



**RAPE CRISIS
NETWORK
IRELAND**

Hearing Every Voice -

**Towards a New
Strategy on
Vulnerable Witnesses
in Legal Proceedings**

March 2018

**RCNI Hearing Every Voice
– Towards a New Strategy
on Vulnerable Witnesses
in Legal Proceedings**

Foreword to Hearing Every Voice

Our happiness and security depends in large part on the fair and efficient functioning of our legal system. For any legal system to function, those who are subject to its rules (including those who operate that system) must accept and endorse it. This means that the public face of the system, the courts, must operate in a way that is seen to be fair, efficient and in accordance with common sense. Our system operates on the basis that oral evidence is given and tested, usually by the witness appearing in person in a court room. It is essential that witnesses in every case are treated fairly and humanely so as to ensure that they are encouraged to participate in the criminal justice system. To give evidence in court is a difficult task for most but particularly for those who are vulnerable. One example of the dangers posed by creating unnecessary difficulties for witnesses in court is the historic under-reporting of rape and sexual abuse cases. There are numerous ways in which this problem can be approached but this report focuses on describing international solutions to the issue and applying them to this jurisdiction in a series of Recommendations. Our aim is to increase public confidence in the criminal justice system and to enable witnesses in all criminal cases, including those who are accused of a crime, to give their best evidence.

While one could accurately describe all victims of crime, particularly violent crime, as vulnerable, we are aware that there are particular groups who need even more specialised support, such as child witnesses and those with some form of disability. For many, it is hard to go through the criminal justice system, but for these groups, it is hardest of all. We can see through our work that the traditional, largely oral-based system of giving live evidence does not work well for many witnesses because their voices are not heard as they should be. It does not work well for the whole community either, because it means that fewer perpetrators are held accountable and a vulnerable accused may be unfairly convicted, if witnesses cannot give their best evidence.

While there is now a very welcome focus on victims and their rights by every profession working in the criminal justice system, there is also room for a more in-depth examination of the particular issues facing the most vulnerable witnesses and for some practical proposals which will address existing gaps in support and protection and thereby, improve the quality of evidence given by vulnerable witnesses. Accordingly, RCNI convened a group of professionals from various disciplines, including other victim support professionals, to analyse the complex issues surrounding vulnerable witnesses and put together this Report which concludes with a set of Recommendations.

This Report is the project of an informal inter-agency group of practising lawyers, victim support workers, academics, and State agency representatives, whose common purpose is to find ways to enable these witnesses to give their best evidence while continuing to protect the right to a fair trial and reduce the risk of harm to vulnerable witnesses. Over the last year, members have shared relevant documents, listened to specialist support workers and practising lawyers, attended one major international conference, discussed possible solutions, studied some recent academic work in the area, examined how the needs of vulnerable witnesses are met in other jurisdictions, and made recommendations for positive changes to our own system, in this report and elsewhere.

“Hearing Every Voice” represents the sum of our experiences, analysis and discussions on vulnerable witnesses, and aims to ensure that these witnesses are given every possible assistance to provide their best evidence to the court, and that they can do so with the minimum risk of harm to themselves.

I am extremely grateful to all Group Members for dedicating so much time, energy, enthusiasm, good will and expertise to these Meetings and to the compilation of the Report itself and also, to all external critical readers whose input has also been very valuable.

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I Introduction to Hearing Every Voice

Our criminal justice system depends largely on the tendering of oral evidence, and measures taken to improve the quality of such evidence can only lead to better, more just and more effective outcomes. Vulnerable witnesses, especially when they are also victims of crime, deserve to be heard and understood by our criminal justice system, without being traumatised unnecessarily by their engagement with that system. This means that as far as possible and appropriate, having regard to the rights of the accused, they should be assisted to give their best evidence to the court.

Historically, there has been little focus on the rights and needs of vulnerable witnesses. Outdated statutory provisions and rules of evidence, as well as accepted custom and practice, have not been adapted to any great extent to take account of the specific needs of individual vulnerable witnesses. Sometimes, the limitations of the traditional largely oral criminal justice system have led to vulnerable witnesses withdrawing from the process, or even finding themselves unable to report the crime at all.¹

In order to address the needs of vulnerable witnesses effectively, the system should take account of modern developments in cognitive and forensic psychology. Vulnerable witnesