistencies in the child's evidence. If a number of different professionals record the interviews with the child, the chances of recorded statements appearing inconsistent will increase.'

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989) Para 7.056 (ix) at p.160.

<sup>1011</sup> 'The video tape can be used to refresh the victim's memory, as evidence of a prior consistent statement, or as substantive evidence of abuse where the victim is recanting at trial.'

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989) Para 7.055 (iii) at p.158.

<sup>1012</sup> Although this legislative provision was not designed for use in relation to child sexual abuse it was used in *DPP v Michael O'Brien* [2010] IECCA 103. where allegations of sexual abuse against two young daughters of the defendant had been made. One of the complainants was unable to give evidence in respect of the offences. A previously taped interview was then admitted as examination in chief testimony. The use of this section regarding child witnesses has been superseded by use of s.16(1)(b) *Criminal Evidence Act 1992*.

<sup>1013</sup> 'The video tape presenting the child as a credible witness may persuade some guilty defendants to plead guilty thus avoiding the necessity for a trial and cross-examination of the child.'

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989) para 7.055 (iii) at p.158.



This is certainly proving to be the case<sup>1014</sup> and this issue may give rise to a concern. If the defendant has pleaded not guilty in the hope that the recording will not be admitted, this may place huge stress on the complainant to swear up in court should the trial judge rule against admission of the recorded statements. The Commission noted that the recorded interview would demonstrate how the interview was conducted. The recording would also show the demeanour of the child which would in turn allow the court to evaluate the way the child gave testimony and how he or she reacted to questions.<sup>1015</sup> Ensuring that the child would then be available for cross-examination would guarantee a balance having regard to the rights of the defendant. It is submitted that the Commission was arguing in the context of fully recorded testimony. As shall be seen, s.16 (1)(b) allows for the admission of examination in chief testimony only, leaving open the probability of in court cross-examination and this causes issues which the Commission could not have foreseen.

### 7.5.0 Pre-trial witness statements

7.5.1 A witness statement is one that is generally taken prior to any court proceedings. It is usually but not always taken in a Garda station and will, depending on the age of the witness, be subject to the penalties of s.21(2)(b) of the *Criminal Justice Act 1984*.<sup>1016</sup> This means that the witness, having had the statement read back to him or her and having had an opportunity to amend the statement prior to signing it, will be liable to any penalty if it is discovered that the statement contains elements that are deliberately incorrect or untrue. The age of criminal responsibility in Ireland would suggest that a prosecution under s.21(2)(b) of the *Criminal Justice*

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<sup>1014</sup> See *DPP v AF* Central Criminal Court, November 2014 at para. 2.35.0.

<sup>1015</sup> 'The child's responses are apparent. The child's demeanour and facial expressions and gestures are preserved. Thus the court can evaluate the way the child gave testimony and how he or she reacted to questions.'

Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989) Para 7.055 (vi) at p.158.

<sup>1016</sup> S. 21 (11) Where—

(a) a statement is tendered in evidence by virtue of this section, and

(b) the person by whom the statement was made has stated in it anything which he knew to be false or did not believe to be true, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€2,500] or to imprisonment for a term not exceeding twelve months or to both, or on conviction on indictment to a fine not exceeding [€5,000] or to imprisonment for a term not exceeding five years or to both.

*Criminal Justice Act 1984.*

*Act 1984* is unlikely.<sup>1017</sup> The commencement of s.16(1)(b) *Criminal Evidence Act 1992* was designed for child complainants under the age of 14.<sup>1018</sup> Under this provision, the recording of a witness statement is taken with the express intention of it being admitted as examination in chief evidence at trial. It means that a statement taken pre-trial may, after a successful application at trial, be transformed into examination in chief testimony. Arguably, it is not taken under the auspices of s.21(2)(b) of the *Criminal Justice Act 1984*

7.5.2 The facility for the admission of unsworn testimony under s.27 of the *Criminal Evidence Act 1992* greatly assists the child witness in respect of the admission of recorded testimony as it removes a procedural hurdle for the child witness. It means that the person who conducts the interview, the Specialist Interviewer, does not need to administer an oath before conducting the interview. The admission of the testimony under s.27 *Criminal Evidence Act 1992* does mean that the evidence is subject to a perjury offence however unlikely that may be given the age of criminal responsibility in this jurisdiction.<sup>1019</sup> It is submitted that placing the unsworn evidence of a child on a legislative basis and facilitating its admission at trial also gives that evidence a legislative imprimatur.

7.5.3 The delay in the commencement of s.16(1)(b) which took place as recently as October 2008, may have been due to delays in drafting the *Good Practice Guidelines*,<sup>1020</sup> guidance for the use of the provision as well as the training of Specialist Interviewers, the personnel who conduct the interviews. Training began in 2007, the section was then commenced in 2008 and interviews have been taking

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<sup>1017</sup> The age of criminal responsibility is outlined in Section 52 of the *Children Act 2001* (as amended by Section 129 of the *Criminal Justice Act 2006*) and states that the age of criminal responsibility is 12 years. No child under the age of 12 years can be charged with an offence. However, 10 and 11 year-olds may be charged with very serious offences, such as unlawful killing, a rape offence or aggravated sexual assault. The Director of Public Prosecutions must give consent for any child under the age of 14 years to be charged.

S.52 *The Children Act 2001* (as amended by s.129 *Criminal Justice Act 2006*).

<sup>1018</sup> Or, under s.19 of the Act, for persons with an intellectual disability who have reached that age. This ties in with s.27 of the *Criminal Evidence Act 1992* which allows for evidence of a child under 14 to be admitted at trial without being sworn or affirmed.

<sup>1019</sup> See Chapter IV at para. 4.0.0

S.52 *The Children Act 2001* (as amended by s.129 *Criminal Justice Act 2006*).

<sup>1020</sup> *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences.* An Garda Síochána, (July 2003).

place under the section since that time. The first contested hearings occurred in November 2010 in the Central Criminal Court<sup>1021</sup> and in December 2010 in the District Court in the Criminal Courts of Justice, Dublin. The section allows for video recorded witness statements to be admitted as examination in chief evidence in courts of all jurisdictions in certain circumstances. The conditions and limitations are significant: the section applies only to complainants under 14 years of age<sup>1022</sup> and only in respect of offences designated under s.12 of the Act. This suggests that the legislature wished to confine the procedure to very narrow circumstances of particularly vulnerable of witnesses.

7.5.4 To elaborate on the scope of the provision, it is clear that the witness must be the complainant. The section describes the witness as “being a person in respect of whom such an offence is alleged to have been committed.”<sup>1023</sup> The witness must be under 14 years of age<sup>1024</sup> or a person with a “mental handicap”<sup>1025</sup> who has reached that age. The term “mental handicap” is not defined within the Act. Crucially, the complainant must be available for cross-examination. The legislation does not require that the complainant must be cross-examined but he or she must be available for cross-examination. The implication is that the child complainant must not only be physically available but that he or she must also be available in the sense of being competent to testify as a witness. In the case of a witness with a severe intellectual disability or a very young witness there may be an issue as to continuing competency if there is a significant gap between the recording of evidence and its admission at trial. The matter of competency will be examined in relation to English cases of *R v Powell*<sup>1026</sup> and *R v Malicki*<sup>1027</sup> As with the entirety of s.16, the offence must come under the offences set out in s.12 *Criminal Evidence Act 1992*, i.e. and these relate to sexual offences, violent offences and offences under the trafficking and pornography acts as well as relevant inchoate offences.

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<sup>1021</sup> See Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* The Bar Review 2011, 16(1), 2-6.

<sup>1022</sup> Under s.19 *Criminal Evidence Act 1992*, for persons with an intellectual disability who have reached that age.

<sup>1023</sup> S. 16 (1)(b) *Criminal Evidence Act 1992*.

<sup>1024</sup> The age requirement is in line with the age of eligibility for unsworn or unaffirmed testimony under s.27 of the *Criminal Evidence Act 1992* thus meaning that the Specialist Interviewers do not have to administer an oath.

<sup>1025</sup> S.19 *Criminal Evidence Act 1992*.

<sup>1026</sup> *R v Powell* [2006] 1 CAR 31.

<sup>1027</sup> *R v Malicki* [2009] EWCA Crim 365.

7.5.5 The issue of disclosure is outlined in s. 15 of the Act which allows for the accused to view the video prior to the hearing only after the accused has been sent forward for trial under Part 1A of the *Criminal Procedure Act 1967*. The issue of pre-trial disclosure is thereby only expressly outlined for indictable offences. It is submitted that disclosure concerning for District Court matters will still apply under traditional District Court disclosure rules and a “Gary Doyle Order.”<sup>1028</sup> However, as hearings occur more rapidly in the District Court, this may put pressure on appropriate personnel regarding disclosure and editing of recordings.

7.5.6 The interview must be conducted by a member of An Garda Síochána or a person competent for that purpose. There is no definition within the Act as to who is a “competent person”. The majority of Specialist Interviewers are Gardaí but a small minority of social workers have also been trained as Specialist Interviewers. The trainers of the Specialist Interviewers state that these skills need to be used regularly or they become defunct within a short space of time.<sup>1029</sup> The policy document, *Garda Síochána Policy on the Investigation of Sexual Crime* states:

There is an absolute obligation on investigating members to refer the interviewing of such complainants to trained Specialist Interviewers. Specialist Interviewers have undergone intensive training and are deemed competent to interview such complainants. Members (who are not trained Specialist Interviewers) will not attempt to take a statement from a person who is under 14 years of age or a person with an intellectual disability who complains of a sexual offence or an offence involving violence or threats of violence, except in exceptional urgent circumstances. Such exceptional urgent circumstances involve the imminent risk of

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1028 A ‘Gary Doyle Order’ is the informal term for disclosure in respect of summary prosecution referred as such after the case of *Director of Public Prosecutions v. Gary Doyle* [1994] 2 IR 286. See also Guidelines of the Office of the Director of Public Prosecutions (November 2010) para. 9.6 at p. 39.

1029 Personal communication from Sgt. Marie Daly, Templemore Garda Training College, An Garda Síochána. July 2011.

loss of life, or injury to the health of any person, harm to the health or welfare of a child or an offender absconding.<sup>1030</sup>

7.5.7 The legislation incorporates certain safeguard to protect the position of the accused. The video recording will not be admitted if the court is of the opinion that it is not in the interests of justice to do so. In considering this, the court shall have regard to all the circumstances including any risk that the admission of the video recording will result in unfairness to the accused. It should be noted that there is a legislative presumption that the witnesses statement “shall be admissible” unless it is not in the interests of justice to do so. The “interests of justice” are not enumerated and it would be beneficial to have specific guidance in respect of the relevant criteria. For example, in the Northern Territory in Australia,<sup>1031</sup> the ‘interests of justice’ in this context are tied to enhancing the effectiveness of the witness’s evidence and minimising the harm caused to him or her.

7.5.8 Section 16 (1)(b) constitutes a statutory exception to the rule against hearsay. This rule generally requires that evidence be given live in court by the person testifying.<sup>1032</sup> The rule is grounded in concerns about the reliability of second testimonial accounts. The difficulties in terms of hearsay issues with regard to the recording of testimony are perhaps easier to overcome than the admission of paper documents or of computer files as it is simpler to verify the identity of the witness and the circumstances in which the statement was made i.e. whether it was made voluntarily and the strictures under which the child witness was aware of the importance of telling the truth.

7.5.9 Procedural aspects to the taking of the recording must remain stringent. Otherwise, the admission of such testimony may be open to allegations of injudicious editing, manipulation of the evidence, and the exclusion of statements

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<sup>1030</sup> Garda Síochána *Policy on the Investigation of Sexual Crime, Crimes Against Children, Child Welfare*. 2<sup>nd</sup> edn, 2013. Para. 32.5 at p.70.

<sup>1031</sup> The legislation in the Australian Northern Territory allows the court to vary the statutory arrangements for vulnerable witnesses in the interests of justice, having regard to minimizing the harm and enhancing the effectiveness of the witness’s evidence: s. 21A (2B) *Evidence Act (Northern Territory)*.

<sup>1032</sup> ‘As such, the provisions under s.16(1)(b) of the *Criminal Evidence Act 1992* constitute another statutory exception to the rule against hearsay; although beyond the hearsay issue, the evidence must abide by the rules of evidence that ordinarily apply to testimony.’  
John Healy, *Irish Laws of Evidence* (Thomson Round Hall, 2004) Para. 1-65 at p.37.

made or that evidence which might be deemed probative or exculpatory had been given off camera. Verification of the manner of the recording, the qualifications of the Specialist Interviewer and the circumstances in which the recording was made may be required by the court in order that the recording be admitted at trial under an exception to the rule against hearsay.<sup>1033</sup> Prior to the commencement of s.16(1)(b), the Minister for Justice set up a Committee to draft the *Good Practice Guidelines* for An Garda Síochána which mirror closely the guidance available to practitioners in England and Wales.<sup>1034</sup> The Committee was set up in 1999 and the *Good Practice Guidelines*<sup>1035</sup> were drafted in 2003. These guidelines assist the court in how the interview under the section should be conducted but they have no statutory authority. They assist the Specialist Interviewer in observing fair procedures while conducting the interview so that it may be admitted at trial.

7.5.10 In *The People (DPP) v JPR*<sup>1036</sup> the accused was charged with the rape of a boy who was 7 years of age at the time of the alleged incident in late 2004. A recording under s.16(1)(b) was taken and an application for its admission was made at trial. As Orange has noted<sup>1037</sup> the defence had identified a number of possible breaches of the guidelines during the taking of the recorded interview. These included a challenge that the interview had not established that the child complainant understood the difference between truth and lies. The Guidelines<sup>1038</sup> emphasise the need for the Specialist Interviewer to establish the child complainants understanding

<sup>1033</sup> In *DPP v XY* and in all subsequent cases, the Specialist Interviewer is questioned as to qualifications as well as how the interview was conducted. See Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* The Bar Review 2011, 16(1), 2-6.

<sup>1034</sup> *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and witnesses, and using Special Measures*. (Ministry of Justice) (March 2011).

<sup>1035</sup> *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences*. An Garda Síochána, (July 2003).

<sup>1036</sup> *The People (DPP) v JPR*, Bill No. CC0057/12 (ex temp.) O'Malley J Central Criminal Court 1st May, 2013.

<sup>1037</sup> Garnet Orange BL, *Police Powers In Ireland* (Bloomsbury Press 2013) para 7.38 at p. 121.

<sup>1038</sup> *Good Practice Guidelines for Persons involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences*. An Garda Síochána, (July 2003).

They require revision in the face of changing practice. For example, the *Guidelines* state that should a subsequent recorded interview be required, a request should be made to the DPP. (Para.1.30 at p. 14) This has now been revised and a request for a supplemental recorded interview can now be made to the senior investigating officer in the case. *Revision of Policy by Deputy Director, November 2009*.

of truth and lies.<sup>1039</sup> However, the judge held that the advice given by the Garda Specialist Interviewer to the child was intended to be age appropriate and that the guidelines did not have to be followed strictly to the letter. The judge expressed concerns that the recording did not show that the child had been warned about the consequences of telling the truth but she was satisfied that there was sufficient evidence to show that the child understood the difference between a truth and a lie and the importance of telling the truth when making the statement. The fact that the judge highlighted this issue is extremely significant. This is notwithstanding the fact that a child under 14 years of age may give his or her testimony unsworn under s.27 of the *Criminal Evidence Act 1992*. The standard for the admission of unsworn testimony is that the witness who is under 14 years of age is able to give an intelligible account of events which are relevant to the proceedings<sup>1040</sup> but s.27(2) of the Act also contains an offence for perjury where the witness gives evidence which he knows to be false or does not believe to be true.<sup>1041</sup>

### 7.6.0 Concerns regarding the provision

7.6.1 There is a concern that the balance of rights will be a difficult one to maintain regarding the use of this provision constituting as it does partially recorded testimony for complainants for specific offences. Healy notes that the provisions for taking evidence in advance of the trial, under s16(1)(b) *Criminal Evidence Act 1992*, raise issues for both the defendant and the complainant:

On occasion, these provisions may benefit the accused, insofar as they provide him with material in advance of the trial to enable him better to anticipate the prosecution's case and to prepare a defence. On the other hand,

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<sup>1039</sup> The guidance for Specialist Interviewers conducting interviews under s.16(1)(b) *Criminal Evidence Act 1992* is the *Good Practice Guidelines* (2003) which recommends that it is important to establish a rapport with the complainant to put them at ease e.g. discuss hobbies and likes/dislikes. The Specialist Interviewer should also establish the ground rules of the interview e.g. if the complainant doesn't understand a question, he or she should say so, and also try and also to establish that the complainant understands the difference between truth and lies. *Good Practice Guidelines* (2003), Section 3 'The Interview' at p. 27. See also: 'Establishing Ground Rules with the Complainant' at para. 3.9 and 3.10 at p. 28.

<sup>1040</sup> '27. Oath or affirmation not necessary for child etc., witness'  
*Criminal Evidence Act 1992*.

<sup>1041</sup> S.27(2) 'If any person whose evidence is received as aforesaid makes a statement material in the proceedings concerned which he knows to be false or does not believe to be true, he shall be guilty of an offence and on conviction shall be liable to be dealt with as if he had been guilty of perjury.'  
*Criminal Evidence Act 1992*.

they raise numerous exigent concerns of undue prejudice, which it is the trial judge's responsibility to mitigate having regard to the constitutional right of the accused to a fair trial.<sup>1042</sup>

7.6.2 It appears that no empirical research on the cases involving s.16(1)(b) nor data as to how many cases are using the section is being compiled.<sup>1043</sup> Therefore information as to how many examination in chief recordings are being taken under the section, or admitted at trial or to what extent they benefit the complainant, is not being evaluated. Some indications as to the issues that may arise and how they might be resolved can be ascertained through cases observed by the author or related to the author by barristers involved in the matter.<sup>1044</sup>

7.6.3 The splitting of testimony between the pre-trial and the trial phases exacerbates the issue of delay. In *DPP v AB*,<sup>1045</sup> the trial, having been adjourned three times, was delayed again. The defence challenged the admissibility of the recording on the first day of trial.<sup>1046</sup> This was despite the fact that the case had had the benefit of a preliminary hearing.<sup>1047</sup> The introduction of pre-trial hearings was designed to resolve evidence issues much earlier in the trial process. Legal argument concerning the admission lasted for two days in which the recording was played to the trial judge and the complainant was cross-examined as to the evidence that would be given at trial. The trial judge ruled that the recorded evidence was

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<sup>1042</sup> John Healy, *The Laws of Evidence*, (Thomson Round Hall 2004) para-1.64 at p.36.

<sup>1043</sup> Information communicated to the author by Kate Mulkerrins, Head of Policy and Research, Office of the Director of Public Prosecutions, Irish Criminal Bar Conference, Kings Inns, March 2012.

<sup>1044</sup> See Miriam Delahunt, *Recorded Evidence for Vulnerable Witnesses in Criminal Proceedings* The Bar Review (June 2015); Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* The Bar Review 2011, 16(1), 2-6.

<sup>1045</sup> See also: *DPP v AB*, Circuit Criminal Court, November 2014 at para.2.31.0.

<sup>1046</sup> 'Circuit Court Practice Directions, CC12 Pre-Trial Procedure'

5. The defence will be required to be in a position to notify the court as to:[...]

d) whether there are any requirements for the running and presentation of the defence case which need to be addressed by the court or the Courts Service in advance.'

Despite this practice direction, applications regarding the admissibility of s.16(1)(b) recordings still take place on the first day of trial without any consequences if no admissibility issues are raised at pre-trial hearings.

<sup>1047</sup> The pre-trial hearing is conducted under:

'Circuit Court Practice Directions, CC12 Pre-Trial Procedure'. (CC13-Midland; CC14-South Eastern Circuits)

'Prosecution Counsel on the Dublin Circuit are required to alert the court as to:

4 c) Video link, video recorded and CCTV evidence

4. Whether it is intended to have admitted as evidence a video recording of any evidence.



admissible and after a trial that took approximately two weeks, the defendant was found guilty.

7.6.4 In *DPP v AC*,<sup>1048</sup> the difficulties which may arise when video link facilities are not available became clear where the transfer of a trial to a neighbouring jurisdiction caused significant delays.<sup>1049</sup> Having heard evidence from the first witness, the second witness' cross-examination began as late at 6pm. Defence counsel stated that he would have no objection to postponing cross-examination until the following day. The court decided to continue and when cross-examination began, the child witness became too distressed to carry on. The court reconvened on the following day and cross-examination was completed without further incident. The defendant was ultimately found guilty. The stress caused to the child cannot be overestimated.

7.6.5 Confusion stemming from the absence of clear procedures in the legislation may give rise to inconsistent and even conflicting rulings. For example, in *DPP v AD*<sup>1050</sup> the trial judge, McCarthy J, ruled that the complainant would not watch the recording in favour of the defendant's challenge on the basis of the length of the interval between the recording of the evidence and the trial. No transcript of the recording was given to the witness *in lieu* and the witness was cross-examined without watching the recording or having the benefit of refreshing her memory as to its content.<sup>1051</sup> Ultimately, the defendant pleaded guilty to a lesser charge. In all other trials observed by the author or described by practitioners, the complainant watched the DVD as it is being played to the jury, a facility that assists the complainant in turning her attention to the evidence on which he or she will be cross-examined. The trial process is not a test of memory and if the trial judge is going to accede to a defence objection to the complainant watching the DVD as it is

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<sup>1048</sup> See also: *DPP v AC*, Circuit Criminal Court, July 2011 at para.2.32.0.

<sup>1049</sup> Where facilities are not available, S.17 *Criminal Evidence Act 1992* provides that proceedings may be transferred to a courtroom which is equipped with the appropriate facilities.

<sup>1050</sup> See also: *DPP v AD*, Central Criminal Court, Jan 2015 at para.2.33.0.

<sup>1051</sup> In England and Wales, the guidance (albeit also non-statutory) regarding this support measure is significantly more comprehensive but also states that that witness may watch the recording prior to trial. See *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures Chapter 4, Witness Support and Preparation, Refreshing the Memory of the Witness* at p.117. (Ministry of Justice) (March 2011).  
[http://www.cps.gov.uk/publications/docs/best\\_evidence\\_in\\_criminal\\_proceedings.pdf](http://www.cps.gov.uk/publications/docs/best_evidence_in_criminal_proceedings.pdf) (Accessed 29<sup>th</sup> September 2015).

being played, the prosecution counsel should be live to the need for a transcript to be given in advance of him or her taking the stand.

7.6.6 Delay can have a significant impact on a trial as was seen in *DPP v AE*.<sup>1052</sup> The complainant was 12 years of age at time of the recording of her statement and was cross-examined at trial, when she was 17 years of age, when the statement was admitted under s.16(1)(b) *Criminal Evidence Act 1992*.<sup>1053</sup> If the recording had not been made, some five years previously, the jury might have found it far more difficult to place the evidence in a temporal context i.e. a detailed visual record is taken at the time of the incident and thus the child witness's age at the time of that incident is made clear to the court. The length of that delay was unusual but the *Courts Services Annual Report*<sup>1054</sup> indicates that there are consistently long waiting times for trial. The average ranges generally from approximately one year to 18 months. In the lives of child complainants under 14 years of age any delay will be significantly more difficult to endure than for an adult.

7.6.7 The need for preliminary hearings to be placed on a statutory basis and enforced in court was seen again in *DPP v AF*.<sup>1055</sup> In this case, after a prosecution application to have recordings taken under s. 16(1)(b) admitted at trial, the court did rule them admissible. The defendant subsequently reconsidered his position changing his plea from not guilty to rape to a plea of guilty to the lesser charge of aggravated sexual assault. At sentencing in April 2015, defence counsel stated that it was during the *voir dire* that the defendant realised the harm he had caused to the complainant and at that point, he had decided to plead guilty. Hunt J noted that it was unfortunate that the legal issues were not dealt with sooner in the case and hoped that the situation would change in the future. It is likely that he was referring to the possible placing of pre-trial hearings on a statutory basis under the *Criminal*

<sup>1052</sup> See also: *DPP v AE*, Dublin Circuit Criminal Court, June 2014 at para. 2.34.0

<sup>1053</sup> In *People (DPP) v JPR*, O'Malley J ruled that although the child witness must be under 14 years of age at the time of the recording, the video may be shown after the child has reached that age. *The People (DPP) v JPR* Bill No. CC0057/12 (ex temp.) O'Malley J Central Criminal Court 1st May, 2013.

<sup>1054</sup> For trial waiting times see The Courts Services Annual Report (Courts Services 2014) 'Waiting times as at 31<sup>st</sup> December 2014' at p. 61. <http://www.courts.ie/Courts.ie/Library3.nsf/0/3B21EBCDBCA7469C802575E6003DBD7F?OpenDocument> (Accessed 25<sup>th</sup> September 2015).

<sup>1055</sup> See also: *DPP v AF*, Central Criminal Court, Dublin, November 2014 at para. 2.35.0.

*Procedure Bill (2015)*.<sup>1056</sup> It is submitted that defendants in criminal proceedings involving sexual offences may frequently plead not guilty anticipating that a witness will be not be able to give testimony at trial. As this evidence is extremely sensitive and difficult to relay in such a public and tense environment, it is not surprising that a witness may not be able to give evidence effectively or at all in some cases. This situation is only exacerbated for a child witness and the defendant should not be able to rely on the witness's potential fragility as a tactic within the criminal process. While it remains the absolute right of the defendant to plead at any time, enforcement of preliminary hearings which would deal with evidential matters at an early stage in proceedings, would better inform decisions of when and how to plead. The use of pre-trial Plea and Case Management Hearings in England and Wales<sup>1057</sup> are particularly helpful in resolving these issues and may provide a model which this jurisdiction could follow.<sup>1058</sup> At present the legislative proposals for preliminary hearings contained in the *General Scheme of the Criminal Procedure Bill (2015)*<sup>1059</sup> do not address the use of support measures or the vulnerable witness.

7.6.8 Anecdotal evidence from legal practitioners and the Gardaí suggest that the likelihood that a witness will 'swear up' in court may influence the defendant's decision to offer a late plea.<sup>1060</sup> A defendant's plea of guilty, even at a late stage in proceedings, will allow the court to take into consideration, as a mitigating factor during sentencing that the defendant's pleas obviated the need for the complainant to go through the arduous task of testifying. Cases involving child sexual abuse have frequently involved this kind of brinkmanship. With the commencement of s.16(1)(b), it could be argued that the stakes are even higher. An application must be made at trial for evidence recorded under s.16(1)(b) to be entered as testimony at

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<sup>1056</sup> *Head 2 - Preliminary Trial Hearings, Revised General Scheme of the Criminal Procedure Bill*, (June 2015)

<sup>1057</sup> See 'Part 3, Case Management,' Criminal Procedure Rules (As in force 6<sup>th</sup> April 2015). <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-03.pdf> Accessed (29th September 2015).

<sup>1058</sup> 'Support before the Trial/Hearing, Plea and Case Management Hearings' *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and witnesses, and using Special Measures*. (Ministry of Justice) (March 2011) Para. 4.43 at p. 115.

<sup>1059</sup> *Head 2 - Preliminary Trial Hearings, Criminal Procedure Bill*, (June 2015)

<sup>1060</sup> Personally communicated to author by counsel who would frequently be involved in cases involving vulnerable witnesses.

trial. If the application is refused or as in *People (DPP) v JPR*,<sup>1061</sup> the recording cannot be shown due to inadmissible content which cannot be edited satisfactorily, the child witness must then come into court. These variable factors place great pressures not only on the child witness but on the multiple agencies who come into contact with the child witness and who must deal with the question of how his or her evidence is presented as the case progresses through the courts.

7.6.9 As a matter of law and policy, certain aspects of the implementation of s.16(1)(b) need to be addressed in the legislation or the accompanying Guidelines. *DPP v AH*<sup>1062</sup> is a case which illustrates this point. It involved the admission of 3 DVD recordings of examination in chief testimony in a case where a father had been charged with numerous sexual offences against his daughter. The defence counsel challenged the admission of these recordings on the basis that the Specialist Interviewer who had conducted the interview had asked leading questions during the interview.

7.6.10 The background to the case is that in 2012, the complainant had disclosed the abuse to her friend who then informed the complainant's teacher at school. The HSE had been informed and the complainant and her four year old brother were taken into care. The Specialist Interviewers in this case had recorded three interviews with the complainant as fresh disclosures were made over the year. The first two interviews took place in 2012 and the third interview took place in 2013. The complainant alleged that from the age of four years of age up until the time she had disclosed the abuse, her father had raped her orally, vaginally and anally. He had also used sex toys in the course of the abuse. He was charged with 64 counts of vaginal, oral and anal rape as well as offences under s.4 of the *Criminal Law (Rape) (Amendment) Act 1990* which involves rape with the use of an implement. The case originated in Castlebar and had come on for trial before Carney J in November 2014 in Galway. Carney J had admitted all recordings under s.16(1)(b) but due to late disclosure issues, the trial had collapsed and was then transferred to Dublin. The case came on

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<sup>1061</sup> *The People (DPP) v JPR*, Bill No. CC0057/12 (ex temp.) O'Malley J. Central Criminal Court (1st May, 2013 Unreported)

<sup>1062</sup> See also: *DPP v AH*, Central Criminal Court, Dublin, June 2015 at para.2.37.0

for trial in June 2015, the recordings were admitted as evidence and ultimately, the defendant was convicted on 22 counts of rape and s.4 rape.<sup>1063</sup>

7.6.11 The admissibility of the interviews in both trials was challenged on the basis that the Specialist Interviewer had referred to a previous off camera conversation in which the complainant and Specialist Interviewer had discussed certain offences which had taken place in a car. The defence counsel argued that the Specialist Interviewer had asked leading questions thus prejudicing the evidence. The prosecution counsel argued that the information which had been aired in the conversation had been part of a previous 'clarification' interview. This was explained as follows. When a complaint is made to the Gardaí, the Specialist Interviewer is notified and arranges a clarification interview with the complainant to establish the nature of the complaint before deciding whether to conduct an interview under s.16(1)(b). In this instance, the clarification interview had taken place and a recorded interview was then conducted with the complainant.

7.6.12 During the recorded interview, the complainant was reluctant to give a free narrative account and the Specialist Interviewer felt it was necessary to prompt the complainant regarding the nature of the abuse referring to details of a conversation which had taken prior to the recording i.e. the clarification interview. The prosecution counsel argued that this information was part of the chain of evidence on the part of the complainant in that the clarification interview had led to the evidence given in the recording.

7.6.13 In addition, the complainant's evidence did not have significant detail in respect of the abuse from the age of 4 years of age to 7 years of age. The recordings when admitted at trial as her examination in chief evidence were sealed and could not be revisited.<sup>1064</sup> In cross-examination, she gave monosyllabic answers in respect

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<sup>1063</sup> Aaron Rogan and Fiona Ferguson, *Man (35) who began sexually abusing his daughter when she was seven years old is jailed for 15 years* The Irish Independent, 31<sup>st</sup> July 2015 <http://www.independent.ie/irish-news/courts/man-35-who-began-sexually-abusing-his-daughter-when-she-was-seven-years-old-is-jailed-for-15-years-31418611.html> (Accessed 25th September 2015).

<sup>1064</sup> See Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* The Bar Review 2011, 16(1), (2-6) at p. 4.

of the details of the locations and times perhaps due to the belief that she was being helpful to the prosecution. On re-examination, she was much more open to answering questions in detail but this was not sufficient to prevent a successful defence application to remove half the counts on the indictment before they went to the jury. The judge removed certain counts from the indictment which he felt would be unfair to put before the jury as there was insufficient evidence to ground them. The defendant was eventually convicted on 22 counts of sexual offence against the complainant which had occurred from when she was seven years of age.

7.6.14 This case highlights a number of difficulties with the current provision of recorded testimony as well as with certain aspects of how cases involving are prosecuted. The complainant had disclosed that she had been abused from the age of 4 years. The DPP directed that the indictment included 64 counts of abuse based on a time frame of offences every quarter of every year at an unspecified location from the age of 4 to the age of 11 years of age. The evidence given by the complainant did not have sufficient information to sufficiently ground certain counts and these were ultimately withdrawn from the jury. This is poor practice as it may prejudice the jury as it hears all of the counts being read when there is little reality to them being successfully prosecuted. It is contended that the prosecution case relied too heavily on the evidence contained on the DVD recordings. It appears that there were no investigations made regarding the use of mobile phones to support allegations of where the offences had taken place. An overemphasis on the evidence contained in the DVD recordings may be unjust to the defence as well as the complainant. The DVD is a powerful piece of testimony taken at a time close to the recording. By the time the defence counsel come to cross-examine he or she is asking questions after a long interval in very different circumstances. At that stage of proceedings, the complainant may not be able to remember certain details or may be overwhelmed by the setting.

### *7.7.0 Procedural issues*

7.7.1 After the recording is made, it may or may not be transcribed into document form in order to help various personnel such as prosecution counsel examine the

particular case file. The question of transcripts is a consistent difficulty with regard to cases involving s.16(1)(b) *Criminal Evidence Act 1992*. The length of a recording may be quite long and more so if there are multiple recordings as in *DPP v AH* so transcription may be of significant assistance for the personnel involved in the matter. Who transcribes the recording, who funds the transcription and who has ultimate responsibility for its accuracy is still to be decided conclusively. In certain cases observed by the author, the Specialist Interviewer has transcribed the recording or in some cases this has also been done by a clerical officer within An Garda Síochána. There is a difficulty in outsourcing transcription as there may be issues in terms of confidentiality as well as health and safety – the person who transcribes these recordings on a consistent basis may need counselling as the content may be potentially traumatising.<sup>1065</sup>

7.7.2 There have been problems regarding how much time must be spent by the Office of the DPP watching the recordings in order to identify the relevant evidence and offences. An agreement has been established between the Specialist Interviewers of An Garda Síochána and the Office of the DPP. In assistance of the prosecution of cases using Section 16(1)(b), Specialist Interviewers prepare a *Verbatim Record of Salient Points* in relation to what offences and sections of the recording may be relevant. This is enclosed with the recording and sent to the Office of the Director of Public Prosecutions prior to the preparation of the Book of Evidence. Section 16(1)(b) states that a recording under this section shall be admissible, under certain provisions, ‘at the trial of the offence as evidence of any fact stated therein of which direct oral evidence would be admissible’. If admitted at trial, this section has been interpreted to mean that that the evidence is sealed and no further examination in chief questions can be asked.<sup>1066</sup> Whether a transcript is made of the relevant sections of the recording or the entire recording, and whether the recording and/or the transcript become part of the Book of Evidence may be a point at issue. However, a reliable transcript is imperative to ensure efficient progress of the case through the criminal justice system. For example, if a defendant wishes to plead early in proceedings and transcript of the recording is not supplied with the

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<sup>1065</sup> Information communicated to the author by Garda. Sgt. Paul Landers and Det. Sgt. Jennifer Molony (March 2011).

<sup>1066</sup> See *DPP v XY* outlined in Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* The Bar Review 2011, 16(1), 2-6 at p. 4.

Book of Evidence, the prosecution cannot furnish the court with details of the relevant offence(s) and the sentencing will have to be delayed while this information is transcribed. If the matter progresses to trial and a transcript is not provided there may be a delay while one is requested, prepared and verified.

7.7.3 Where a recording includes information which is prejudicial to the defendant, this may have to be edited out after agreement between prosecution and defence counsel or after an order by the court. Another significant issue is which agency retains responsibility for the editing of the recording where this is required at trial. Issues regarding editing may cause significant problems as was demonstrated in the case of *People (DPP) v JPR*.<sup>1067</sup> While O'Malley J admitted the recording as evidence, the statement was not shown to the jury. Unfortunately, the need to edit it to remove potentially prejudicial comments became an insurmountable obstacle.<sup>1068</sup> As a result, the child witness had to come into court to give examination in chief evidence.

7.7.4 Similar issues regarding the audibility of recordings frequently occur, due in part to different audio visual systems being used to record, edit and play the recordings in court.<sup>1069</sup> The jury may request a transcript where there is difficulty hearing the complainant or where the complainant has a speech impediment or a strong accent. A transcript was requested by prosecution counsel in *DPP v AC*,<sup>1070</sup> *DPP v AF*<sup>1071</sup> and *DPP v AH*.<sup>1072</sup> In the first two cases the trial judge refused the application and in *DPP v AH*<sup>1073</sup> the prosecution counsel and defence counsel agreed that the application could be revisited after the recordings had been played. In the event, no renewal of the application was made. In England and Wales, the courts have outlined strict parameters regarding the use of transcripts for the jury. Where a transcript is required to assist understanding the recording, a transcript may be given

<sup>1067</sup> *The People (DPP) v JPR*, Bill No. CC0057/12 (ex temp.) O'Malley J. Central Criminal Court (1st May, 2013 Unreported)

<sup>1068</sup> Garnet Orange BL, *Police Powers In Ireland* (Bloomsbury Press 2013) para 7.38 at p. 121.

<sup>1069</sup> In relation to the difficulties which were involved in one of the first uses of the provision, see Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* The Bar Review 2011, 16(1), 2-6.

<sup>1070</sup> *DPP v AC*, Circuit Court, July 2011.

<sup>1071</sup> *DPP v AF*, Central Criminal Court, Dublin, November 2014.

<sup>1072</sup> *DPP v AH*, Central Criminal Court, Dublin, June 2015.

<sup>1073</sup> *DPP v AH*, Central Criminal Court, Dublin, June 2015.



to the jury while they view the recording but they may not bring the transcript into the jury room as this may cause an imbalance in the weight given to that evidence during their deliberations.<sup>1074</sup> These questions are only beginning to be examined in this jurisdiction and certain procedural questions may only come to light when an appeal is brought before the Court of Appeal. In *DPP v PP*<sup>1075</sup> previously unexamined aspects of the use of s.16(1)(b) *Criminal Evidence Act 1992* were considered. When evidence had been completed at trial and the jury had retired, they had been given all exhibits included the DVD recorded under s.16(1)(b). The defence had objected on the basis that the recordings were to be regarded as oral evidence<sup>1076</sup> and if the jury wished to have their memory refreshed regarding any part of it, it was appropriate that this be done in open court. The trial judge permitted the jury to have the recording in the jury room and this recording could be played whenever wished during deliberations.

7.7.5 This became a point of appeal as the appellant argued that the fact that the jury were able to view the recording during deliberations gave this testimony an unnatural weight which was prejudicial to the defendant. While there was no appropriate case law in this jurisdiction, the appellant cited relevant English case law. The case of *R v Rawlings and R v Broadbent*<sup>1077</sup> was very clear on the point. This case stated that where the jury wished to have their memory refreshed, only the part of the evidence which was relevant should be replayed in open court. The judge, from his own notes, should also remind the jury of what was said in cross-examination and re-examination and these dicta had been approved in the more recent case of *R v John Baird*.<sup>1078</sup>

7.7.6 In *DPP v PP*,<sup>1079</sup> the Court of Appeal dismissed the appeal on this and other grounds. On this point, the court stated that the relevant cross-examination had been short and limited to general questions. It determined that there was no issue of any

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<sup>1074</sup> *R v Welstead* [1996] 1 Cr App R 59 CA; *R v Popescu* [2011] Crim LR 227 CA; *R v Sardar* [2012] EWCA Crim 134; *R v Rawlings and R v Broadbent* [1995] 1 WLR 178.

<sup>1075</sup> *DPP v PP* [2015] IECA 152. The judgment of the 6<sup>th</sup> July 2015 was delivered by Sheehan J.

<sup>1076</sup> The recording is 'admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible' and therefore is the equivalent of oral testimony. *S.16(1)(b) Criminal Evidence Act 1992*.

<sup>1077</sup> *R v Rawlings and R v Broadbent* [1995] 1 WLR 178.

<sup>1078</sup> *R v John Baird* [2007] EWCA Crim.287.

<sup>1079</sup> *DPP v PP* [2015] IECA 152.

injustice resulting from the jury viewing ‘the s.16 DVD’ in their room along with any other exhibits. It is submitted that this judgment highlights the confusion that may arise between an ordinary exhibit, which may include recordings such as CCTV evidence, and the recording of evidence under s.16(1)(b). The subsection is quite clear in that it states that such recording shall be ‘admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible’.<sup>1080</sup> If a jury had a query regarding testimony which had been given in court, it would be usual for the judge, in the presence of both counsel, to refresh the memory of the jury from his notes and from a transcript of the particular day’s evidence. It would be highly unusual for the judge to allow the transcript to be given to the jury for their deliberations.

7.7.7 In *DPP v PP*,<sup>1081</sup> the court noted that the defence objection at trial had been cursory in nature and the judgment appears to consider that this is an important factor in the dismissal of the ground of appeal. It is submitted that the Court of Appeal was incorrect in this instance and it is hoped that future decisions will follow the lead of the appropriate case law in England and Wales.

### 7.8.0 S. 16 Criminal Justice Act 2006

7.8.1 Although the admission of recorded testimony has been superseded by the use of s.16(1)(b) *Criminal Evidence Act 1992*, the case of *DPP v Michael O’Brien*<sup>1082</sup> is significant in examining how the courts have dealt with this support measure. S.16 *Criminal Justice Act 2006* was enacted to deal with “gangland” crime but was then used very effectively in *DPP v Michael O’Brien*.<sup>1083</sup> It allows the admission of previous statements in certain circumstances. In *O’Brien*<sup>1084</sup> the accused was charged with several counts of sexual assault of his two daughters. The two children were, M who was aged nine at the time of the trial, and K, aged eight at the time of the trial. The offences had taken place on several dates up to the time when M was approximately six years of age and K was approximately five years of age. It was at

<sup>1080</sup> S.16(1)(b) *Criminal Evidence Act 1992*.  
<sup>1081</sup> *DPP v PP* [2015] IECA 152.  
<sup>1082</sup> *DPP v Michael O’Brien* [2010] IECCA 103.  
<sup>1083</sup> *DPP v Michael O’Brien* [2010] IECCA 103.  
<sup>1084</sup> *DPP v Michael O’Brien* [2010] IECCA 103.

this stage that the offences came to light and both complainants made statements in respect of the alleged assaults.

7.8.2 At trial, K gave evidence broadly in line with her statement. However, M gave evidence which, after argument, was deemed by the trial judge to be “*materially inconsistent*” with her pre-trial statements. She had said consistently “I don’t remember” when asked about the events and said “I can’t really say-I am not sure why” when read sections from her original statement and then asked why they were different. The prosecution sought permission to introduce a pre-trial statement which existed, pursuant to the provisions of s.16 of the Act of 2006 which provides for the admission of statements as evidence in certain circumstances. This statement included video recorded interviews which had been conducted between M and a psychologist shortly after the complaints had been made by the children’s mother to An Garda Síochána. After a lengthy voir dire which took six days, the trial judge admitted the video recorded statements.

7.8.3 It should be noted that there was additional corroborative medical evidence of sexual abuse but it did not identify the perpetrator of the abuse. The defendant was ultimately found guilty and appealed his conviction. One of the grounds of his appeal concerned the admission of the recorded statement. He argued that the trial judge had erred in law in his interpretation and application of the provisions of s.16(1) of the Act of 2006, in that: (a) the witness did not come within the terms of the section at all, because she did not give evidence “*materially inconsistent*” with her prior statement; (b) there was inadequate, or no evidence, upon which the trial judge could conclude that her statement was made voluntarily; (c) the statement was not reliable within the meaning of the section, because (i) it had not been made either on oath or affirmation, did not contain a statutory declaration to the effect that it was true, and (ii) there was no other or sufficient evidence available to ensure that the witness understood the requirement to tell the truth, as mandated by the provisions of the section.

7.8.4 Examining the video recorded statement, the court found that the statement was given voluntarily and no pressure was exerted on the complainant to make it. The court also found the statement was reliable and that the evidence given at trial

was fundamentally at variance with the video recorded statements and was, therefore, materially inconsistent. The court rejected the accused's argument that the evidence was simply "unfavourable" to the prosecution. In respect of the requirement to tell the truth within the section, the court stated:

Apart from the requirement that the statement be both voluntary and reliable, the statement also must be (a) made under oath, (b) or affirmed, (c) or must contain a statutory declaration as to the truth of the matters stated in it. Or if none of these occurred, the court must be "*otherwise satisfied*" that when the statement was made, the witness understood the requirement to tell the truth. Quite clearly this latter requirement is readily, or most securely, met by evidence that the statement was prefaced by a warning, or even a reminder, to the witness to tell the truth, or by a statement of the consequences that might flow from a failure to do so. But the Act does not require this expressly. Rather, it leaves to a trial judge the obligation to satisfy himself, in the particular circumstances of each case, that the witness did understand the requirement to be truthful.

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7.8.5 The trial judge took into account all the circumstances of the case and deemed that the circumstances obliged the child witness to tell the truth. In addition, the Court of Criminal Appeal stated that this was not a case where the witness was ever likely, due to her age, to be giving evidence on oath or affirmation. Rather, it was a case where the jury was most likely going to consider her unsworn evidence. The trial judge stated he was heavily influenced by his own assessment of the witness at the time of interview and based this on what he saw on the tapes. He also acknowledged that while the interviews were not preceded or prefaced by asking questions such as what would happen if the truth were not told, or by any caution being administered, he was nonetheless satisfied, having seen the video, that the evidence was reliable. The trial judge drew support for his view from the conclusion of the psychologist that the interviewee came across as a very credible child. The circumstances of the interviews in the present case, but not necessarily in all cases,

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<sup>1085</sup> *DPP v Michael O'Brien* [2010] IECCA 103 as per Macken J.

were such that the trial judge was, moreover, entitled to take the view that the matters under discussion in the interview were very important, and that it was clear to the witness that it was important to tell the truth. He was entitled therefore to find, as he did, that M was “*telling the truth*” and “*knew she should tell the truth*”.<sup>1086</sup> The appeal failed on this point.

7.8.6 It also failed on another ground concerning arguments put forward by the applicant under the right to a fair trial under the Constitution of Ireland as well as Art. 6 European Convention of Human Rights and the European Convention of Human Rights Act 2003. The Court of Appeal held that the right to cross-examine had been fully vindicated at trial and it ruled that there was no contention in European Court of Human Rights jurisprudence that he had a right to cross-examine at the pre-investigative stage. This Court stated that it was:

satisfied that on the basis of the arguments made, and the case law relied upon, there are no grounds upon which it can be contended that the provisions of Article 6 of the Convention were infringed by not permitting the applicant, or his legal advisers, to cross-examine the witness during the course of her interviews with the psychiatrist. It is not necessary in the circumstances to embark on an analysis of the case law invoked from other jurisdictions.<sup>1087</sup>

The appeal was dismissed and the conviction was upheld.

7.8.7 Although s.16(1)(b) Criminal Evidence Act 1992 will now capture the examination in chief testimony of complainants under 14 years of age, the case of *DPP v O'Brien*<sup>1088</sup> includes guidance for a trial judge to determine whether a child witness is able to understand the obligation to tell the truth at trial.

### **7.9.0 Competency issues arising from split recorded testimony**

7.9.1 The competency of vulnerable witnesses is a theme that runs through the trial process and may be raised at any time and may be raised at any time in the course of

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<sup>1086</sup> *DPP v Michael O'Brien* [2010] IECCA 103.

<sup>1087</sup> *DPP v Michael O'Brien* [2010] IECCA 103 as per Macken J.

<sup>1088</sup> *DPP v Michael O'Brien* [2010] IECCA 103.

their giving evidence. Delay will occur when evidence is divided into recorded and live evidence and the extent of that delay may potentially exacerbate the concern regarding competency. Cases such as *R v Powell*<sup>1089</sup> and *R v Malicki*<sup>1090</sup> suggest that a substantial delay between giving the recording of evidence and giving evidence at trial may raise suggestions about the ongoing competency of the witness. While the recording of testimony allows for evidence to be taken closer to the time of the incident, evidence of younger witnesses or witnesses with an intellectual disability, who may be competent at the time of the recording of examination in chief evidence may, by the time of giving live cross-examination evidence at trial, be deemed to be incompetent.

7.9.2 Up until s.30 of the *Children Act 1908*, the test for competency was linked to the ability of the child witness to swear an oath<sup>1091</sup> and this gave rise to particular difficulties in respect of a judge's opinion as to what the child's understanding of truth, falsehood and damnation might be.<sup>1092</sup> In this jurisdiction, s.27 of the *Criminal Evidence Act 1992* has simplified the process. It allows a child under the age of 14 to give testimony without that evidence being sworn or affirmed. It outlines a competency test for the child witness. It provides an offence of perjury should false evidence be given and it allows persons with an intellectual disability who have reached the age of 14 to avail of the provisions with the section.

7.9.3 The competency test for child witnesses is essentially that the witness should be capable of giving an intelligible account of events that are relevant to the proceedings.<sup>1093</sup> In England and Wales, the test under s.53 *Youth Justice and Criminal Evidence Act 1999*<sup>1094</sup> for any witness, is that the witness should be able to

<sup>1089</sup> *R v Powell* [2006] 1 CAR 31.

<sup>1090</sup> *R v Malicki* [2009] EWCA Crim 365.

<sup>1091</sup> *R v Holmes* (1861), 175 E.R. 1286 at 1286 (Winter Assizes). 1861.

<sup>1092</sup> The evolution in respect of the taking of the oath and the origins of the dispensation under s.27 of the *Criminal Evidence Act 1992* is detailed in the Law Reform Commission *Report on Oaths and Affirmations* (LRC 34-1990).

<sup>1093</sup> S.27 *Criminal Evidence Act 1992*. See also Chapter III- Competence, Compellability and Corroboration at para. 3.0.0.

<sup>1094</sup> 'S.53 *Competence of witnesses to give evidence*.

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

(2) Subsection (1) has effect subject to subsections (3) and (4).

(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—

understand what the court is saying to him or her and the court should be able to understand what the witness is saying to the court

7.9.4 The cases of *R v Powell*<sup>1095</sup> and *R v Malicki*<sup>1096</sup> highlight the difficulties relating to competency that may stem from a delay between the time of the incident and the recording of the statement, or a delay between the recording of the statement and the case coming to trial. In *R v Powell*,<sup>1097</sup> after considering a video recording of the child's evidence, as well as evidence of the officer responsible for the interview and expert evidence, the trial judge decided that a girl of three and a half years of age was competent to give evidence in a case involving sexual abuse. The Court of Appeal upheld that the trial judge's initial decision was justified. However, the Court went on to consider the related question of whether the child's competency should have been revisited later at trial when the cross-examination of the child raised serious doubts as to whether she was "simply not intelligible in the context of the case".<sup>1098</sup>

7.9.5 The Court of Appeal held that the trial judge should have re-assessed the child's competency at that stage and furthermore that the judge should have found the child to be incompetent. This would have led inevitably to the trial judge dismissing the charges. In *R v Malicki*,<sup>1099</sup> the complainant was four years and eight months of age at the date of the alleged indecent assault. The video interviews suggested she was competent at that time and after cross-examination at trial the question of her competence was re-visited. In cross-examination the complainant had detailed a recollection of the incident, but it was "impossible to discern whether she was actually remembering the incident herself or simply recalling her video, which she had just seen twice: once on the Friday before the Monday of the trial,

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(a) understand questions put to him as a witness, and

(b) give answers to them which can be understood.

(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).

(5) In subsection (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).<sup>7</sup>

*Youth Justice and Criminal Evidence Act 1999.*

<sup>1095</sup> *R v Powell* [2006] 1 CAR 31.

<sup>1096</sup> *R v Malicki* [2009] EWCA Crim 365.

<sup>1097</sup> *R v Powell* [2006] 1 CAR 31.

<sup>1098</sup> *R v Powell* [2006] 1 CAR 31 at p. 31.

<sup>1099</sup> *R v Malicki* [2009] EWCA Crim 365.

and once at the trial before she was cross-examined”.<sup>1100</sup> It was suggested by the defendant that the problem of cross-examining the child arose from the fact that it was not possible to ask whether “her being licked was a recollection of a question put to her by the police officer on the video rather than a direct recollection of the event itself”.<sup>1101</sup> The court identified two problems arising from the delay: firstly that a child of such a young age would not have any accurate recollection of events which took place 14 months earlier; and secondly, a matter of greater concern was that she might merely be recollecting what was said on the video and incapable of distinguishing between that account and the underlying events themselves. These considerations led the Court of Appeal to conclude that the evidence should have been excluded under the relevant legislation<sup>1102</sup> and “stopped because of the lapse of time”. Although the interview took place relatively soon after the incident, the trial itself followed some 14 months later and this extended time frame was sufficient to give rise to concern regarding competency.

7.9.6 The difficulties of splitting the evidence between pre-recorded examination in chief evidence and live cross-examination evidence give rise to these unique competency concerns. It is submitted that challenges similar to those raised in *R v Powell*<sup>1103</sup> and *R v Malicki*<sup>1104</sup> would be upheld in this jurisdiction, thus allowing the advantage of the admission of evidence of even very young victims to be lost where, if the testimony had been recorded in full prior to trial, competency issues would not have arisen.<sup>1105</sup>

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<sup>1100</sup> *R v Malicki*[2009] EWCA Crim 365 at para.15.

<sup>1101</sup> *R v Malicki*[2009] EWCA Crim 365 at para 15.

<sup>1102</sup> ‘S.78 Exclusion of unfair evidence’.

(1) *In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

(2) *Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.*

S.78 *Police and Criminal Evidence Act 1984.*

<sup>1103</sup> *R v Powell* [2006] 1 CAR 31.

<sup>1104</sup> *R v Malicki*[2009] EWCA Crim 365.

<sup>1105</sup> In Western Australia, where full pre-recording of testimony takes place for child witnesses, competency for children under 12 is determined before the jury and is pre-recorded. No further inquiry as to competency can be made at the subsequent trial. See Hal Jackson *Children’s Evidence in Western Australia, Children and Cross-Examination, Time to Change the Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at p. 80.



7.9.7 A further difficulty in splitting the child's evidence between the pre-trial and trial phases is the absence of examination in chief as a lead-in to cross-examination evidence. Where the evidence is recorded close to the time of the incident and there is a delay between the recording and the coming on for trial of the offence, the vulnerable witness must then face the trauma of immediate cross-examination at trial. "Parachuting" the child into the trial itself and compelling him or her to undergo cross-examination without any lead-in through examination in chief questioning may heighten the level of stress experienced by the witness. The Law Reform Commission noted in this regard:

The process of giving oral evidence in court may actually help the child. The prosecutor can bring the child through his or her evidence thereby giving the child time to settle down, and to get used to the courtroom atmosphere and to answering questions put by a lawyer.<sup>1106</sup>

7.9.8 Bernard Richmond Q.C., who acted as counsel for the defence in *R v Barker*<sup>1107</sup> has noted the difficulties in cross-examining young children:

One of the main problems for those who defend in cases involving young complainants or witnesses is one of *attuning* ourselves to the witness. The "achieving best evidence" interview<sup>1108</sup> is not particularly useful in that regard - it is often conducted many months previously; in an atmosphere where the child is made as comfortable as possible; the surroundings permit the child and questioner to interact as naturally as possible; and the interviewer

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<sup>1106</sup> The Law Reform Commission of Victoria, Australia similarly observed that "*Otherwise the child is immediately confronted by the defence counsel's cross-examination and may find it difficult to testify effectively.*" Law Reform Commission of Victoria, Report No. 18, *Sexual Offences Against Children* para 275 (1988) as mentioned in the Law Reform Commission of Ireland Consultation Paper on *Child Sexual Abuse* (August, 1989) at p. 158.

<sup>1107</sup> *R v Barker* [2010] EWCA Crim 4.

<sup>1108</sup> The interview taken under s.27 *Youth Justice and Criminal Evidence Act 1999* is known as 'the ABE interview' or 'the Achieving Best Evidence interview'. While similar to the provisions of s.16(1)(b) *Criminal Evidence Act 1992*, the eligibility for the provision is wider as child witnesses in all criminal proceedings are eligible to have their evidence recorded. S.16 *Youth Justice and Criminal Evidence Act 1999* outlines the parameters for eligibility for special measures for vulnerable witnesses.

has doubtless either met the child before or spent some time familiarizing him/ herself with the needs of the child.<sup>1109</sup>

7.9.9 Richmond makes the insightful observation that by the time the case has come to court the witness will be significantly older and that various expert reports about the child are not really an assessment of the child's level of general comprehension, linguistic ability and capacity to understand and interpret more complex ideas. Even prior to the commencement of s. 16(1)(b) *Criminal Evidence Act 1992*, Charleton et al noted that to allow a child to be cross-examined without having given evidence in chief might leave them unprepared for questioning.<sup>1110</sup> Spencer, commenting on the *Barker* case,<sup>1111</sup> is troubled by the fact that in a contested hearing, a child of such a young age will have to undergo live cross-examination at trial. He notes that this raises difficult issues as to the fact that justice will fail if the child witness cannot give his or her testimony intelligibly in court and observes that if the accusations are true, the witness will have to relive the incident in court. Even where a young child can engage with a defence counsel, as in *Barker*,<sup>1112</sup> it is likely to be a rudimentary exchange and so the defence does not get, to use Spencer's term, "a fair crack at the whip" which runs contrary to the interests of justice and the defendant's right to a fair trial.

7.9.10 Spencer advocates the use of full pre-trial recording of testimony to resolve these issues:

These problems would be much reduced if, where very young witnesses are concerned, the defence could put their questions not at trial, but at an informal video-interview session, conducted like the initial video-interview, and held very shortly after it. At such a session, a small child would be much more likely to communicate. And unless new material emerged later which the defence needed

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<sup>1109</sup> Bernard Richmond *Cross Examining Young Witnesses* Criminal Law & Justice Weekly (2011) 175 JPN 69.

<sup>1110</sup> Peter Charleton, Paul Anthony McDermott and Marguerite Bolger- *Criminal Law* (Butterworths, 1999) para. 8.80 at p. 600.

<sup>1111</sup> J.R. Spencer Case Comment: *Children's evidence: the Barker case, and the case for Pigot*, Archbold Review 2010, 3, 5-8.

<sup>1112</sup> *R v Barker* [2010] EWCA Crim 4.

to ask further questions about, the child could then drop out of the proceedings at this point.<sup>1113</sup>

7.9.11 In *Barker*,<sup>1114</sup> the defendant was convicted of anally raping the complainant, X, when she was two years of age. Shortly before her third birthday, she disclosed details of the abuse to her foster mother and subsequently to a psychologist. Physical evidence was not conclusive in respect of the allegations and identity of the attacker. Her interview was recorded when she was three and she was cross-examined at trial when she was four. While there was a short delay before she answered some questions, the Court deemed that she passed the competency test as set out in s. 53 of the *Youth Justice and Criminal Evidence Act 1999*<sup>1115</sup> upholding the conviction.

7.9.12 The case challenged many of the prejudices of the competency of young witnesses. The Court of Appeal stated that the issues of competency are not limited to the evidence of children but applied to individuals of unsound mind and the infirm. The question in each case is whether the individual witness or child is competent to give evidence in a particular trial. The Court noted that the witness need not understand the special importance that the truth should be told in court and the witness need not understand every single question or give a readily understood answer to every question. The Lord Chief Justice observed in his judgement, that many competent adults would fail such a test. The case of *Barker*<sup>1116</sup> has perhaps highlighted a cultural change in respect of the willingness of the courts in England and Wales to accept the evidence of young witnesses.<sup>1117</sup>

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<sup>1113</sup> J.R. Spencer, Case Comment -*Children's evidence: the Barker case, and the case for Pigot*”, Archbold Review 2010, 3, 5-8 p. 4.

<sup>1114</sup> *R v Barker* [2010] EWCA Crim 4.

<sup>1115</sup> See S.53 Youth Justice and Criminal Evidence Act 1999(See fn 1121).

<sup>1116</sup> *R v Barker* [2010] EWCA Crim 4.

<sup>1117</sup> Previously, the predominant view appeared to be that a prosecution could not proceed on the evidence of a child under five. See Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy Across Boundaries* (Oxford University Press 2010) at p. 624 (n197) regarding the concerns voiced by MPs in the debate concerning the *Youth Justice and Criminal Evidence Act 1999* (England) where it was noted that the Crown Prosecution Service was reluctant to prosecute any case involving children under five [*Hansard*, 15 April 1999, cols 442,446].

7.9.13 The use of recorded testimony, even partially recorded testimony, has facilitated the admission of the evidence of even very young witnesses.<sup>1118</sup> This evidence can be taken closer to the time of the incident which affords the giving of fresher details by the witness. In addition, there is the advantage of eliciting more detailed evidence by recording the evidence in more child-friendly and nonthreatening circumstances. The stressful environment of the courtroom may prove overwhelming and distressful to the child witness to the point that he or she is unable to give full or any testimony.

### 7.10.0 *The necessity for full pre-trial recorded testimony*

7.10.1 Full recorded testimony has only recently been implemented in England and Wales but it would appear that the objective in that jurisdiction has been the recording of full evidence for admission at trial as it included provision for the recording of both examination in chief<sup>1119</sup> and cross-examination testimony.<sup>1120</sup> The 'Pigot Report'<sup>1121</sup> included recommendations that video recorded interviews, conducted by a police officer or social worker, be used as a substitute for the child's live testimony at trial. The *Criminal Justice Act 1988* as amended by the *Criminal Justice Act 1991*<sup>1122</sup> incorporated the proposals but only for the recording of examination-in-chief evidence. The legislation has since been updated and s.27 *Youth Justice and Evidence Act 1999* provides for video recorded examination in chief evidence to be admitted at trial.<sup>1123</sup>

7.10.2 Section 28<sup>1124</sup> of the Act which allowed for the video recording of cross-examination and re-examination of evidence was not commenced until 2013. It is being evaluated on a pilot project basis at present.<sup>1125</sup> The delay in commencement

<sup>1118</sup> *R v Barker* [2010] EWCA Crim 4.; *R. v Krezolek (Mariusz)* [2014] EWCA Crim 2782; [2015] 2 Cr. App. R. (S.) 2; [2015] Crim. L.R. 628

<sup>1119</sup> *S.27 Youth Justice and Criminal Evidence Act 1999.*

<sup>1120</sup> *S.28 Youth Justice and Criminal Evidence Act 1999.*

<sup>1121</sup> *Report of the Advisory Group on Video Evidence 'The Pigot Report' (1989, London: Home Office)*

<sup>1122</sup> *S.32A(3) Criminal Justice 1988* as amended by the *Criminal Justice Act 1991*. Repealed by the *Youth Justice and Criminal Evidence Act 1999.*

<sup>1123</sup> *ss. 27 Youth Justice and Criminal Evidence Act 1999* as amended by the *Coroners and Justice Act 2009.*

<sup>1124</sup> '28.Video recorded cross-examination or re-examination.'

*Youth Justice and Criminal Evidence Act 1999*

<sup>1125</sup> See Andrew Ford, *Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act*. Counsel 2015, Mar, 18-20. March 2015; David Wurtzel, *Pre-Recorded Cross-examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System*, Counsel, Dec 2014.

was possibly due to the protests from the Criminal Bar Association in England and Wales on the basis of difficulties of third party disclosure at an early stage in proceedings and the clash between the 'mere credibility rule' and public interest immunity.<sup>1126</sup> Spencer suggests that it was attributable to implementation difficulties on the part of the Home Office.<sup>1127</sup>

7.10.3 However one of the catalysts for implementation of s.28 *Youth Justice and Criminal Evidence Act 1999* was high profile reporting of cases where vulnerable witnesses suffered extreme trauma during the trial process.<sup>1128</sup> In commencing the section and implementing pilot projects, the Secretary of State for Justice, Chris Grayling said:

The particularly hostile treatment of victims and witnesses in court has nothing to do with fairness or justice. I am adamant we must put a stop to this, but without compromising everyone's right to a fair trial.<sup>1129</sup>

7.10.4 Initially commencing on a pilot scheme in three areas, Leeds, Liverpool and Kingston-upon-Thames, it remains to be seen how the admission of recorded testimony will develop in England and Wales. The move has been welcomed by Victim Support UK,<sup>1130</sup> a voluntary organisation that provides support and

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<sup>1126</sup> Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy Across Boundaries* (Oxford University Press 2010), (Disclosure of Evidence in the Possession of Third Parties) Preface to the Paperback Edition pg. lv (This matter was previously addressed in the hardback edition of *Child Abuse Law and Policy Across Boundaries* (Oxford University Press 2007) at Chapter 7, section C at p. 552).

<sup>1127</sup> J.R.Spencer, Conclusions: 'If Section 28 is Workable, Will it Solve all the Problems that Arise from the Cross-examination of Children' in *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 172.

<sup>1128</sup> 'Rather than having to delay recalling horrific experiences until a trial takes place, thereby prolonging the trauma, those who have suffered serious attacks will be helped to put the memories behind them at an earlier stage. The move follows several high-profile cases – such as that of the violinist Frances Andrade, who killed herself after giving evidence in court about historic indecent assaults – that have raised questions about how victims should be treated.'

Owen Bowcott, The Guardian newspaper, 11th June 2013.

[http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court?CMP=tw\\_t\\_gu](http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court?CMP=tw_t_gu) (accessed 29<sup>th</sup> September 2015).

<sup>1129</sup> Owen Bowcott The Guardian, Tuesday, 11th June 2013.

[http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court?CMP=tw\\_t\\_gu](http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court?CMP=tw_t_gu) (Accessed 29<sup>th</sup> September 2015).

<sup>1130</sup> 'Announcement of new pre-recorded evidence measures', Victim Support UK

'Justice Secretary Chris Grayling has announced today that the Ministry of Justice is commencing Section 28 of the Youth Justice and Criminal Evidence Act 1999. This means that young and vulnerable

information to victims of crime. The practical implementation of the legislation must involve the resolution of the practical problems involving fully recorded testimony. This will include the issues of disclosure.<sup>1131</sup> At time of writing full practical details as to how full recorded testimony will be implemented have not been published as yet. However, it appears that the use of the provision has instigated further significant change in how cross-examination is to be conducted. The use of intermediaries modified the style and content of counsel's questioning<sup>1132</sup> and the use of recorded cross-examination under s. 28 *Youth Justice and Criminal Evidence Act 1999* in pilot projects has seen further alteration to cross-examination techniques, including the requirement to submit a list of cross-examination questions to the trial judge prior to the commencement of recording.<sup>1133</sup> It remains to be seen if this trend will continue when use of s.28 is rolled out on a national basis.<sup>1134</sup>

7.10.5 Returning to the position in Ireland, there are no legislative proposals for full recorded testimony in this jurisdiction at the present time. Concerns relating to disclosure would undoubtedly be a substantial barrier to reform. Disclosure in cases involving sexual offences has been an ongoing source of difficulty in this jurisdiction. This occurred in November 2014. As the Central Criminal Court was

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*victims will be offered the chance to avoid what is often a distressing and intimidating court experience by pre-recording both their evidence and any cross-examination for a later trial.*

*Responding to the announcement, Victim Support's Chief Executive Javed Khan said: "It is vital that greater emphasis is given by the entire justice system to ensure that the needs of vulnerable victims are fully taken into account. We have long been calling for greater use of special measures in court. Repeated, aggressive, cross-examination of vulnerable witnesses cannot be the best way to obtain sound, accurate evidence – which is ultimately so vital in bringing offenders to justice. And most importantly it is not the right way to protect vulnerable victims and witnesses.*

*"We welcome measures like pre-recorded interviewing in safe spaces. In addition, we firmly believe that vulnerable and intimidated witnesses must be offered specialist help and support throughout the justice process. That is why we are calling for specialist witness services for children and young people to be extended from seven trial sites to all parts of England and Wales.*

*"Witness and victims are entitled to a fair trial as well as defendants. Today's announcement goes a long way to rebalance the system but still more needs to be done."*

([http://www.victimsupport.org.uk/about-us/news/2013/06/pre-recorded-evidence#.Uf\\_FjZKpXg8](http://www.victimsupport.org.uk/about-us/news/2013/06/pre-recorded-evidence#.Uf_FjZKpXg8))  
(accessed 5th August 2013)

<sup>1131</sup> See :J.R.Spencer, Conclusions: 'If Section 28 is Workable, Will it Solve all the Problems that Arise from the Cross-examination of Children' in *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 173.

<sup>1132</sup> *R v B* [2010] EWCA Crim 4; [2010] Crim LR 233, CA; *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr. App. R. 2; [2012] Crim. L.R. 565; *R v Lumbeba* [2014] EWCA Crim 2064; [2015] 1 W.L.R. 1579;

<sup>1133</sup> Andrew Ford, *Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act*. Counsel 2015, Mar, 18-20. March 2015; David Wurtzel, *Pre-Recorded Cross-examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System*, Counsel 2014, Dec 2014;

<sup>1134</sup> At time of writing, s.28 *Youth Justice and Criminal Evidence Act 1999* has not yet been implemented on a national basis.

sitting in Galway, the sittings were limited. There was not enough time for the sitting to accommodate a longer trial and so the trial judge was obliged to collapse the trial. The matter was put back in the 'list to fix dates' and was finally heard in June 2015 in the Central Criminal Court. This disruption not only causes significant difficulties for the defendant but also for the complainant.

7.10.6 Full disclosure, particularly in relation to TUSLA documentation as to first reporting of the incident and subsequent care and treatment, may either be deemed by a judge as irrelevant to the trial process or probative depending on the nature of the document and its contents. Applications in respect of any disclosure may take time and any delay will then impact on the recording of cross-examination testimony. The question of disclosure was recently evaluated by the Law Reform Commission<sup>1135</sup> and there are legislative proposals to address the difficulties.<sup>1136</sup>

7.10.7 If full testimony is legislated for in the future in this jurisdiction, the issue of disclosure will need to be addressed. Delaying the interview until disclosure is completed weakens the usefulness of the provision. Conducting the interview soon after the incident without full disclosure may undermine fair procedures on behalf of the defendant as he or she may not have access to the necessary information to conduct an adequate cross-examination. However, the advantages of full recording, even after a delay and relatively close to the time of trial, will provide some advantages to the child witness in that he or she will not have to come in to court to give live testimony and will be spared the uncertainties inherent in a trial process of waiting to give evidence with all the stress and anxiety that that entails.<sup>1137</sup>

7.10.8 Western Australia has implemented the recording of full testimony of children and vulnerable witnesses far more readily and effectively than other adversarial jurisdictions.<sup>1138</sup> New Zealand has resisted the implementation of full

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<sup>1135</sup> See *Law Reform Report on Disclosure and Discovery in Criminal Cases* (LRC 112 – 2014) 15th December 2014.

<sup>1136</sup> See S.38 (*Disclosure of third party records in certain trials*), *Criminal Law (Sexual Offences) Bill 2015*

<sup>1137</sup> 'One obvious improvement is likely to be that the child is not kept waiting outside the courtroom for a day and half, as with the four year old girl in the Barker case.' John Spencer, *Conclusions: (i) Is Section 28 workable? And (ii) If Section 28 is Workable, Will it Solve all the Problems that Arise from the Cross-Examination of Children?* 'in *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) ) p.175.

<sup>1138</sup> Section 106T of the *Evidence Act 1906*, Western Australia.

pre-recording having introduced a system similar to the procedure of recording of examination in chief testimony but cross examining live in court with access to a video link<sup>1139</sup> which is available in all criminal proceedings.<sup>1140</sup> New Zealand had introduced full pre-recording of testimony in the *Evidence Amendment Act 1989* but the section was not commenced prior to its repeal in the *Evidence Act 2006*. As Henderson notes, New Zealand was both the earliest Commonwealth country to allow such measures and the only country to remove them.<sup>1141</sup>

7.10.9 However, Western Australia, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory now permit the pre-recording in full of a child complainant's evidence.<sup>1142</sup> Many of these territories followed the lead set by Western Australia in the early 1990's. Hoyano and Keenan note that, in 1997, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission made joint recommendations respecting children's testimony under Federal and State law which would establish a uniform approach across the country using the Western Australian version of 'full-Pigot'.<sup>1143</sup> Following the publication of government-appointed Child Sexual Abuse Task Force report in 1987<sup>1144</sup> and a Law Reform Commission of Western Australia Report in 1991,<sup>1145</sup> changes to the *Evidence Act 1906* made in 1992 allowed for the entire evidence of the child witness to be taken at a special hearing and subsequently

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In relation to video link and pre-trial recording Western Australia, Jackson states:

“ *The State is very large physically, about eight times the British Isles. But it has a tiny population of about 2.5 million, living mainly in Perth and to a lesser extent the south-west region, with a vastly separated number of small, remote communities in the remainder. The capital city, Perth, is a long way from the rest of Australia. CCTV and pre-recording are ideal tools to service such an area.*”

Hal Jackson Children's Evidence in Western Australia *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 75.

<sup>1139</sup> Section 105 (1)(a) *Evidence Act 2006*.

<sup>1140</sup> Section 107 (1)(a) *Evidence Act 2006*.

<sup>1141</sup> Emily Henderson, *Child Witnesses in New Zealand in Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 123.

<sup>1142</sup> Annie Cossins, 'Cross-Examining The Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context' in John R. Spencer and Michael E. Lamb eds. *Children and Cross-Examination – Time to Change the Rules* edited by (Hart Publishing, 2012) at p. 95.

<sup>1143</sup> Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy Across Boundaries (Oxford University Press 2010)* at p. 644 citing Aus LRC, Seen and Heard [14.45]-[14-47], Recommendation 94.

<sup>1144</sup> Child Sexual Abuse Task Force, Department of the Premier and Cabinet (WA), Child Sexual Abuse: A Report to the Government of Western Australia (1987)

<sup>1145</sup> 'Project 87 - Evidence of children and other vulnerable witnesses' Report - Law Reform Commission of Western Australia (1991) ([http://www.lrc.justice.wa.gov.au/P/project\\_87.aspx](http://www.lrc.justice.wa.gov.au/P/project_87.aspx)) Accessed 12<sup>th</sup> October 2013.



admitted at trial. The result is that children rarely give evidence in open court before juries, although they can seek the court's permission to do so.<sup>1146</sup>

7.10.10 Initially the provision was offence eligible in respect of sexual offences or involving physical violence and Jackson notes that restrictions, necessary due to the innovative nature of the amendments to the *Evidence Act 1906*, are offset by provision being made for application by other persons to be declared 'special witnesses' to whom the same protections apply.<sup>1147</sup> While the procedure does allow for the admission of the child's initial video recorded interview with the police and welfare unit as evidence, an application may be made by the Director of Public Prosecutions, to pre-record the child's evidence. During pre-recording the judge, prosecutor, defence counsel, clerk of arraigns and usher remain in the courtroom with the accused and any security officers. The judge is not required to be the trial judge. The recording can be admissible at trial as the child's direct evidence at trial and is therefore not an exhibit.<sup>1148</sup> In 2000, a provision was introduced to allow the pre-recording be admitted at retrial and/or appeal.<sup>1149</sup>

7.10.11 The priority given to cases involving child witnesses places an onus on all parties to act as expediently as possible and this includes applications regarding disclosure. In addition, should new issues arise which require the child to come into court to give evidence, the legislation facilitates this.<sup>1150</sup> The taking of full evidence pre-trial has become common place. Jackson notes:

The procedure of pre-recording the child's entire evidence at a special hearing is extensively used in Western Australia. It is now regarded as normal. It has been extended beyond children to

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<sup>1146</sup> 106O *Evidence Act 1906*. See also: Hal Jackson, *Children's Evidence in Western Australia Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at p. 76.

<sup>1147</sup> Hal Jackson *Children's Evidence in Western Australia Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at p. 76.

<sup>1148</sup> Hal Jackson *Children's Evidence in Western Australia Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at p. 79

<sup>1149</sup> Section 106T of the *Evidence Act 1906* Western Australia.

<sup>1150</sup> Hal Jackson *Children's Evidence in Western Australia Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at p. 81.

persons declared as special witnesses such as persons suffering mental disability, and adult sexual assault victims.<sup>1151</sup>

7.10.12 Indeed in recent discussions regarding the testimony of vulnerable witnesses in England and Wales and the introduction of recorded cross-examination testimony,<sup>1152</sup> Western Australia has been cited as a successful example of its implementation although<sup>1153</sup> Hoyano and Keenan cite figures from the Child Witness Service,<sup>1154</sup> a government support agency established in 1995 to promote and implement the support measure, which in 2002, indicate that, in that year, 400 children had their evidence pre-recorded. This was 60% of all witnesses. Of those witnesses who had their evidence recorded, 65% were complainants, mostly of sexual offences, and 35% were witnesses to crime and were called by either the prosecution or the defence.<sup>1155</sup>

7.10.13 In 2002, an empirical study by Eastwood and Patton, which compared experiences of child complainants in sexual assault trials in Western Australia, Queensland, and New South Wales, asked the children if they would ever report sexual abuse again following their experience in the criminal justice system. 64% of the Western Australian children in the study sample said they would, whereas in Queensland and New South Wales (although Queensland had full recording provisions, these were used rarely and New South Wales did not have recorded testimony provisions) the positive responses were 44% and 33% respectively. The researchers concluded that the higher positive response in Western Australia was indicative of the more child-friendly routine provisions in that State.<sup>1156</sup>

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<sup>1151</sup> Hal Jackson *Children's Evidence in Western Australia Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at p. 82.

<sup>1152</sup> Discussion on BBC Radio 4 Today Programme with Sally O'Neill QC and Alan Wardle, Head of Public Affairs, NSPCC, 24<sup>th</sup> May 2013.

<http://www.bbc.co.uk/programmes/b01sjn53/live> (Accessed 25th September 2015).

<sup>1153</sup> For a detailed and recent description of the evidential procedures for children in Western Australia, see Hal Jackson *Children's Evidence in Western Australia Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb (Hart Publishing, 2012) at p. 75.

<sup>1154</sup> Hoyano and Keenan cite figures given in information to Robert Layton QC which was reported in *Our Best Investment – A State Plan to Protect and Advance the Interests of Children (South Australian Government 2003)* [15.26].

<sup>1155</sup> Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy Across Boundaries (Oxford University Press 2010)* at p. 647.

<sup>1156</sup> C Eastwood and W Patton *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Criminology Research Council), Canberra, 2002 at pps. 43-45 as noted by Laura Hoyano

7.10.14 There does not seem to be a similar impetus in Ireland to legislate for full recorded testimony. It was widely expected that the obligations under the *EU Directive Establishing Minimum Standards of Support on the Rights, Supports and Protection of Victims*<sup>1157</sup> would prompt legislation in this regard but that has not been the case. *Criminal Law (Sexual Offences) Bill 2015*, published in September 2015, includes a proposal to widen the eligibility for s.16(1)(b) to witnesses under 18 in relation to sexual offences and also to amend the interpretation of ‘sexual offences’ within the *Criminal Evidence Act 1992*.<sup>1158</sup> The *Criminal Justice (Victims of Crime) Bill 2015* does not include any provision to introduce full recorded testimony. However, it further widens the provisions which already exist in the *Criminal Evidence Act 1992* for child witnesses so that they are no longer offence eligible.<sup>1159</sup> This includes the provision for recorded testimony under s.16(1)(b) *Criminal Evidence Act 1992*. As the provision under the *Criminal Justice (Victims of Crime) Bill 2015* applies to child victims, the provision is extended to all child victims under the age of 18. It is still the case that the child witness is only eligible if he or a victim of the crime and therefore the provision is still restrictive as to eligibility. How these provisions will be legislated in reality remains to be seen.

7.10.15 There is no compulsion in respect of the member states to implement full or partial recorded testimony with the implementation of the *EU Directive Establishing Minimum Standards of Support on the Rights, Supports and Protection of Victims*.<sup>1160</sup> Present legislation for recorded testimony may be extended under Article 24<sup>1161</sup> of the Directive but there is no obligation to implement full recorded

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and Caroline Keenan, *Child Abuse Law and Policy Across Boundaries* (Oxford University Press 2010) at p. 648.

<sup>1157</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14/11/2012.

<sup>1158</sup> ‘Part 5 – Head 46 - Amendment of section 2 of Act of 1992 (Interpretation); Head 50 (Amendment of section 16 of Act of 1992 (Video recording as evidence at trial)).’ *General Scheme - Criminal Law (Sexual Offences) Bill 2014*.

<sup>1159</sup> ‘Part 6, Special measures for child victims  
Head 17 ‘Child victims’, *Criminal Justice (Victims of Crime) Bill 2015*.

<sup>1160</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14/11/2012.

<sup>1161</sup> ‘Article 24

*Right to protection of child victims during criminal proceedings*

testimony. What may be more mandatory in nature is contained within Article 10(1) of the *Directive*, in respect of the issue of participation in criminal proceedings.<sup>1162</sup> It states that member states shall ensure that victims may be heard during criminal proceedings and may provide evidence. It also states that where a child victim is to be heard, due account shall be taken of the child's age and maturity. However, Article 10 also states that the procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law<sup>1163</sup> which does give a wide latitude to each member state as to how provisions will be implemented in respect of the facilitation of the right of the child to be heard. It is arguable as to whether a requirement can be made for full recorded testimony on the basis that a child cannot be heard in criminal proceedings without it. Future reform in Ireland may be influenced by the legislative and cultural changes currently taking place in England and Wales in respect of full recorded pre-trial testimony and modifications in approaches to cross-examination to enable the

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1. In addition to the measures provided for in Article 23, Member States shall ensure that where the victim is a child:

(a) in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings;

(b) in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family;

(c) where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, in his or her own name, in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.

The procedural rules for the audiovisual recordings referred to in point (a) of the first subparagraph and the use thereof shall be determined by national law.

2. Where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of this Directive, be presumed to be a child.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14/11/2012.

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'Chapter 3, Participation in Criminal Proceedings, Article 10  
'Right to be heard'

1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity.

2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.'

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315, 14/11/2012.

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'Chapter 3, Participation in Criminal Proceedings, Article 10  
'Right to be heard'

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315, 14/11/2012.

child witness (or the vulnerable witness, in general) to have his or her voice heard in criminal proceedings.

### 7.11.0 Conclusion

7.11.1 The efficacy of the legislation designed to allow for the admission of recorded testimony of child witnesses cannot currently be fully assessed or evaluated. The use of the deposition procedure under ss.4F and 4G *Criminal Procedure Act 1967* is not standard within criminal trials for vulnerable witnesses and is rarely used. Section 16(1)(b) of the *Criminal Evidence Act 1992* provides a “quarter-Pigot” solution, somewhat similar to the provisions in England and Wales<sup>1164</sup> but it is not as far reaching. Cases involving the use of s.16(1)(b) are not being evaluated by the Office of the Director of Public Prosecutions. There is no systematic feedback as to how it is working in practice since its first use in a trial at the Central Criminal Court in December 2010 in the case of *DPP v XY*.<sup>1165</sup> It would also appear that since that first case various procedural issues such as issues relation to transcripts, editing, the classification of whether the recording should be considered an exhibit or testimony, the use of leading questions by Specialist Interviewers are being dealt with on an individual case by case basis. The author has been informed that there are plans to revise the *Good Practice Guidelines* in 2015.<sup>1166</sup> It is submitted that the Good Practice Guidelines are inadequate in their current incarnation and the proposal that they will be revised is welcome. However, it remains the fact that these guidelines are non-statutory and have only persuasive authority in the courts.<sup>1167</sup> It is for the trial judge to ensure that fair procedures are upheld. If a recording is not conducted according to the constitutional requirements outlined in *State (Healy) v Donoghue*<sup>1168</sup> and *In Re Haughey*,<sup>1169</sup> the evidence may

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<sup>1164</sup> S.27 *Youth Justice and Criminal Evidence Act as amended by the Coroners and Justice Act 2009*, allows for video recorded examination in chief testimony to be admitted for child witnesses under the age of 17 and for witnesses who have been identified as in need of special measures according to the need to maximise their evidence. The provision is not offence eligible and applies in any criminal proceedings.

<sup>1165</sup> For an examination of the first uses of S.16(1)(b) *Criminal Evidence Act 1992* in the District and Central Criminal Court, see Miriam Delahunt, *S. 16(1)(b) Criminal Evidence Act 1992*, *The Bar Review* (Feb 2011).

<sup>1166</sup> Personal Communication from Det.Sgt. Jennifer Molony, Friday 5<sup>th</sup> June 2015.

<sup>1167</sup> See Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* *The Bar Review* (Feb 2011) where the court's attitude to the Good Practice Guideline was outlined in *DPP v XY*.

<sup>1168</sup> *State (Healy) v Donoghue* [1976] I.R. 325.

<sup>1169</sup> *In re. Haughey* [1971] I.R. 217.

not be admitted and consequently the pressure on the complainant will be intensified. As Healy states:

There is clearly a need to address, by statutory instrument or practice guidelines, the procedural delicacies of taking and videotaping the child's complaints in this way – the need to avoid solicitous or leading questions, the use of anatomical dolls and photographs etc. – if they are properly and fairly to function as admissible evidence later.<sup>1170</sup>

7.11.2 Charleton *et al* were sceptical of the efficacy of video recorded testimony<sup>1171</sup> but the recent use of s.16(1)(b) *Criminal Evidence Act 1992* has shown that many of their concerns were erroneous particularly their belief that videotaped evidence would be insufficient to break down the cultural mistrust within the criminal justice system that the child witness faces when giving evidence.<sup>1172</sup> S.16(1)(b) *Criminal Evidence Act 1992* is a realistic move towards facilitating the testimony of child witnesses to be heard within the criminal justice system. As well as minimising the stress caused to the child witness, perhaps its greatest advantage is the improvement of the quality of the testimony admitted at trial.

7.11.3 However, it should be remembered that at present, the sections only real advantage of s.16(1)(b) is the capturing of the details of the alleged offence contemporaneous to the time of the incident. It does not prevent the witness having

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<sup>1170</sup> John Healy, *The Laws of Evidence*, (Thomson Round Hall 2004) para-1.75 at p.41.

<sup>1171</sup> “Experience indicates that juries are very reluctant to act on the evidence of a child in the absence of strong corroborative evidence link the accused to the commission of the offence. If a case is prosecuted for the purpose of convicting a guilty offender than a case must be capable of being proved beyond a reasonable doubt. That very high standard of proof is very difficult to achieve merely by playing the jury a video of a child’s testimony.”

Peter Charleton, Paul Anthony McDermott and Marguerite Bolger, *Criminal Law* (Butterworths, 1999) para. 8.80 at p. 600.

<sup>1172</sup> “Legal rules cannot operate independently of the community. Convictions depend upon ordinary people being willing to accept as true an account of sexual abuse from a child. Since Article 38.5 of the Constitution makes the community, through the jury system, the ultimate judge of what evidence proves guilt beyond reasonable doubt, legislation which proceeds on a merely theoretical basis without regard to the factual results is of little use. Leaving the jury with evidence consisting of a video tape will not assist in further breaking down the collective scepticism as to the veracity of children who complain that they have been sexually abused.”

Peter Charleton, Paul Anthony McDermott and Marguerite Bolger- *Criminal Law* (Butterworths, 1999) para. 8.81 at p. 600.

to undergo the trauma of cross-examination at trial. In addition, as cases continue to be heard, it raises serious issues as to the potential undermining of the rights of the accused as was seen in *DPP v AH*.<sup>1173</sup> In that case, multiple recordings of examination in chief evidence were admitted at trial practically unedited. The recordings contained questions which were leading in nature. In addition, prior to the taking of the third interview, the Specialist Interviewers showed the complainant the first two interviews. No explanation was given as to why this was done and it is certainly not expressly provided for in the *Good Practice Guidelines*.

7.11.4 The trial judge admitted all the recordings but these issues are likely to ground points of appeal, particularly given the significant role of the evidence of the complainant played in the prosecution case at trial. Because sexual offences against children frequently take place with no independent witnesses, it is vital that the procedures which facilitate the admission of recorded evidence are unimpeachable. Procedural issues should not be dealt with on a case by case basis should be addressed in statutory guidelines which are consistent and clear.

7.11.5 The recording of testimony prior to trial raises fundamental issues in relation to the witness's entitlement, or right, to give his or her best evidence. As noted above, delay between the recording of the examination in chief testimony and the start of the trial create substantial problems for the child witness. Lengthy delay, particularly with a young witness, may complicate the question of competence. This is not addressed in the legislation or guidelines and although experience in England and Wales may shed some light, this is surely a poor substitute for indigenous law and policy.

7.11.6 It is self-evident that the implementation of testimony, full or partial, will have limited effect in the absence of reform in the manner of traditional cross-examination. Spencer notes two disadvantages of the current method of adversarial

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<sup>1173</sup> *DPP v AH*, Central Criminal Court, Dublin June 2014. See also para 6.6.9.

cross-examination in respect of child witnesses, firstly that it is an unreliable means of testing the evidence and secondly that it is potentially abusive.<sup>1174</sup> Cossins states:

In order to produce real change to the cross-examination process, reforms will need to go further than allowing a child to give evidence via CCTV or pre-recording their evidence, or imposing a judicial duty to disallow improper questions.<sup>1175</sup>

7.11.7 Despite this, as Jackson points out,<sup>1176</sup> the benefits to the child witness of the full recording of his or her testimony clearly include the early hearing of their evidence. The will achieve a great deal including superior quality of memory and greater reduction of stress. It will also reduce the waiting in court for procedural aspects such as jury selection, other witnesses to finish, and legal arguments, as the child witness will have a fixed appointment to keep when his or her evidence is to be recorded. Spencer also notes this advantage i.e. that one obvious improvement is likely to be that the child is not kept waiting outside the courtroom for a day and a half, as with the four-year-old in the *Barker* case.<sup>1177</sup> The recording of evidence will also avoid any other delays such as adjournments or any other delays inherent in the criminal justice system. On this basis alone, the gathering of evidence contemporaneous to the time of the incident and the avoidance, for the child witness, of the delays inherent in the criminal justice system is considerable.

7.11.8 England and Wales have gone some way to curtail the manner in which a child witness may be cross-examined.<sup>1178</sup> However there are no similar proposals in Ireland nor are there suggestions comparable to the legislation regarding

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<sup>1174</sup> J.R.Spencer, *Conclusions: Second Problem – the Method of Adversarial Cross-Examination* ‘ in *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 178.

<sup>1175</sup> Anne Cossins, ‘*Cross-Examining The Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context*’ in John R. Spencer and Michael E. Lamb eds. *Children and Cross-Examination – Time to Change the Rules* edited by (Hart Publishing, 2012) at p. 107.

<sup>1176</sup> Hal Jackson, *Children’s Evidence in Western Australia Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 81.

<sup>1177</sup> J.R.Spencer, *Conclusions: Second Problem – the Method of Adversarial Cross-Examination* ‘ in *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 177.

<sup>1178</sup> *R v Wills* [2011] EWCA Crim 1938, [2012] 1 Cr. App. R. 2; 565; *R v Lumbeba* [2014] EWCA Crim 2064; [2015] 1 W.L.R. 1579;



unacceptable questions testimony as there is in New Zealand<sup>1179</sup> and Western Australia<sup>1180</sup>

7.11.9 The current legislation under s.16(1)(b) *Criminal Evidence Act 1992* provides only a half answer for the difficulties facing a child witness limiting as it does the recording of testimony for a child victim, under the age of 14 in respect of other offences. The child victim will still have to come to court to be available for a potentially difficult cross-examination. As Cossins states:

However, pre-recording does not tackle the endemic problems that exist in relation to the actual purpose and function of cross-examination in a child sexual assault – rather than being a method for uncovering untruthful child witnesses, empirical evidence shows that it is a process that manufactures inaccurate evidence.<sup>1181</sup>

7.11.10 Hoyano and Keenan note that the success of the implementation of the provisions in Western Australia was largely attributable to the supporting structures

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<sup>1179</sup> See S.85 Evidence Act 2006. (New Zealand).

‘Child victims and witnesses are subject to direct cross-examination by defence counsel, regardless of how or when they give evidence. However, under section 85 of the Evidence Act 2006, Judges may disallow, or direct that a witness (of any age) is not obliged to answer any unacceptable questions put to the witness. These are questions that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.’

(<http://www.justice.govt.nz/publications/global-publications/a/alternative-pre-trial-and-trial-processes-for-child-witnesses-in-new-zealands-crimfinal-justice-system/current-provisions-for-child-witnesses>) (Accessed 12<sup>th</sup> October 2013)

<sup>1180</sup> ‘(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is –

(a) misleading; or

(b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Subsection (1) extends to a question that is otherwise proper if the putting of the question is unduly, annoying, harassing, intimidating, offensive or repressive.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account –

(a) any relevant condition or characteristic of the witness, including age, language, personality and education; and

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

S.26 (Western Australian) Evidence Act 1906.

<sup>1181</sup> Anne Cossins, ‘Cross-Examining The Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context’ in John R. Spencer and Michael E. Lamb eds. *Children and Cross-Examination – Time to Change the Rules* edited by (Hart Publishing, 2012) at p. 111.

set up to implement the new regime.<sup>1182</sup> In this jurisdiction, the success or failure of recorded testimony as it stands at present is yet to be evaluated. A clear understanding of the support structure required for any review or evolution of recorded testimony is necessary before any legislative development is undertaken. The proposals under the *Criminal Law (Sexual Offences) Bill 2015* and the *Criminal Justice (Victims of Crime) Bill 2015* widen the use of s.16(1)(b) *Criminal Evidence Act 1992*. This will mean that the present structures will have to bear a far heavier burden and it is submitted that no further legislative provisions should be commenced until it can be established that it can be supported completely. The many issues which the provision has created should first of all be resolved before many more cases using it progress through the courts.

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<sup>1182</sup> Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy Across Boundaries* (Oxford University Press 2010) at p. 647.

## 8.0.0 Chapter VIII - Conclusion

### 8.1.0 Introduction

8.1.1 The traditional adversarial trial process is unsuitable for the child witness and may cause psychological harm to children who do not have the cognitive and emotional resources to deal with many of its facets.<sup>1183</sup> While certain procedures have been modified to facilitate the voice of the child to be heard within criminal proceedings the traditional adversarial model remains essentially intact. The developments in law and practice that have taken place have had a significant impact.<sup>1184</sup> However, further innovation is required to reduce the harm caused to child witnesses. Such innovation or reform should also seek to ensure that the child witness's voice is fully heard in criminal proceedings, that the quality of the child's evidence is improved and that attrition is reduced in the prosecution of cases involving child complainants and witnesses.

8.1.2 Future developments would be greatly enhanced if they were grounded in a consistent and clear policy objective. The guiding principles that motivated the enactment of the *Criminal Evidence Act 1992* were a desire to protect the child witness and make it easier for him or her to give evidence at trial.<sup>1185</sup> However, the express objective of maximising the child's evidence is not reflected in any legislative or policy document in this jurisdiction nor are the courts required to consider the use of support measures in light of the 'best interests of the child'.<sup>1186</sup> Incorporating these doctrines within a legislative framework for support measures

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<sup>1183</sup> 'It has been accepted that the reason for the enactment of s. 13 (1) (a) is that it is generally accepted that young persons under the age of 17 are likely to be traumatised by the experience of giving evidence in court and that its purpose is to minimise this trauma.'

*Donnelly v Ireland* 1 IR 321 as per Costello P at p.325.

'There is universal agreement that it is traumatic for children to give evidence of unpleasant experiences and that it is particularly disturbing when they have been victims of parental abuse and are required to confront the abusing parent in Court.'

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) para.7.01 at p.67.

<sup>1184</sup> See in particular *Chapter III – Competence, Compellability and Competence* at para. 3.0.0 and *Chapter VI- The Support Measure of Recorded Testimony* at para. 6.0.0.

<sup>1185</sup> See Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) para.7.01 at p.67. See also: Comments by Pádraig Flynn, Minister for Justice, Criminal Evidence Bill, Dáil Debates, Tuesday, 3 March 1992. Vol. 416 No. 6 Col.1284.

<sup>1186</sup> See *Chapter II- The Rights of Child Witnesses in Criminal Proceedings* at para. 2.0.0.

would assist both practitioners and the courts in interpreting how best to assist the child witness in criminal proceedings.

8.1.3 Since the enactment of the *Criminal Evidence Act 1992*, the political and social rights landscape has altered considerably in Ireland.<sup>1187</sup> The Children's Rights Referendum<sup>1188</sup> reflected an aspiration to strengthen the position of the child within the Constitution of Ireland and more broadly within Irish society. In tandem with children's rights developments at an international level, the child's position as an intrinsic rights holder is now considerably strengthened.<sup>1189</sup> There has also been a change in the assumption that the evidence of children is inherently unreliable.<sup>1190</sup> Child witnesses are capable of giving credible evidence particularly in circumstances where they are supported in their efforts to do so. Moreover, children must be heard if offences against children are to be successfully prosecuted.<sup>1191</sup> The

<sup>1187</sup> 'The law governing the giving of evidence by children has undergone a dramatic transformation over the decades in tandem with various related development: the evolution of children's rights, changes in society's understanding of child development, and heightened awareness of offences against children.'

Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury 2014) para. 4.35 at p.135.

<sup>1188</sup> The passing of the referendum in November 2012 allowed Article 42A to be inserted into the *Constitution of Ireland 1937*. (See Appendices.)

<sup>1189</sup> See *Chapter II – The Rights of the Child Witnesses in Criminal Proceedings* at para. 2.0.0.

<sup>1190</sup> 'It is clear that many of the anxieties pertaining to our recommendations to abolish the corroboration requirement and the warning requirement are based on fundamental fears as to children's competence. We were persuaded by our review of the research evidence that it is time to change fundamentally our stance in relation to children, and to challenge these untested and unfounded assumptions about their unreliability as witnesses. Throughout our consultations, no empirical evidence has been advanced to us which has made us reconsider that position.'

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) para.5.25 at p.59.

See also: *Children's Testimony – A Handbook of Psychological Research and Forensic Practice* (Eds. Michael E. Lamb, David J. La Rooy, Lindsay C. Malloy and Carmit Katz.) (Wiley-Blackwell) (2<sup>nd</sup> Ed., 2011); Laura Hoyano *Reforming the adversarial trial for vulnerable witnesses and defendants*, *Criminal Law Review* Crim. L.R. 2015, 2, 107-129; Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy across Boundaries* (Oxford: Oxford University Press, 2010), pps. 599 – 606.

<sup>1191</sup> 'There is universal agreement that it is traumatic for children to give evidence of unpleasant experiences and that it is particularly disturbing when they have been victims of parental abuse and are required to confront the abusing parent in Court. This leads, understandably, to a desire to shield them from this experience and to a failure to report and/or prosecute the crime. This in turn encourages further abuse.'

Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990) para.7.01 at p.67.

The importance of the witness in the criminal justice system was highlighted in the research contained in 'No Witness, No Justice'. 'The *No Witness, No Justice (NWNJ)* project provides an opportunity to test the hypothesis that improving the care of victims and witnesses and enabling them to attend court is an effective means of narrowing the justice gap and increasing public confidence in the criminal justice system (CJS).'

Criminal Case Management Programme of the Criminal Justice System in the UK: "No Witness, No Justice". (Avail Consulting, 2004.)

reports following investigations and inquiries into child abuse<sup>1192</sup> have illustrated the long standing truth that the most vulnerable in society are susceptible to physical and sexual abuse, neglect and cruelty. It is the State's responsibility to prosecute criminal offences and to this end, it must present credible evidence to the court. Children may not have the communication skills or emotional and/or psychological strengths necessary to convey their testimony effectively without the benefit of certain accommodations. Facilitating the child witness to give evidence in court may therefore allow more cogent testimony to be presented at trial and this will assist in prosecuting offences involving children. This may in turn result in improved circumstances where offenders cannot exploit the communicative frailties of children at trial as a means of evading justice.

8.1.4 The facilitation of the child's evidence does not mean that the testimony of the child witness is to be favoured over other sources of evidence merely because the testimony comes from a child. Having started from a position whereby the child's testimony was traditionally mistrusted at common law, the pendulum should not be allowed to swing to a position where the child witness is always believed or where his or her evidence cannot be fully challenged and tested. Rather, the objective of reform should be to redress the disadvantage the child witness experiences on many levels - intellectually, cognitively, emotionally and psychologically. As with any victim, the child witness may also be traumatised by the original incident which gives rise to the proceedings and may be inhibited from testifying due to trauma, fear and stress. Reform should be directed towards alleviating all of the factors which hinder the giving of best evidence at trial.

8.1.5 The fundamental objective of this thesis is a critical legal analysis of the support measures which allow the child to be shielded from the harsher and more inhibiting aspects of the criminal trial process. During the cross-examination of a

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<sup>1192</sup> *Government inquiry into the allegations of clerical sexual abuse in the Roman Catholic Diocese of Ferns in County Wexford, Ireland.* "The Ferns Report" (October 2005); *The Report of the Commission to Inquire into Child Abuse* "The Ryan Report" (May 2009); *Report by Commission of Investigation into Catholic Archdiocese of Dublin* "The Murphy Report" (November 2009). *Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries* (February 2013).

child witness, defence counsel may legitimately use strategic techniques to influence the evidence such as tag questions, complicated sentence construction, confused chronology, inappropriate pace, repetition of questions and an authoritarian tone. These techniques individually or in combination may, persuade the child that he or she is mistaken, or may confuse the child and thereby his or her evidence. These tactics will not necessarily elicit the truth but they may undermine the credibility of the witness. Faith in traditional cross-examination techniques as a means of obtaining the truth requires re-evaluation.<sup>1193</sup> The objective of a trial is to determine the guilt or innocence of the defendant in accordance with fair procedures. Allowing the participants to use strategies and techniques in which the collateral damage may be the harming of a child witness is arguably unfair. The use and ongoing development of support measures may assist the child witness in coping with such techniques thereby protecting the child witness and promoting the administration of justice.

8.1.6 McGrath notes the customary dangers that the courts have associated with the testimony of children.<sup>1194</sup> Children may be too immature to engage in the trial process<sup>1195</sup> or may be prone to fantasise<sup>1196</sup> and have trouble distinguishing reality from illusion. They may also be suggestible and easily influenced by third parties.<sup>1197</sup> Alternatively, children may be perceived to have a less developed sense of moral responsibility<sup>1198</sup> and may be presumed to give evidence out of spite or a desire to make mischief.<sup>1199</sup> The case of Feichín Hannon<sup>1200</sup> bolstered the perception that the evidence of child witnesses is uniquely prone to such risks.<sup>1201</sup> In 1997, Mr.

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<sup>1193</sup> Emily Henderson, "Did you see the broken headlight?" *Questioning the cross-examination of robust adult witnesses*, Archbold Review, Arch. Rev. 2014, 10, 4-6. Emily Henderson, *Reforming the cross-examination of children: the need for a new commission on the testimony of vulnerable witnesses*, Archbold Review, Arch. Rev. 2013, 10, 6-9.

<sup>1194</sup> Declan McGrath, Evidence (Thomson Round Hall 2014) *Evidence of Children* Para 4 -179 at p 237. *DPP v Hester* [1973] AC at 325, [1972] 3 All ER 1056 at 1073 (per Lord Diplock); *R v Spencer* [1987] AC 128 at 141, [1986] 2 All ER 928 at 937 (per Lord Ackner); *Kendall v R* [1962] SCR 469 at 473, (1962) 132 CCC 216 at 220 (per Judson J).

<sup>1196</sup> *People (DPP) v Quilligan* [1993] 2 IR 305 at 342 (per McCarthy J). See also *R v Dossi* (1918) 13 CR App R 158 at 161.

<sup>1197</sup> *People (AG) v Casey* (No.2) [1963] IR 33 at 37 (per Kingsmill Moore J). *People (DPP) v Quilligan* [1993] 2 IR 305 at 342 (per McCarthy J). See also *R v Dossi* (1918) 13 CR App R 158 at 161.

<sup>1198</sup> *Kendall v R* [1962] SCR 469 at 473, (1962) 132 CCC 216 at 220 (per Judson J).

<sup>1199</sup> Dennis, 'Corroboration Requirements Reconsidered' [1984] Crim LR 316 at 330.

<sup>1200</sup> *DPP v Hannon* [2009] IECCA 43.

<sup>1201</sup> In asserting his client's innocence, the defence counsel in *DPP v AH* (Central Criminal Court, Dublin, June 2015) referred to the case of *DPP v Hannon* [2009] IECCA 43 and contended that children's motives in making allegations of abuse may be varied and complex.

Hannon was convicted of the offences of sexual and common assault on a 10 year old girl. He pleaded not guilty, was convicted at trial and received a four year suspended sentence. The conviction was solely based on the testimony of the complainant who gave evidence from the body of the court and without the benefit of any support measures.<sup>1202</sup> Nine years later, the complainant made a statement to An Garda Síochána confessing to having falsified the allegation against the defendant and Mr. Hannon was ultimately granted a certificate of miscarriage of justice pursuant to s.9 *Criminal Procedure Act 1993*. The complainant's conduct in this case was objectionable and indeed unlawful. Nevertheless, it is noteworthy that the possibility a witness lying in court, of being mistaken, of giving conflicting evidence with previous statements or of giving unreliable evidence when in a psychologically vulnerable state, is not confined to children.<sup>1203</sup>

8.1.7 Over the course of the past century, law and practice have evolved to assist the child witness when giving evidence at trial. The perceived risks associated with the testimony of child witnesses have been reduced in response to a greater understanding of how children communicate and the difficulties they may face when giving evidence at trial.<sup>1204</sup> The catalyst for the revolution in this jurisdiction were the ground-breaking *Consultation Paper* and *Reports* of the Law Reform Commission of Ireland. The *Consultation Paper*<sup>1205</sup> and *Report*<sup>1206</sup> on *Child Sexual Abuse* and the *Report on Sexual Offences against the Mentally Handicapped*<sup>1207</sup> directly informed the pioneering piece of legislation that was the *Criminal Evidence Act 1992*. Currently in this jurisdiction, a child witness who is under 14 years of age may give his or her evidence unsworn.<sup>1208</sup> That evidence no longer requires corroboration<sup>1209</sup> and may corroborate other unsworn evidence.<sup>1210</sup> There is no obligation on the trial judge to give a warning to the jury in the event

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<sup>1202</sup> Information communicated to the author in April 2012 by the defence counsel in the case, Paul MacDermott SC now a judge of the High Court.

<sup>1203</sup> *DPP v Wall* [2005] IECCA 140; *DPP v Hanley* [2011] 1 I.R. 247; *DPP v Pringle* [1995] 2 IR 547.

<sup>1204</sup> See: Michael E. Lamb, Irit Hershowitz, Yael Orbach & Phillip Esplin (Eds) *Tell me what happened – Structured Investigative interviews of child victims and witnesses* (Wiley-Blackwell) (2<sup>nd</sup> Edn. 2010).

<sup>1205</sup> Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989).

<sup>1206</sup> Law Reform Commission of Ireland, *Report on Child Sexual Abuse (LRC32-1990)* (September 1990).

<sup>1207</sup> Law Reform Commission of Ireland, *Report on Sexual Offences against the Mentally Handicapped (LRC33-1990)* (September 1990).

<sup>1208</sup> S.27 (1) *Criminal Evidence Act 1992*.

<sup>1209</sup> S.28 (1) *Criminal Evidence Act 1992*.

<sup>1210</sup> S.28 (3) *Criminal Evidence Act 1992*.

that the evidence is uncorroborated.<sup>1211</sup> The court will dispense with the usual identification requirements where the witness is testifying via video link and where other evidence can be presented at court to show that the accused is known to the witness or has been identified at an identity parade.<sup>1212</sup> If the case involves certain offences, notably sexual or violent offences, the child may be eligible for support measures to facilitate his or her giving evidence and to protect him or her from the potentially hostile court environment.<sup>1213</sup> The child witness may give evidence via video link<sup>1214</sup> and if he or she has a particular difficulty in communication, he or she may be entitled to avail of an intermediary.<sup>1215</sup> If the child witness is under 14 years of age and the victim of the offence, he or she may have a pre-recorded statement admitted as examination in chief evidence.<sup>1216</sup>

### **8.2.0      *In Camera Hearings, Exclusion of the Public, Clearing of the Court while giving Evidence***

8.2.1 Under Article 34.1 of the Constitution of Ireland, justice ‘save in such special and limited cases as may be prescribed by law, shall be administered in public.’<sup>1217</sup> The difficulties of children participating in judicial proceedings may be improved by the hearing of the matter ‘in camera’, in circumstances where the public are excluded or where there are strict reporting restrictions.

8.2.2 In family law and child care matters, cases may be heard ‘in camera’ meaning that the only persons permitted to be present are the parties concerned, their legal representatives and officers of the court. Under the *Courts and Civil Law (Miscellaneous Provision) Act 2013*, the in camera rules have been relaxed to allow, in certain circumstances, the public and members of the press to be present in court during family law and child care proceedings. Reporting restrictions are maintained under s.40A *Civil Liability and Courts Act 2004* as amended by the 2013 Act.

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<sup>1211</sup> S.28 (2) *Criminal Evidence Act 1992*.

<sup>1212</sup> S.18 *Criminal Evidence Act 1992*.

<sup>1213</sup> Part III, *Criminal Evidence Act 1992*.

<sup>1214</sup> S.13 (1) (a) *Criminal Evidence Act 1992*. S.39 *Criminal Justice Act 1999*.

<sup>1215</sup> S.14 *Criminal Evidence Act 1992*.

<sup>1216</sup> S.16 (1) (b) *Criminal Evidence Act 1992*.

<sup>1217</sup> Article 34.1 Constitution of Ireland 1937



8.2.3 Although frequently termed the ‘in camera’ rule, certain other provisions do not quite abide by this term. They provide for the exclusion of the public where children are giving evidence or where certain offences are being prosecuted but allow for certain other parties to be present during proceedings. S. 257 *Children Act 2001*.<sup>1218</sup> The section applies to any criminal proceedings where a child is called as a witness and provides that during his or her evidence, only certain person may remain in court. The section allows for officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons (if any) as the court may in its discretion permit to remain. S.257 *Children Act 2001* is a general provision for the exclusion of the public but only applies while a child is giving evidence in criminal proceedings.<sup>1219</sup>

8.2.4 There is also general provision for the exclusion of persons throughout the entire hearing of criminal matters under s. 20(3) *Criminal Justice Act 1951*<sup>1220</sup> which allows for the same categories of persons to remain i.e. officers of the Court, persons directly concerned in the proceedings, *bona fide* representatives of the Press, and such other persons as the Court may, in its discretion, permit to remain. However, the Court must be of the opinion that the offence is of an indecent or obscene nature

<sup>1218</sup> *The Children Act 2001*

257. Clearing of court in certain cases

(1) Where in any proceedings for an offence a person who, in the opinion of the court, is a child is called as a witness, the court may exclude from the court during the taking of his or her evidence all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons (if any) as the court may in its discretion permit to remain.

(2) The powers of a court under this section shall be in addition and without prejudice to any other power of the court to hear proceedings *in camera* or to exclude a witness until his or her evidence is required or to Part III (which relates to evidence through a television link in certain proceedings) of the Act of 1992.

<sup>1219</sup> *The Children Act 2001*

257. Clearing of court in certain cases

(1) Where in any proceedings for an offence a person who, in the opinion of the court, is a child is called as a witness, the court may exclude from the court **during the taking of his or her evidence** ... ..

<sup>1220</sup> (3) *In any criminal proceedings for an offence which is, in the opinion of the Court, of an indecent or obscene nature, the Court may, subject to subsection (4), exclude from the Court during the hearing all persons except officers of the Court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons as the Court may, in its discretion, permit to remain.*

(4) *In any criminal proceedings—*

(a) *where the accused is a person under the age of twenty-one years, or*

(b) *where the offence is of an indecent or obscene nature and the person with or against whom it is alleged to have been committed is under that age or is a female, a parent or other relative or friend of that person shall be entitled to remain in Court during the whole of the hearing.*

in order to thus rule. S. 20 (4) of the same Act also provides the right of the parent , relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court. A similar provision, including the right of a parent, etc to remain is included in the *Criminal Justice (Female Genital Mutilation ) Act 2012*.

8.2.5 An almost exact similar provision is also included in s.6 *Criminal Law (Rape) Act 1981* which allows for similar categories to remain and the general public to be excluded in any proceedings for a rape offence or the offence of aggravated sexual assault or attempted aggravated sexual assault or any connected inchoate offence. S. 3 of the same Act also provides the right of the parent, relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court. A similar provision, which also includes the right of a parent, etc to remain is included in the *Criminal Justice (Female Genital Mutilation ) Act 2012*.

8.2.6 A similar provision includes s.2 *Criminal Law (Incest Proceedings )Act 1995*<sup>1221</sup> which, again, allows for the same category of persons to remain. (It does not however include a similar provision to s.3 *Criminal Law (Rape) Act 1981*). A proposal is contained under s.24 *Criminal Law (Sexual Offences) Bill 2015* to exclude the public from hearings of proceedings under the *Punishment of Incest Act 1908* but it still does not contain a provision to allow for a relative or friend of the complainant to remain or a relative or friend of the accused where he or she is under 18 years of age.

8.2.7 An additional general power to exclude the public and restrict reporting of a trial, is contained under the General Scheme of the Criminal Procedure Bill (2015) in Head 2 part 6 which also contains a provision under part 8 which also provides that where the accused is a person under the age of eighteen, a parent, guardian, or

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<sup>1221</sup> *Criminal Law (Incest Proceedings )Act 1995*

2. Exclusion of public from hearings of proceedings

(1) In any proceedings for an offence under the Act of 1908, the judge or the court, as the case may be, shall exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the press and such other persons (if any) as the judge or the court, as the case may be, may, in his, her or its discretion, permit to remain.

other relative or friends of that person shall be entitled to remain Court during the whole of the hearing.<sup>1222</sup>

### 8.3.0 Reporting Restrictions

8.3.1 S.252 *Children Act 2001*<sup>1223</sup> is a general provision which allows for the anonymity of any child whether he or she is a witness or a complainant. Reporting restrictions are also contained in s.7 *Criminal Law (Rape) Act 1981* in respect of the complainant. Alternatively, the trial judge may clear the court of persons not connected with a case when a child is giving evidence.<sup>1224</sup> The court may also order that reporting restrictions will apply where a child is a witness or a complainant in any proceedings.<sup>1225</sup> A child witness may have access to court accompaniment which will provide general, practical support within the court environment.<sup>1226</sup> A pre-trial court visit may be arranged so that the child will be familiar with the court environment before giving evidence. Post-conviction, a child witness giving a victim impact statement may do so through an intermediary and/or by means of video link.<sup>1227</sup> None of these measures may seem particularly radical today but each was ground-breaking at the time of enactment, over 20 years ago.

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<sup>1222</sup> Revised General Scheme of the Criminal Procedure Bill ( June 2015)

<sup>1223</sup> The Children Act

s. 252 Anonymity of child in court proceedings

(1) Subject to subsection (2), in relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings—

(a) no report which reveals the name, address or school of the child or includes any particulars likely to lead to his or her identification, and

(b) no picture which purports to be or include a picture of the child or which is likely to lead to his or her identification,

shall be published or included in a broadcast.

(2) The court may dispense to any specified extent with the requirements of subsection (1) if it is satisfied that it is appropriate to do so in the interests of the child.

(3) Where the court dispenses with the requirements of subsection (1), the court shall explain in open court why it is satisfied it should do so.

(4) Subsections (3) to (6) of section 51 shall apply, with the necessary modifications, for the purposes of this section.

(5) Nothing in this section shall affect the law as to contempt of court.

<sup>1224</sup> S.257 *Children Act 2001*.

<sup>1225</sup> S.252 *Children Act 2001*.

<sup>1226</sup> See: *Victims Charter and Guide to the Criminal Justice System*. Victims of Crime Office, Dept. of Justice, Equality and Law Reform at p. 5.

<http://www.victimsofcrimeoffice.ie/en/vco/Entire%20Charter.pdf/Files/Entire%20Charter.pdf> (Accessed 25<sup>th</sup> September 2015)

Court Accompaniment Court Services (CASS), Children at Risk in Ireland.

<http://www.cari.ie/our-services/cass-court-accompaniament-support-service> (Accessed 25th September 2015).

<sup>1227</sup> SS..5 and 6 *Criminal Procedure Act 2010*.

## 8.4.0 Perception of the Child Witness

Perceptions of even very young witnesses are constantly changing.<sup>1228</sup> From the position of being seen as inherently untrustworthy, witnesses as young as three years of age<sup>1229</sup> and four and half years of age<sup>1230</sup> have, on occasion, been recognised as capable of giving credible evidence in neighbouring jurisdictions. Nevertheless, significant differences between child and adult witnesses remain. Adult witnesses may have greater resources in recovering from the effects of the original crime itself and the subsequent trial process. The child witness may lack comparable reservoirs of resilience and may be psychologically harmed by aspects of the trial process such as the delay before testifying, having to undergo difficult cross-examination or as a result of the stressful environment itself.<sup>1231</sup> In addition, the traditional adversarial process may cause heightened stress and trauma to the child thereby impeding the giving of best evidence. The protections available through appropriate support measures may shield the child from the risk of such psychological stress and trauma. Child witnesses require the personnel who engage with them to have a wider skill set and specialised training and experience in how children communicate.

## 8.5.0 Requirement for Extensive Research prior to Legislative Developments

8.5.1 The provisions of Part III *Criminal Evidence Act 1992* strengthened the evidence of child witnesses to the extent that it could be assessed, as with the evidence of adult witnesses, through the prism of credibility rather than from a viewpoint of scepticism. By facilitating the evidence of child witnesses in a practical manner, the legislative provisions under the *Criminal Evidence Act 1992* allowed the

<sup>1228</sup> In 1958, Lord Goddard CJ “deprecated” the calling of a child of five as a witness in a case of incest, saying that it was “ridiculous” to suppose a jury would attach any value to it.  
*R v Wallwork* [1958] 42 CAR 153.

<sup>1229</sup> ‘Three-year-old becomes youngest trial witness’  
The Independent (UK), 12<sup>th</sup> November 2011.

(<http://www.independent.co.uk/news/uk/crime/threeyearold-becomes-youngest-trial-witness-6261012.html>) (Accessed 29<sup>th</sup> September 2015).

<sup>1230</sup> *R v Barker*[2010] EWCA Crim 4.

<sup>1231</sup> Owen Bowcott, *Call for research into effects on children of giving evidence in abuse cases* The Guardian 20<sup>th</sup> March 2013.

evidence of children to shed the negative associations as outlined by McGrath.<sup>1232</sup> However, in the years since the Law Reform Commission published its *Consultation Papers and Reports*, there has been little research of comparable scope and depth. The research and innovations which are ongoing in England and Wales,<sup>1233</sup> Australia<sup>1234</sup> and New Zealand<sup>1235</sup> have not been mirrored in this jurisdiction. Ireland has been compelled to introduce certain changes to law and practice in light of the enactment of the *EU Directive on Establishing Minimum Standards on the Rights, Support and Protection and Victims of Crime*.<sup>1236</sup> Although the relevant domestic legislation has not been commenced at time of writing, the proposed legislation merely extends the eligibility for support measures which already exist.<sup>1237</sup> It appears that no examination of how the measures are working in practice was undertaken prior to the drafting of this legislation. Reappraisal of the efficacy of support measures and appropriate legislative revision has been noticeably absent in

- <sup>1232</sup> McGrath suggests that children may be too immature to engage in the trial process, may be prone to fantasise, may have trouble distinguishing reality from illusion and may also be suggestible and easily influenced by third parties. Children may also be perceived to have a less developed sense of moral responsibility and may be presumed to give evidence out of spite or a desire to make mischief. Declan McGrath, *Evidence* (Thomson Round Hall 2014) para 4 -179 at p. 237.
- <sup>1233</sup> Joyce Plotnikoff and Richard Woolfson, *The "Go-Between": Evaluation of Intermediary Pathfinder Projects* (2007); *Achieving Best Evidence in Child Sexual Abuse Cases – A joint inspection*. (HMCPSI/HMIC) (December 2014). Joyce Plotnikoff and Richard Woolfson, *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (Plotnikoff & Woolfson/The Nuffield Foundation/ NSPCC July 2009) Chapter 8 at pps. 88-98. Joyce Plotnikoff and Richard Woolfson, *Young witnesses in Criminal Proceedings – A Progress Report on Measuring Up?* (Lexicon Limited/The Nuffield Foundation/ NSPCC June 2011). Concerning the implementation of full pre-recorded testimony under s.28 Youth Justice and Criminal Evidence Act 1999, see Andrew Ford, *Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act*. Counsel 2015, Mar, 18-20. March 2015; David Wurtzel, *Pre-Recorded Cross-examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System*, Counsel, Dec 2014;
- <sup>1234</sup> Anne Cossins, 'Cross-Examining The Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context' in John R. Spencer and Michael E. Lamb eds. *Children and Cross-Examination – Time to Change the Rules* edited by (Hart Publishing, 2012) at p. 107.
- <sup>1235</sup> *Child Witnesses In The New Zealand Criminal Courts: A Review Of Practice And Implications For Policy* (Kirsten Hanna, Emma Davies, Emily Henderson, Charles Crothers, Clare Rotherham) (The Law Foundation, New Zealand, The Institute of Public Policy, Auckland University, 2010 ). Kirsten Hanna, Emma Davies, Charles Crothers Clare, et al. (2011) *Questioning child witnesses in New Zealand's criminal justice system: Is cross-examination fair? Psychiatry, Psychology and Law* 19(4): 530-546. Kirsten Hanna, Emma Davies, Emily Henderson and L Hand (2013) *Questioning child witnesses: Exploring the benefits and risks of intermediary models in New Zealand*. *Psychiatry, Psychology and the Law* 20(4): 527-543. Henderson E (2014) *Judges as cross-examiners: The Starmer v Grieve debate*. *Archbold Review* 5: 3.
- <sup>1236</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*. 14.11.2012 OJ L 315/57.
- <sup>1237</sup> *Criminal Law (Sexual Offences) Act 2014; Criminal Justice (Victims of Crime) Bill 2015;*

this jurisdiction. Difficulties exist with the current provisions such as lack of legislative detail, procedural guidance, adequate facilities and appropriate training<sup>1238</sup> and these issues will not be resolved through piecemeal reform. Recent data shows that a statistically high proportion of children are still being sexually and physically abused and that the abuse is predominantly carried out by persons known to the children in question thereby making prosecutions more difficult and more traumatic.<sup>1239</sup> It is therefore imperative that the necessary support measures are grounded in legislation that is clear, comprehensive and effective as possible. This is a recommendation which was contained in the Final Report of the Joint Oireachtas Committee on Child Protection

The Committee recommends further study of victim responses to the criminal justice system and of the means that might be available to alleviate any unnecessary hardship caused to victims by the operation of the criminal trial process.<sup>1240</sup>

### 8.6.0 Issues with the support measure of Video Link

8.6.1 Although the support measure of video link, under *s.13 Criminal Evidence Act 1992*, has been in operation in this jurisdiction for over 20 years, there are

<sup>1238</sup> See *Chapter VII – The Support Measure of Recorded Testimony* at para. 7.0.0. See also Miriam Delahunt, *Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992* *The Bar Review* (Feb 2011); Miriam Delahunt, *Recorded Evidence for Vulnerable Witnesses in Criminal Proceedings* *The Bar Review* (June 2015);

<sup>1239</sup> As Browne has pointed out, the S.A.V.I. report indicated that the abuse of children is continuing at a very high level with 20.4% of women reporting sexual abuse in childhood and 5.6% reporting having been raped as children. In relation to men, 16.2% reported experiencing sexual abuse in childhood.

*‘State still not responding to scale of sexual abuse’*

Vincent Browne, *The Irish Times* Wednesday, 5<sup>th</sup> February 2014.

<http://www.irishtimes.com/news/politics/state-still-not-responding-to-scale-of-sexual-abuse-1.1679458>

(Accessed 29th September 2015).

The SAVI Report: Hannah McGee, Rebecca Garavan, Mairead de Barra, Joanne Byrne and Ronan Conroy of the Health Services Research Centre at the Royal College of Surgeons in Ireland. Sponsored by the Dublin Rape Crisis Centre. *The Sexual and Violence in Ireland (SAVI) Report* (Liffey Press, 2002);

*‘The majority of perpetrators of sexual violence are known to the person they perpetrate the abuse against (93%).’*

*A common pattern emerges when all incidents of abuse disclosed to RCCs (Rape Crisis Centres) are examined by survivors relating to the age of the survivor at the time of the violence.*

- *Survivors who were under the age of 13 when the violence took place most commonly disclosed that the abusers were relatives/family members (45%).*

- *Children aged 13 to 17 were more likely to be abused by non-family members, most commonly friends/acquaintances/neighbours (43%).’*

*National Rape Crisis Statistics*, Rape Crisis Network of Ireland (RCNI 2014) at p. 20.

<http://www.rcni.ie/wp-content/uploads/RCNI-National-Stats-2014.pdf> (Accessed 28th September 2015)

<sup>1240</sup> *Joint Oireachtas Committee Report on Child Protection* (November 2006) Chapter 11, para 11.10.8 at page 78.

certain areas of concern regarding its use. In *White v Ireland*<sup>1241</sup> Kinlen J noted that the new technology might allow the jury a greater facility for examining the body language and face of the child witness.<sup>1242</sup> Yet, it is submitted that the testimony of the child witness is in fact “flattened” through the mechanical intervention of the television screens. While the jury may observe the child witness in greater detail, they are essentially experiencing testimony at a physical remove, devoid of a natural emotional response to the questioning.<sup>1243</sup> Evidence delivered from the body of the court may allow the witness to establish a more immediate and direct connection with a jury. For this reason, if a child witness is capable of giving evidence of from the body of the court, and the potential risks to the wellbeing of the child of giving evidence in this manner have been assessed as minimal, this should be the preferred manner of testifying. While the use of video link is now routine for child witnesses, there has been no significant revision of the legislation since its commencement; nor has adequate procedural guidance been published concerning its use. There is no statutory obligation to ensure that the child’s preference is heard as to the manner how he or she gives evidence. A child witness may feel that he or she is able to testify from the body of the court and indeed may prefer to do so.<sup>1244</sup> Therefore, a legislative provision should be enacted requiring the court to ensure that the views of the child are taken into consideration as to the manner in which the evidence is given.

<sup>1241</sup> *White v Ireland* [1995] 2 IR 268.

<sup>1242</sup> *White v Ireland* [1995] 2 IR 268 at 282.

<sup>1243</sup> *‘The further you get from the real, live, appearance of a person in a court telling their story, the more the prosecution case can be weakened. I have seen video link work, and there have been times as prosecutor that I was grateful that it was there, but on other occasions I wondered about it. Putting a distance between the victim and the jury could on occasion be less than helpful. There can be occasions, however, where without facilitators, without video-link, you will have no witness. Just how far are we prepared to go?’*

Charleton J, *Chairman’s Opening Speech, The Law Reform Commission Annual Conference 2011: Sexual Offences and Capacity* at p. 6.

[http://www.lawreform.ie/\\_fileupload/misc/AC11/CharletonJ.pdf](http://www.lawreform.ie/_fileupload/misc/AC11/CharletonJ.pdf) (Accessed 29<sup>th</sup> September 2015).

<sup>1244</sup> *‘I would have rather been in court so I could have looked him in the eye and shown him that I wasn’t scared.’ (Joan, 10)*

*‘I would have preferred to give evidence in the courtroom. They didn’t give me a choice. We told the witness care officer that we wanted to go behind a screen but he said that it had to be a video link. At court they said you have to go in the TV link room because we have already set it up.’ (Charlie, 12)*

*‘I wanted to go in the court. Why? I just did. I was not nervous or frightened. I told people. They said I can’t because I’m not 17. I was only two months off. I was being spoken to like I’m a ten-year-old. It was frustrating.’ (Jess, 16)’*

Plotnikoff, Joyce and Woolfson, Richard –*Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* – (Lexicon Limited; The Nuffield Foundation, July 2009) at p.90

8.6.2 Although there has been an increase in the implementation of video link facilities in court rooms in this country<sup>1245</sup> certain courtrooms are not equipped with these facilities. In certain cases, such as in the case of *DPP v AC*,<sup>1246</sup> where video link facilities in the appropriate court room, trials may need to be transferred to a location where appropriate facilities have been installed. This may cause significant delay, upset and inconvenience to the child witness.

### **8.7.0 Issues with the support measure of Intermediaries**

8.7.1 The difficulties associated with the provision for intermediaries, under s.14 *Criminal Evidence Act 1992*, are extensive. There is no reported use of this support measure and it has been described as a 'dead letter' provision for the two decades that the Act has been in force.<sup>1247</sup> It is a support measure that is in need of significant reform as, under the existing provision, the nature and scope of the intermediary's role is unduly restrictive. The intermediary may only interpret counsel's question and convey the meaning of the question to the witness; there is no provision in the legislation for the intermediary to convey the meaning of the answer to the court. The support measure is only available when the witness testifies via video link and this may further limit the efficacy of the child's testimony. As no independent training and registration of intermediaries exists in this jurisdiction, there is currently no panel from which the court may appoint an intermediary who is trained in the rules of evidence as well as experienced in the resolution of the communication difficulties of child witnesses.

8.7.2 The experience of other countries suggests that the use of an intermediary, properly trained and utilised by the court, can assist the giving of best evidence by a

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As reflected in the Commencement Orders contained in s.13 *Criminal Evidence Act 1992*:

*Section 13- Commencement Order for the Circuit Court sitting in Cork Circuit as of May 2, 2005 by the Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2005 (S.I. No. 221 of 2005).*

*Section 13 - Commencement Order for the District Court sitting in District No. 19 as of July 8, 2005 by the Criminal Evidence Act 1992 (Section 13) (Commencement)(No. 2) Order 2005 (S.I. No. 296 of 2005).*

*Section 13 commenced for the Circuit Court sitting in the South Eastern Circuit and the District Court sitting in District No.8 by the Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2007 (No. 52 of 2007) with effect from February 12, 2007.*

*Section 13 commenced for the Circuit Court sitting in the Midland Circuit and, the District Court sitting in District No. 9 by the Criminal Evidence Act 1992 (Section 13) (Commencement) (No. 2) Order (S.I. No. 572 of 2007) with effect from August 20, 2007.*

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*DPP v AC* Circuit Criminal Court, July 2011 at para. 2.32.0.

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Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury 2014) para. 4.63 at p. 145.



vulnerable witness.<sup>1248</sup> It is submitted that, at present, legal practitioners and the judiciary lack the requisite skills and training to overcome the communication difficulties of certain child witnesses at trial; the role of the intermediary may provide a solution to the problems that currently inhibit the giving of effective evidence by such children.

8.7.3 As noted above, one of the significant aspects of cross-examination is that the defence may legitimately use strategic techniques to control the child witness.<sup>1249</sup> In those circumstances, the child witness should be provided with mechanisms of support when questioned at trial. As Healy has indicated, defence counsel may take issue with the modification of the pace and/or interference of the method of cross-examining the witness imposed by the specifications of the intermediary in his or her examination of the child witness.<sup>1250</sup> Yet potentially, the use of an intermediary may facilitate the communication of detailed information to the court by the child witness and its use should be a benefit to all sides, if properly implemented.

8.7.4 The case of *DPP v AG*<sup>1251</sup> highlights resistance to the use of the legislative provision for intermediaries under s.14 *Criminal Evidence Act 1992*. On hearing the application for an intermediary for a trial that was to take place 3 days later before a different court and judge, Nolan J stated that any difficulties could be dealt with by counsel. He added that if this proved to be inadequate, an application could be made to the trial judge for the use of an intermediary. It is submitted that communicating with an unfamiliar child who has suffered a traumatic event and who may come from a difficult socio-economic environment and who may have certain educational and cognitive needs will result in particular difficulties in a court environment. It is

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<sup>1248</sup> Dr. Emily Henderson "A very valuable tool": judges, advocates and intermediaries discuss the intermediary system in England and Wales, *International Journal of Evidence & Proof* (2015), 19(3), 154-171; Dr. Emily Henderson *All the proper protections - the Court of Appeal rewrites the rules for the cross-examination of vulnerable witnesses* *Crim. L.R.* 2014, 2, 93-108; Joyce Plotnikoff and Richard Woolfson *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press)(2015); Brendan M.O'Mahony, *The Emerging Role Of The Registered Intermediary With The Vulnerable Witness And Offender: Facilitating Communication With The Police And Members Of The Judiciary*. *British Journal Of Learning Disabilities* 38.3 (2010): 232-237. (22 June 2015);

<sup>1249</sup> Tag questions, complicated sentence construction, confused chronology, inappropriate pace, repetition of questions, an authoritarian tone which might, in itself, persuade the child that they are mistaken, and skilful body language are all legitimate cross-examination techniques which may confuse and destabilise the child witness.

<sup>1250</sup> John Healy, *Irish Laws of Evidence* (Thomson Round Hall 2002) para.1-58 at p. 33.

<sup>1251</sup> *DPP v AG* Dublin Circuit Court, December 2013 at para. 2.36.0.

in these circumstances that an intermediary may assist not only the child witness but also the practitioners involved. It is vital that the intermediary be appointed as early as possible in the process and re-evaluation on the day of the trial is an inadequate response to the issues involved.

8.7.5 Although there are no reported cases in the law reports of the use of the support measure, anecdotally intermediaries have been used in this jurisdiction.<sup>1252</sup> It appears that this has occurred in very rare circumstances in cases where the witness has had significant difficulties in communicating in the court room setting. The role of intermediary has been closer to that of an interpreter in those situations. In terms of the broader context of the criminal trial, it is submitted that it is wholly redundant to have a special measure on the statute books which gives a false impression that the system operates a full range of functioning support measures.<sup>1253</sup> Significant reform is required in this jurisdiction to ensure that the provision is employed effectively.

### 8.8.0 *Issues with the support measure of Recorded Testimony*

8.8.1 The most recently implemented support measure is the use of pre-trial recorded testimony under *s.16(1)(b) Criminal Evidence Act 1992*. It was first used in a trial in the Central Criminal Court in November 2010<sup>1254</sup> but it appears since that time, that the use of *s.16(1)(b) Criminal Evidence Act 1992* has not been evaluated.

<sup>1252</sup> While anecdotally the support measure of an intermediary has been used in this jurisdiction, it appears that this has been in very rare circumstances in cases where there has been significant difficulty in communicating with the witness who had an intellectual disability and a speech impediment. As a result, the role of intermediary has been closer to that of an interpreter. Personal communication to the author from Senior Counsel in June 2015.

<sup>1253</sup> In a written answer to a parliamentary question, Alan Shatter gave this response: *Section 14(1) (of the Criminal Evidence Act 1992) provides that, in the case types mentioned (sic), there such persons are giving evidence, the court may, on the application of the prosecution or the accused, direct that questions be to a witness (sic) be put through an intermediary is satisfied that, having regard to the age or mental condition of the witness, the interests of justice require. ....I am informed by the Courts Service that they comply with the relevant UN Guidelines in respect of child victims and witnesses of crime and provides (sic) the necessary video link facilities as required under the 1992 Act.*

Alan Shatter TD, Minister for Defence,  
732 Dáil Debates col. 740 (18 May 2011).

<sup>1254</sup> For an examination of the first cases in respect of the *S.16(1)(b) Criminal Evidence Act 1992* see Miriam Delahunt, *Video Evidence and S.16(1)(b) Criminal Evidence Act 1992*, *The Bar Review*, (vol.1, 2-5) (Feb 2011). For issues concerning its use since then, see also Miriam Delahunt *Recorded Testimony for Vulnerable Witnesses*. *The Bar Review 5, Vol. 3, 46-49* (June 2015).

It is therefore not known how it is working in practice and how many cases have made use of the provision.

8.8.2 Section 16(1)(b) *Criminal Evidence Act 1992* allows for the admission at trial of a recorded statement as examination in chief testimony and is undoubtedly a practical step towards facilitating the testimony of child witnesses to be heard within the criminal justice system. It minimises the stress caused to the child witness in giving examination in chief evidence but perhaps the greatest advantage of the support measure is that it allows details of the alleged offence to be captured closer to the time of the incident. This results, potentially, in the improvement in the quality of the testimony admitted at trial. The concerns that Charleton *et al* asserted concerning the use of recorded testimony have not been realised. Writing in 1999, the authors suggested that leaving the jury with evidence in the form of a video tape would not assist in further breaking down the ‘collective scepticism’ as to the veracity of children who complain that they have been sexually abused.<sup>1255</sup> However, it is asserted that watching a recording of a child complainant relate details of the relevant incident in a relaxed and safe environment can produce compelling evidence. This has been clear from cases observed by the author in which the special measure has been used.<sup>1256</sup>

8.8.3 Nevertheless, there are legitimate concerns regarding the use of recorded testimony as currently drafted and implemented. The measure does not prevent the witness having to undergo the trauma of cross-examination at trial and, therefore, it is questionable whether it achieves any meaningful protection for the child witness. In addition, it constitutes a substantial incursion into the rights of the accused as it allows for hearsay evidence to be admitted at trial. A significant issue for the child

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<sup>1255</sup> “Legal rules cannot operate independently of the community. Convictions depend upon ordinary people being willing to accept as true an account of sexual abuse from a child. Since Article 38.5 of the Constitution makes the community, through the jury system, the ultimate judge of what evidence proves guilt beyond reasonable doubt, legislation which proceeds on a merely theoretical basis without regard to the factual results is of little use. Leaving the jury with evidence consisting of a video tape will not assist in further breaking down the collective scepticism as to the veracity of children who complain that they have been sexually abused.”

Peter Charleton, Paul Anthony McDermott and Marguerite Bolger- *Criminal Law* (Butterworths, 1999) para. 8.81 at p. 600.

<sup>1256</sup> See Chapter VII – *The Support Measure of Recorded Testimony* at para.7.0.0. See also Miriam Delahunt, *Video Evidence and S.16(1)(b) Criminal Evidence Act 1992*, *The Bar Review* 2011, 16(1), 2-6 For an examination of the issues concerning its use since then, see also Miriam Delahunt *Recorded Testimony for Vulnerable Witnesses*. *The Bar Review* 5, Vol. 3, 46-49 (June 2015).

witness is the delay between the recording of the examination in chief testimony and the commencement of the trial.<sup>1257</sup> The competency of the child may be questioned after the recording has been admitted and played to the jury if he or she is unable to give an intelligible account of the relevant events at trial.<sup>1258</sup> Even if the child witness is deemed competent, with a significant delay, there remains the strong possibility that he or she will not be able to remember the events as clearly as when the recording was made<sup>1259</sup> an eventuality that may disadvantage both the prosecution and the defence.

8.8.4 The issue of the competence of the child witness during the trial process is not addressed within s.16 of the *Criminal Evidence Act 1992* and only to a minimal degree in the procedural guidance<sup>1260</sup> and case law from England and Wales may be used as a guiding principle should these matter arises.<sup>1261</sup> This is not ideal in circumstances where the legislative provisions and guidance in the neighbouring jurisdiction are substantially different. It is submitted that many of the issues concerning the present use of recorded testimony would be resolved if s.16(1)(b) were replaced, legislatively, by full pre-trial recording of examination in chief and cross-examination testimony. However, there is no proposal for full pre-trial recorded testimony for child witnesses in any of the current legislative proposals.<sup>1262</sup>

8.8.5 While the use of partially recorded testimony under s.16(1)(b) *Criminal Evidence Act 1992*, and video link<sup>1263</sup> may assist the child witness, these support measures have not fundamentally changed the adversarial process.<sup>1264</sup> Spencer notes

<sup>1257</sup> For trial waiting times see The Courts Services Annual Report (Courts Services 2014) 'Waiting times as at 31st December 2014' at p. 61.

<sup>1258</sup> <http://www.courts.ie/Courts.ie/Library3.nsf/0/3B21EBCDBCA7469C802575E6003DBD7F?OpenDocument> (Accessed 25th September 2015).

<sup>1259</sup> *S.27 Criminal Evidence Act 1992.*

<sup>1260</sup> *DPP v AH* Central Criminal Court, June 2015 at para. 2.37.0

<sup>1261</sup> *Good Practice Guidelines for Persons Involved in Video Recording interviews with complainants under 14 years of age (or with intellectual disability) for Evidential Purposes in accordance with Section 16(1)(b) of the Criminal Evidence Act, 1992, in cases involving Sexual and/or Violent Offences.*

<sup>1262</sup> An Garda Síochána, (July 2003), 'Competence, compellability and availability for cross-examination' paras 2.14-2.19 at p.18.

<sup>1263</sup> *R v Powell* [2006] 1 CAR 31 ; *R v Malicki* [2009] EWCA Crim 365.

<sup>1264</sup> *Criminal Law (Sexual Offences) Act 2014; Criminal Justice (Victims of Crime) Bill 2015;*

<sup>1265</sup> *S.13 Criminal Evidence Act 1992.*

<sup>1266</sup> '...pre-recording does not tackle the endemic problems that exist in relation to the actual purpose and function of cross-examination in a child sexual assault – rather than being a method for uncovering untruthful child witnesses, empirical evidence shows that it is a process that manufactures inaccurate evidence.'

two disadvantages associated with the current method of adversarial cross-examination of child witnesses: firstly that it is an unreliable means of testing the evidence and, secondly that it is potentially abusive.<sup>1265</sup> England and Wales have gone some way towards curtailing the manner in which a child witness may be cross-examined.<sup>1266</sup> There are as yet no proposals in this jurisdiction for measures to prevent the use of unacceptable questions, measures that exists in New Zealand<sup>1267</sup> and Western Australia.<sup>1268</sup> In Ireland, it is the responsibility of the prosecution counsel and the trial judge to intervene where it is felt that cross-examination has become too bruising. The *Code of Conduct of the Bar Council of Ireland* does purport to restrain the use of damaging questioning techniques.<sup>1269</sup> However, it

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1265 Anne Cossins, 'Cross-Examining The Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context' in John R. Spencer and Michael E. Lamb eds. *Children and Cross-Examination – Time to Change the Rules* edited by (Hart Publishing, 2012) at p. 111.

1265 J.R.Spencer, *Conclusions: Second Problem – the Method of Adversarial Cross-Examination* ' in *Children and Cross-Examination, Time To Change The Rules?* Eds. John R. Spencer, Michael E. Lamb ( Hart Publishing, 2012) at p. 178.

1266 See: *R v Wills* [2011] EWCA Crim 1938, [2012] 1 Cr. App. R. 2; *R v Lumbeba and JP* [2014] EWCA Crim 2064.

Although only in use in pilot projects at time of writing, the implementation of full recorded testimony has seen further restrictions to cross-examination including the prior submission to court of proposed cross-examination questions.

See Andrew Ford, *Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act*. Counsel 2015, Mar, 18-20. March 2015; David Wurtzel, *Pre-Recorded Cross-examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System*, Counsel 2014, Dec 2014;

1267 'Child victims and witnesses are subject to direct cross-examination by defence counsel, regardless of how or when they give evidence. However, under section 85 of the Evidence Act 2006, Judges may disallow, or direct that a witness (of any age) is not obliged to answer any unacceptable questions put to the witness. These are questions that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.'

S.85 Evidence Act 2006. (New Zealand).

(<http://www.justice.govt.nz/publications/global-publications/a/alternative-pre-trial-and-trial-processes-for-child-witnesses-in-new-zealands-criminal-justice-system/current-provisions-for-child-witnesses>)

(Accessed 24<sup>th</sup> September 2015).

1268 S.26 of the *Western Australian Evidence Act 1906* states :

(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is –

(a) misleading; or

(b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Subsection (1) extends to a question that is otherwise proper if the putting of the question is unduly, annoying, harassing, intimidating, offensive or repressive.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (1) ,it is to take into account –

(a) any relevant condition or characteristic of the witness, including age, language, personality and education; and

(b) any mental ,intellectual or physical disability to which the witness is or appears to be subject.

1269 'Barristers when conducting a case must not make statements or ask questions which are merely scandalous or are intended only for the purpose of vilifying, insulting or annoying a witness or some other person.'

The Code of Conduct, Bar Council of Ireland (July 2014) at para. 5.22.

would be preferable to place the prohibition of ‘unacceptable questions’ on a statutory footing so that best practice would prevail openly and consistently.

8.8.6 It is a traditional feature of the trial process that defence counsel will ‘put the defendant’s case’ to the child witness. This may involve asserting that the child witness is lying, mistaken or has fantasised about the events in question. While upsetting to an adult, questioning of this kind may be particularly damaging to a child and this aspect of cross-examination has been significantly modified in England and Wales.<sup>1270</sup> The objective for the defence counsel in ‘putting the case’ is to ensure that the jury is apprised of the defendant’s version of events but, for a variety of reasons, counsel may not wish to put his or her client in the witness box. However, the defendant’s case does not necessarily have to be put to the child witness in the traditional manner where it may be presented by other means.<sup>1271</sup> It is submitted that modification to this traditional manner of cross-examination in England and Wales is welcome and should be considered in this jurisdiction.

### 8.9.0 State responsibility to protect the child witness

8.9.1 The State has an obligation to prosecute criminal offences in order to protect society and at the same time is constitutionally obliged to vindicate the right of the defendant to a fair trial.<sup>1272</sup> It is also obliged to protect children who are in environments which may cause them harm and it is submitted that this includes the court environment.<sup>1273</sup> The criminal trial process in this jurisdiction must adequately

<sup>1270</sup> Modification to this line of questioning has been made in England and Wales:  
*‘When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate ‘putting his case’ where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions. Where limitations on questioning are necessary and appropriate, they must be clearly defined.’*  
*Criminal Practice Directions*, [2014] EWCA Crim 1569, 23<sup>rd</sup> July 2014 at Para 3E.4.

<sup>1271</sup> *R v Cokesix Lubemba; R v JP* [2014] EWCA Crim 2064.

<sup>1272</sup> Art.38.1 Constitution of Ireland 1937.

<sup>1273</sup> On 28th January 2014, Louise O’ Keffe won a judgment in the European Court of Human Rights against Ireland concerning a lack of protection provided by the school she attended which enabled her to be abused by her teacher. The judgment indicated there is an obligation on the State to protect citizens where they are on notice that abuse can or has occurred within their purview of responsibility.  
*O’Keffe v Ireland* (Application No. 35810/09). (ECtHR 28<sup>th</sup> January 2014).

Article 24 of the *EU Charter of Fundamental Rights* outlines specific rights for children. EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims; EU Directive

address the risk of psychological harm that child witnesses face when giving evidence.<sup>1274</sup> Since the publication in the UK of the *Report of the Advisory Group on Video Evidence*,<sup>1275</sup> there has been an ongoing evaluation and re-evaluation of the experience of the child witness in the criminal justice system in England and Wales.<sup>1276</sup> Legislation has been revised continually to accommodate the needs of the child witness.<sup>1277</sup> Before implementing certain reforms, such as the use of intermediaries or the use of recorded cross-examination, pilot projects have been established in certain geographical areas to evaluate how the measures are working in practice.<sup>1278</sup>

8.9.2 In this jurisdiction, the eligibility for the support measures in the *Criminal Evidence Act 1992* has been extended to encompass offences such as sexual grooming, sexual exploitation, trafficking and pornography involving children.<sup>1279</sup> Yet in circumstances where the use of support measures is increasing, there has been no comprehensive assessment of how they are working in practice. Consequently insight can be gained only through the experience of other common law jurisdictions

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2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography.

*CS and CAS v Romania* (Application No. 26692/05) 20th March 2012; *ND v Slovenia* (Application no. 16605/09) (Fifth Section) 15 January 2015. *Z and others v United Kingdom*, (App.29392/95, 10 May 2001 [GC]),(2002) 34 EHRR 97, ECHR 2001 – V at 73. *X and Y v The Netherlands* (1986) 8 EHRR 235; *PM v Bulgaria* ECHR 49669/07 - 24/01/2012.

<sup>1274</sup> Owen Bowcott, *Call for research into effects on children of giving evidence in abuse cases* *The Guardian* 20<sup>th</sup> March 2013.

<sup>1275</sup> *The Advisory Group on Video Evidence ‘The Pigot Report’* (Home Office UK 1989).

<sup>1276</sup> J. Plotnikoff and R. Woolfson, *The “Go-Between”: Evaluation of Intermediary Pathfinder Projects* (2007); *Achieving Best Evidence in Child Sexual Abuse Cases – A joint inspection*. (HMCPSI/HMIC) (December 2014). Plotnikoff, Joyce and Woolfson, Richard *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (Plotnikoff & Woolfson/The Nuffield Foundation/ NSPCC July 2009) Chapter 8 at pps. 88-98.

Plotnikoff, Joyce and Woolfson, Richard, *Young witnesses in Criminal Proceedings – A Progress Report on Measuring Up?* (Lexicon Limited/The Nuffield Foundation/ NSPCC June 2011).

Concerning the implementation of full pre-recorded testimony under s.28 Youth Justice and Criminal Evidence Act 1999, see Andrew Ford, *Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act*. Counsel 2015, Mar, 18-20. March 2015; David Wurtzel, *Pre-Recorded Cross-examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System*, Counsel 2014, Dec 2014; *Achieving Best Evidence in Child Sexual Abuse Cases – A joint inspection*. (HMCPSI/HMIC) (December 2014).

<sup>1277</sup> *Criminal Justice Act 1988* as amended by the *Criminal Justice Act 1991*; *Youth Justice and Criminal Evidence Act 1999* as amended by the *Coroners and Justice Act 2009*.

<sup>1278</sup> J. Plotnikoff and R. Woolfson, *The “Go-Between”: Evaluation of Intermediary Pathfinder Projects* (2007); Andrew Ford, *Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act*. Counsel 2015, Mar, 18-20. March 2015; David Wurtzel, *Pre-Recorded Cross-examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System*, Counsel 2014, Dec 2015.

<sup>1279</sup> *Criminal Law (Sexual Offences) Act, 1993*; *Criminal Law (Rape) (Amendment) Act, 1990*, *Criminal Law (Sexual Offences) Act, 1993*, *Criminal Law (Sexual Offences) Act 2006*; *Criminal Law (Sexual Offences) (Amendment) Act 2007*; *Criminal Law (Human Trafficking) Act 2008*; *Child Trafficking and Pornography Act, 1998*.

where reform has resulted in modifications in traditional procedures. The use of intermediaries in England and Wales has prompted changes in the length and manner of the cross-examination of vulnerable witnesses at trial,<sup>1280</sup> modifications that have been upheld by the Court of Appeal.<sup>1281</sup> Further reform was prompted by negative media reporting concerning the treatment of child witnesses in criminal trials.<sup>1282</sup> The use of recorded cross-examination under s. 28 *Youth Justice and Criminal Evidence Act 1999* in pilot projects has resulted in additional restrictions of cross-examination techniques, including the requirement that counsel submit a list of cross-examination questions to the trial judge prior to recording.<sup>1283</sup> Although similar modifications would undoubtedly meet constitutional challenges in this jurisdiction, comparable practical reform would be welcome.

8.9.3 The use of full pre-trial recorded evidence for vulnerable witnesses could only be implemented in this jurisdiction if disclosure issues were resolved earlier in the process<sup>1284</sup> and it is contended that the issue of timely disclosure should be revised as quickly as possible. For example, the first trial in *DPP v AH*<sup>1285</sup> in November 2014 collapsed due to the fact that late disclosure involving TUSLA reports were made days after the trial had commenced. This caused significant inconvenience, distress and delay to the parties involved. Legislation concerning the issue of disclosure has been drafted in relation to sexual offences but it remains to be seen if it will be commenced as outlined under s. 38 *Criminal Law (Sexual Offences) Bill 2015*

<sup>1280</sup> *Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters) [2013] EWCA Crim 1631; [2013] 1 WLR 3164 (CPD) in particular at 'General Matters 3E: Ground Rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant'*. (As in force 6<sup>th</sup> October 2014).

<sup>1281</sup> *R v Barker* [2010] EWCA Crim 4; [2010] Crim LR 233, CA; *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr. App. R. 2; [2012] Crim. L.R. 565; *R v Lumbeba* [2014] EWCA Crim 2064; [2015] 1 W.L.R. 1579;

<sup>1282</sup> 'Pre-recorded evidence to spare vulnerable victims court ordeal - Move comes in response to several high-profile cases which have raised questions about how victims should be treated'

The Guardian, 11<sup>th</sup> June 2013. <http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court> (Accessed 29<sup>th</sup> September 2015).

'Lawyers' treatment of gang grooming victims prompts call for reform'

The Guardian, 19<sup>th</sup> May 2013

<http://www.theguardian.com/law/2013/may/19/lawyers-oxford-abuse-ring> (Accessed 29<sup>th</sup> September 2015).

<sup>1283</sup> Andrew Ford, *Pre-Record, Not fade away – S. 28 of the Youth Justice and Criminal Evidence Act*. Counsel 2015, Mar, 18-20. March 2015; David Wurtzel, *Pre-Recorded Cross-examination and the Questioning of Vulnerable Witnesses in the Criminal Justice System*, Counsel Dec 2014;

<sup>1284</sup> See *Law Reform Report on Disclosure and Discovery in Criminal Cases* (LRC 112 – 2014), 15<sup>th</sup> December 2014. See also *Part 5 – Head 52. (Disclosure of third party records in sexual abuse cases), General Scheme - Criminal Law (Sexual Offences) Bill 2014*.

<sup>1285</sup> *DPP v AH*, Central Criminal Court, Dublin, June 2015 at para. 2.37.0.



<sup>1286</sup>which will add s.19A (*Disclosure of third party records in certain trials*) to s.19 *Criminal Evidence Act 1992*.

### 8.10.0 Reform objectives

8.10.1 It is submitted that, ultimately, the logical focus of reforms should be, as far as possible, the removal of the child witness or complainant from the court room. The live adversarial process in no way facilitates the giving of the best evidence of the child witness. While it may be unrealistic to predict an overhaul of the adversarial system to that extent in this jurisdiction, it may be possible to ring-fence an inquisitorial process for the recording of the evidence of the child witness which could then be incorporated within the trial process. Legislative reform should include the widening of the eligibility for available support measures to all witnesses under 18 years of age regardless of the nature of the offence or whether the witness was the victim of the offence or a witness to it. The competency test should also be revised to clarify what standard a witness must meet in order to be competent to testify. The appropriate requirements may include intelligibility, the understanding of truth and lies and/or the obligation to tell the truth. The competency test should apply to witnesses of any age. A separate provision may set out the necessary requirements for a witness to give unsworn evidence and there may be an age under which unsworn testimony is admissible provided the competency test has been complied with. It is also contended that the perjury provision under s.27 *Criminal Evidence Act 1992* is wholly ineffective and requires substantial reform. A requirement that the trial judge or counsel secure a promise from a young child witness to tell the truth would be more successful in ensuring the veracity of the testimony.<sup>1287</sup>

<sup>1286</sup>

S.38 *Disclosure of third party records in certain trials Criminal Law (Sexual Offences) Bill 2015*.

<sup>1287</sup>

Lyon states that asking children to promise to tell the truth may yield positive results. His research 'indicates found that children who failed to perform well on a truth-lie understanding task were nevertheless more honest after promising to tell the truth. The probable reason for this is that comprehension tasks are likely to underestimate what children understand.'

See Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice informed by Psychology and Law. Children's Testimony – A Handbook of Psychological Research and Forensic Practice* (Eds. Michael E. Lamb, David J. La Rooy, Lindsay C. Malloy and Carmit Katz.) at p. 76. (Wiley-Blackwell) (2<sup>nd</sup> Ed.2011).

See also 'Promise to tell truth

16.1.(6) *The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.'*

8.10.2 There are several disparate legislative provisions which could be consolidated in one comprehensive piece of codifying legislation. These include clearing the court under s.257 *Children Act 2001*, reporting restrictions under s.252 *Children Act 2001*, and provision for a deposition to be taken under ss.4F and 4G of the *Criminal Procedure Act 1967* (by means of s.255 of the *Children Act 2001* where the wellbeing or health of a child is at risk). The provisions for the giving of victim impact statements of children via video link and intermediary under ss.5 and 6 of the *Criminal Procedure Act 2010* should also be included in a single comprehensive Act.

8.10.3 The ‘fast tracking’ of all cases involving child witnesses should be the goal of any reform. Making cases involving children a priority in the court lists would require the completion of all disclosure within a reasonable time framework in order to avoid any delay pre-trial. The example of the Commercial Court indicates that where there is sufficient political will and judicial support, significant procedural changes can occur. Order 63A of the *Rules of the Superior Courts*<sup>1288</sup> governs the Commercial Court, a divisional court of the High Court which deals with commercial proceedings. Order 63A provides that where the monetary value of a certain civil matter is greater than €1million, the case may be included in the Commercial Court listing and avail of swift resolution of the issues involved.<sup>1289</sup> The Commercial Court should be used as a template for the fast tracking of all cases involving child witnesses in criminal proceedings. *The Final Report of the Joint Oireachtas Committee on Child Protection* recommended that the listing and hearing of cases involving child sexual abuse be reviewed:

Numerous submissions received by the Committee argued that cases involving allegations of child sexual abuse should be heard and disposed of as expeditiously as possible. The Committee accepts, without

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c.32 An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the *Canada Evidence Act, 2005*.

<sup>1288</sup> ‘*Commercial Proceedings : S.I. No. 2 of 2004*.’ Order 63A Rules of the Superior Courts.

<sup>1289</sup> ‘*The Court uses a detailed case management system that is designed to streamline the preparation for trial, remove unnecessary costs and stalling tactics, and ensure full pre-trial disclosure..*’

[http://www.citizensinformation.ie/en/justice/courts\\_system/commercial\\_court.html](http://www.citizensinformation.ie/en/justice/courts_system/commercial_court.html) (Accessed 21st September 2015).

reservation, this submission. Naturally, given the seriousness of the subject matter and the importance of child protection, it would be desirable that such cases be heard promptly. Furthermore, the difficulty that children, especially young children, may have in recollecting matters that go back many years necessitates an early hearing.

The Committee recommends that the arrangements for the listing and hearing of cases involving allegations of child sexual abuse, whether criminal trials or judicial review applications, be reviewed so as to ensure that such cases receive as prompt a hearing as possible, consistent with the rights of the accused.<sup>1290</sup>

Unfortunately, no legislative proposal which encompasses this recommendation appears to be contained within any of the current draft legislation such as the *Criminal Law (Sexual Offences) Act 2015*, the *Revised Scheme of the Criminal Procedure Bill 2015* or the *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*.

#### **8.11.0 Widening of peripheral support framework**

8.11.1 The establishment of an independent dedicated witness care unit to provide information and court preparation for the child witness would be extremely beneficial not only to the child witness but to all practitioners involved in the progress of the appropriate case through the court system. An independent witness care unit would ensure that aspects of the case that require central coordination could be dealt with by a single, dedicated organisation. These would include the dissemination of information as well the co-ordination of appropriate services. The unit would liaise with the child witness as to the progress of the case as well as dealing with court familiarisation, court preparation and court accompaniment under the supervision of both the Department of Justice and the Courts Service. The witness care unit could also recommend and facilitate counselling resources before, during and post-trial as appropriate. The models which exist in England and

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<sup>1290</sup> The Final Report of the Joint Oireachtas Committee on Child Protection (November 2006) Chapter 11 at para 11.10.9 at page 78

Wales<sup>1291</sup> and Western Australia<sup>1292</sup> may provide illustrations of practice and procedure for consideration in this jurisdiction.

8.11.2 A greater level of skill and experience for all personnel who work with child witnesses is necessary to ensure that Ireland adheres to best practice. Specialist child focused training for the judiciary and prosecution counsel who are ‘ticketed’ (i.e. may only act in cases involving child witnesses if they have appropriate training and/or experience) would ensure that the child will be better facilitated at trial. Adequate child focused training for all agencies which come into contact with the child witness should also be implemented and these agencies include An Garda Síochána, TUSLA, child counselling services and any NGOs which may assist the child witness in advance of the trial. Ticketing of the judiciary<sup>1293</sup> has commenced in England and Wales in relation to sexual offences and there are proposals to extend the ticketing of practitioners to all publicly funded counsel.<sup>1294</sup> It is submitted that similar initiatives would ensure higher standards of practice in this jurisdiction.

8.11.3 There has been a consistent approach to establishing and revising protocols in England and Wales. The steps taken include collaborative initiatives between ACPO (Association of Chief Police Officer) and the CPS (Crown Prosecution Service),<sup>1295</sup> Culminating in a corpus of significant documents, they describe practical steps and procedures to be adhered to in specific types of cases. The documents include A

<sup>1291</sup> ‘The aim of witness care units is to provide a single point of contact for victims and witnesses for information about the progress of their cases and to minimise the stress of attending court. Witnesses are essential to successful prosecutions and we are committed to making the process as straightforward as we can. Witness Care Units are in place across England and Wales and are jointly staffed by the police and the Crown Prosecution Service.’

Crown Prosecution Service, (England and Wales) (2015)

[http://www.cps.gov.uk/news/fact\\_sheets/witness\\_care\\_units/](http://www.cps.gov.uk/news/fact_sheets/witness_care_units/)

<sup>1292</sup> ‘The Child Witness Service helps children and young people under 18 years of age who may need to give evidence in court. The children involved can be victims or witnesses to any criminal charge, in any court. The Child Witness Service, part of the Department of the Attorney General, provides practical information and helps children and young people emotionally prepare for court. Support is provided on an individual basis. Evidence is never discussed.

*The Child Witness Service does not provide counselling. However, referrals can be made to appropriate agencies when additional support is required.*’

Child Witness Service, Government of Western Australia

<http://www.victimsofcrime.wa.gov.au/C/child.aspx?uid=0883-9898-1908-9198>.

<sup>1293</sup> CPD XIII Listing D: Authorisation of Judges, Criminal Practice Directions March 2015 [2015] EWCA Crim 430.

<sup>1294</sup> Catherine Baksi ‘Advocates to have specialist training for sex cases’ Law Society Gazette. 15 September 2014.

<sup>1295</sup> National Protocols and Agreements with Other Agencies (CPS)

<http://www.cps.gov.uk/publications/agencies/> ( Accessed 20<sup>th</sup> May 2016)

*Protocol between the Association of Chief Police Officers, the Crown Prosecution Service and Her Majesty's Courts & Tribunals Service to expedite cases involving witnesses under 10 Years*<sup>1296</sup> and *ACPO-CPS Protocol on the investigation and prosecution of allegations of rape*.<sup>1297</sup> There is also guidance on disclosure in relation to cases involving child abuse contained in the *Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings*.<sup>1298</sup> Similar documentation exists in Ireland but is by no means as comprehensive. *The Garda Síochána Policy on the Investigation of Sexual Crime Against Children*<sup>1299</sup> contains protocols regarding the investigation of sexual offences against children. The document also encompasses guidance regarding complainants and witnesses with an intellectual disability. While a positive initiative, there is scope for greater cooperation and dissemination of inter-agency information.

8.11.4 One method whereby the protection of a child's interests could be enhanced would be the provision of separate legal representation. This could take a form similar to that of the provision for separate legal representation in rape trials under s.4A *Criminal Law (Rape) Act 1981* (as amended by s.34 *Sex Offenders Act 2001*) where there is an application to cross-examine the complainant on previous sexual history.<sup>1300</sup> An appropriate legal representative could inform the child of the available support measures, assess the child's needs and preference and submit a

<sup>1296</sup> 'This protocol details the working arrangements between the police, the CPS and HMCTS to expedite cases involving very young witnesses to:

- a) maximise the opportunity for them to provide their best evidence
- b) minimise the stress and emotional impact of the Criminal Justice process.'

*A protocol between the Association of Chief Police Officers, the Crown Prosecution Service and Her Majesty's Courts & Tribunals Service to expedite cases involving witnesses under 10 Years* (January 2015).

<sup>1297</sup> 'This joint protocol between the Crown Prosecution Service and the Association of Chief Police Officers, published on 8 January 2015, sets out how both organisations will deal with all rape cases from the initial complaint to after the verdict in a trial.'

*ACPO-CPS protocol on the investigation and prosecution of allegations of rape* (Updated version 2.1 published June 2015).

<http://www.cps.gov.uk/publications/agencies/>

<sup>1298</sup> 'The 2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings (2013 protocol) covers all aspects of information exchange from the Local Authority and the Family Court to the police and CPS and vice versa. The 2013 protocol applies to all cases of alleged child abuse (sexual and non-sexual abuse). The 2013 protocol ensures that disclosure takes place from the outset of the investigation to the maximum extent permitted and required by law.'

<http://www.cps.gov.uk/publications/agencies/> (Accessed 25<sup>th</sup> September 2015).

<sup>1299</sup> *Garda Síochána Policy on the Investigation of Sexual Crime Against Children, Child Welfare, 2<sup>nd</sup> Edition*, (2013).

<http://garda.ie/Controller.aspx?P.=94&Lang=1>

<sup>1300</sup> S.3 *Criminal Law (Rape) Act 1981* as amended by the *Criminal Law (Rape)(Amendment) Act 1990*.

report to the court. Applications for the appropriate support measures could be made well in advance of the trial. While the legal representative would owe his or her duty to the court, he or she would provide a communicative channel between the child witness and the court and safeguard the child witness' needs within the trial process.

#### **8.12.0        *Maintaining the balance between the rights of the defendant and the child witness***

8.12.1 The need for legislative reform for child witnesses has been apparent for some time.<sup>1301</sup> In the absence of such reform it falls to the judiciary to resolve any issues which arise. As not all cases are reported, communication of the rulings in any given case may not be adequately transmitted to other members of the judiciary and practitioners so the courts must resolve them anew on each occasion that they arise. The result is an undesirable state of uncertainty for judges, practitioners, the witnesses and others involved in the trial process.

8.12.2 In *DPP v PP*,<sup>1302</sup> the court addressed difficulties regarding the implementation of recorded testimony under s.16(1)(b) *Criminal Evidence Act 1992*. At trial, the recorded statements had been admitted as evidence even though the trial judge had not conducted an assessment of the eligibility and competence of the child witness, who was ten years of age at the time of trial. In addition, because the recordings had been held to constitute exhibits, the jury was able to re-play the examination in chief testimony in the jury room. These issues formed grounds of appeal on the basis that the defendant's constitutional right to a fair trial had been breached.

8.12.3 The Court of Appeal held that the examination in chief and subsequent cross-examination showed that the child witness was ultimately more than competent and so the absence of an assessment for purposes of admissibility under s.16(1)(b) was not unfair. More controversially perhaps, the Court held that there was no prejudice

<sup>1301</sup> See Úna Ní Raifeartaigh SC, *The Bar Review, Child Sexual Abuse cases: the need for cultural change within the criminal justice system - Volume 14, Issue 5, (November 2009)*; Claire Edwards, Gillian Harold, and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland (UCC/CCJHR)* (February 2012) National Disability Authority. <http://nda.ie/nda-files/Access-to-Justice-for-People-with-Disabilities-as-Victims-of-Crime-in-Ireland1.pdf> (Accessed 3rd May 2016)

<sup>1302</sup> *DPP v PP* [2015] IECA 152.

caused by the jury being able to replay the examination in chief recordings in the jury room. The judgment does not elaborate in detail as to why the replaying of the recording did not improperly affect the jury's consideration of the evidence. Being able to view the recording a number of times may have allowed the jury to give it an unnatural weight when considering all the evidence in the case. It is submitted that departing from traditional procedures in such a manner is a fundamental breach of fair procedures. There is minimal case law in this jurisdiction regarding the implementation of recorded testimony and the fact that the Court of Appeal may have reinforced poor practice is unfortunate.

8.12.4 It is imperative that the implementation of support measures is grounded on practical and detailed guidance. Alternatively, appeal cases such as *DPP v PP*<sup>1303</sup> will only serve to facilitate inconsistent practice which is unfair both to the child witness and to the defendant. Comprehensive, updated legislation is required in this jurisdiction. However legislation will not resolve outstanding issues standing alone. Effective implementation as well as ongoing appraisal is vital to ensure that the child is protected within the trial process.

### **8.13.0 Conclusion**

8.13.1 The criminal justice system is the last stage on a difficult journey for the child witness. This thesis deals with the practical realities a child may face when he or she gives evidence. While it is submitted that the facilitation of the child witness is likely to assist in decreasing the level of offending against children, this is only one part of a large jigsaw. The child who knows that an offence is being committed against him or her and who has the confidence to tell someone he or she trusts about this is in an advantageous position. A child, who blames him or herself for what is being done to him and is persuaded not to tell anyone or, worse, has no one to tell, is in a very injurious position. That situation may be prevented through education and improved family and social care provisions. The aspiration of ensuring a child is aware of his or her personal rights and is capable of communicating a violation of

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<sup>1303</sup> *DPP v PP* [2015] IECA 152.

said rights to an adult, forms part of a wider social objective which has the child's welfare as its focus.<sup>1304</sup>

8.13.2 Where a child is a witness to, or a victim of an offence, it is unfortunate if the criminal trial itself is so damaging that it is better for a child not to give evidence and to risk a 'secondary victimisation'.<sup>1305</sup> Some criminal practitioners have indicated that they would not put their child through such a system.<sup>1306</sup> It would be difficult to advise a child to give evidence when he or she is at risk of being told that he or she is lying, is a fantasist, is incompetent or is spiteful. It should be remembered that the child witness who testifies in criminal proceedings is performing a function on behalf of the State; he or she is helping to create a safer environment by assisting in the prosecution of criminal offences. It is submitted that the State is therefore obliged to provide assistance to the child witness who is acting for the benefit of society as a whole. The use of support measures may allow the testimony of child witnesses to be tested without incurring the same degree of psychological and emotional harm. On this basis alone, the State should do its utmost to guarantee that the child witness is given every assistance to ensure that his or her voice is heard within the trial process. At present, far more could be done to improve the use of support measures which assist the child witness in this jurisdiction.

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<sup>1304</sup> The 'Children First' *National Guidance for the Protection and Welfare of Children (Department of Children and Youth Affairs) (2011)* is to be placed on a statutory basis. The *Children First Bill 2014* was first published in April 2014 but at time of writing has not yet been commenced.

<sup>1305</sup> 'There is a need to avoid procedural abuses and shortcomings in the criminal justice system that can amount to secondary victimisation.'

Commonwealth Secretariat, (2002), *Commonwealth Best Practice Guidelines on Victims' Rights*, London at p.11.

*Like other alternative ways of giving evidence, an important potential benefit of pre-recording evidence is the assistance it provides in offering protection for complainants from secondary victimisation in the courtroom. It does this by reducing or eliminating the need for giving direct oral evidence at trial, and by potentially allowing recovery to begin at an earlier stage.*

Yvette Tinsley, Elisabeth McDonald, *Use of alternative ways of giving evidence by vulnerable witnesses: current proposals, issues and challenge* (2011) 42 VUWLR.

<sup>1306</sup> Conference on the Proposed Constitutional Amendment on the Rights of the Child, Irish Women Lawyers Association, Saturday 28<sup>th</sup> February 2009. Chair: Mary Ellen Ring SC (Now Judge of the High Court) At the conference, Ellen Ring J spoke of the efficacy of the 'Children First' *National Guidance for the Protection and Welfare of Children* which facilitated the disclosing of abuse of children. She also stated that she would not put her own child through the trial process. This sentiment has been echoed by several criminal practitioners who have communicated it to the author.



## Appendices

### Article 42A The Constitution of Ireland 1937

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings -  
i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or  
ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

## Part III and Part IV Criminal Evidence Act 1992

### PART III EVIDENCE IN CERTAIN PROCEEDINGS

#### 12.

This Part applies to—

- (a) a sexual offence,
  
- (b) an offence involving violence or the threat of violence to a person,
  
- (c) an offence under section 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998,
  
- (d) an offence under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008, or
  
- (e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c) or (d). ]

#### 13. Evidence through television link

- (1) In any proceedings [(including proceedings under section 4E or 4F of the Criminal Procedure Act, 1967)] for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link—
- (2) Evidence given under subsection (1) shall be video recorded.
- (3) While evidence is being given through a live television link pursuant to subsection (1) (except through an intermediary pursuant to section 14 (1)), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.

#### **14. Evidence through intermediary**

(1) Where—

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 18 years of age is giving, or is to give, evidence through a live television link,

the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

#### **15. Procedure in District Court in relation to certain offences**

(1) Where—

[(a) under Part IA of the Criminal Procedure Act 1967, the prosecutor consents to the sending forward for trial of an accused person who is charged with an offence to which this Part applies,

(b) the person in respect of whom the offence is alleged to have been committed, or a person who has made a videorecording under section 16(1)(b)(ii), is under 18 years of age on the date consent is given to the accused being sent forward for trial, and

(c) it is proposed that a videorecording of a statement made by the person concerned during an interview as mentioned in section 16(1)(b) shall be given in evidence pursuant to that section,]

the prosecutor shall, in addition to causing the documents mentioned in section 4B(1) of that Act to be served on the accused—

(i) notify the accused that it is proposed so to give evidence, and

(ii) give the accused an opportunity of seeing the video-recording of the interview.

[(2) The judge hearing an application under section 4E of the Criminal Procedure Act 1967 may consider any statement made, in relation to an offence, by a person in a videorecording mentioned in section 16(1)(b) if the person is available for cross-examination at the hearing of the application.]

(3) If the accused consents, an edited version of the video-recording of an interview mentioned in section 16(1)(b), may, with leave of the judge hearing an application referred to in subsection (2) of this section, be shown at the hearing of the application, and, in that event, subsection (2) and section 16(1)(b) shall apply in relation to that version as it applies in relation to the original video-recording.

## 16.

### **Videorecording as evidence at trial**

(1) Subject to subsection (2)

(a) a videorecording of any evidence given, in relation to an offence to which this Part applies, by a person under 18 years of age through a live television link in proceedings under Part IA of the Criminal Procedure Act, 1967, and

(b) a videorecording of any statement made during an interview with a member of the Garda Síochána or any other person who is competent for the purpose—

(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed), or

(ii) by a person under 18 years of age (being a person other than the accused) in relation to an offence under—

(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or

(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008,

shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video recording mentioned in paragraph (b), the person whose statement was video recorded is available at the trial for cross-examination.

(2)

(a) Any such videorecording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the videorecording concerned or that part ought not to be so admitted.

(b) In considering whether in the interests of justice such videorecording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to any statement contained in such a video recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) In this section “statement” includes any representation of fact, whether in words or otherwise.

### **17. Transfer of proceedings**

In any proceedings for an offence to which this Part applies in any circuit or district court district in relation to which any of the provisions of sections 13 to 16 or section 29 is not in operation the court concerned may, if in its opinion it is desirable that evidence be given in the proceedings through a live television link or by means of a videorecording, by order transfer the proceedings to a circuit or district court district in relation to which those provisions are in operation and, where such an order is made, the jurisdiction of the court to which the proceedings have been transferred may be exercised—

(a) in the case of the Circuit Court, by the judge of the circuit concerned, and

(b) in the case of the District Court, by the judge of that court for the time being assigned to the district court district concerned.

### **18. Identification evidence**

Where—

(a) a person is accused of an offence to which this Part applies, and

(b) evidence is given by a person (in this section referred to as “the witness”) through a live television link pursuant to section 13 (1),

then—

(i) in case evidence is given that the accused was known to the witness before the date on which the offence is alleged to have been committed, the witness shall not be required to identify the accused at the trial of the offence, unless the court in the interests of justice directs otherwise, and

(ii) in any other case, evidence by a person other than the witness that the witness identified the accused at an identification parade as being the offender shall be admissible as evidence that the accused was so identified.

### **19. Application of Part III to persons with mental handicap.**

The references in sections 13 (1) (a), 14 (1) (b), 15 (1) (b) and [16(1)(a) and (b)(ii) to a person under 18 years of age and the reference in section 16(1)(b)(i)] to a person

under 14 years of age shall include references to a person with mental handicap who has reached the age concerned.

... ..

#### **Part IV Criminal Evidence Act 1992**

... ..

#### **27. Oath or affirmation not necessary for child etc., witness**

(1) Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.

(2) If any person whose evidence is received as aforesaid makes a statement material in the proceedings concerned which he knows to be false or does not believe to be true, he shall be guilty of an offence and on conviction shall be liable to be dealt with as if he had been guilty of perjury.

(3) Subsection (1) shall apply to a person with mental handicap who has reached the age of 14 years as it applies to a person under that age.

#### **28. Abolition of requirement of corroboration for unsworn evidence of child, etc.**

(1) The requirement in section 30 of the Children Act, 1908, of corroboration of unsworn evidence of a child given under that section is hereby abolished.

(2)

(a) Any requirement that at a trial on indictment the jury be given a warning by the judge about convicting the accused on the uncorroborated evidence of a child is also hereby abolished in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child and it shall be for the judge to decide, in his discretion, having regard to all the evidence given, whether the jury should be given the warning.

(b) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so.

(3) Unsworn evidence received by virtue of section 27 may corroborate evidence (sworn or unsworn) given by any other person.

## Section 16 Criminal Justice Act 2006

### 16. Admissibility of certain witness statements

(1) Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as “the statement”) may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination—

- (a) refuses to give evidence,
- (b) denies making the statement, or
- (c) gives evidence which is materially inconsistent with it.

(2) The statement may be so admitted if—

(a) the witness confirms, or it is proved, that he or she made it,

(b) the court is satisfied—

(i) that direct oral evidence of the fact concerned would be admissible in the proceedings,

(ii) that it was made voluntarily, and (iii) that it is reliable, and

(c) either—

(i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or

(ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.

(3) In deciding whether the statement is reliable the court shall have regard to—

(a) whether it was given on oath or affirmation or was video recorded, or

(b) if *paragraph (a)* does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability, and shall also have regard to—

(i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or

(ii) where the witness denies making the statement, any evidence given in

relation to the denial.

(4) The statement shall not be admitted in evidence under this section if the court is of opinion—

(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or

(b) that its admission is unnecessary, having regard to other evidence given in the proceedings.

(5) In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(6) This section is without prejudice to sections 3 to 6 of the Criminal Procedure Act 1865 and section 21 (proof by written statement) of the Act of 1984. Section 39 Criminal Justice Act 1999



### Section 39 Criminal Justice Act 1999

S.39 (1) Subject to subsection (2), in any proceedings on indictment for an offence (including proceedings under Part IA of the Act of 1967) a person other than the accused may, with the leave of the court, give evidence through a live television link.

(2) A court shall not grant leave under subsection (1) unless it is satisfied that the person is likely to be in fear or subject to intimidation in giving evidence otherwise.

(3) Evidence given under subsection (1) shall be videorecorded.

(4) In any proceedings referred to in subsection (1) in any circuit or district court district where the court is satisfied that leave should be granted for evidence to be given through a live television link pursuant to subsection (1) but the necessary facilities for doing so are not available in that circuit or district, the court may by order transfer the proceedings to a circuit or district court district where such facilities are available and, where such an order is made, the jurisdiction of the court to which the proceedings have been transferred may be exercised—

(a) in the case of the Circuit Court, by the judge of the circuit concerned, and

(b) in the case of the District Court, by the judge of that court for the time being assigned to the district court district concerned.

(5) Where evidence is given by a person (“the witness”) through a live television link pursuant to subsection (1)—

(a) in case evidence is given that the accused was known to the witness before the date on which the offence in question is alleged to have been committed, the witness shall not be required to identify the accused, unless the court in the interests of justice directs otherwise, and

(b) in any other case, evidence by a person other than the witness that the witness identified the accused as being the offender at an identification parade or by other means shall be admissible as evidence that the accused was so identified.

(6) This section is without prejudice to any other enactment providing for the giving of evidence through a live television link.

## **Sections 5 and 6 Criminal Procedure Act 2010**

### **S.5 Evidence through television link.**

5.— The Act of 1993 is amended by the insertion of the following section after section 5:

“5A.— (1) (a) A child or a person with a mental disorder in respect of whom an offence to which section 5 applies was committed, may give evidence pursuant to section 5(3), whether from within or outside the State, through a live television link unless the court sees good reason to the contrary.

(b) Any other person in respect of whom an offence to which section 5 applies was committed may, with the leave of the court, give evidence pursuant to section 5(3), whether from within or outside the State, through a live television link.

(2) Evidence given under subsection (1) shall be videorecorded.

(3) While evidence is being given pursuant to subsection (1) (except through an intermediary pursuant to section 5B(1)), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.”.

### **S.6. Evidence through intermediary.**

The Act of 1993 is amended by the insertion of the following section after section 5A:

“5B.— (1) Where a child or a person with a mental disorder is giving, or is to give evidence through a live television link, pursuant to section 5A, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his or her age and mental condition, the meaning of the questions being asked.

(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.”

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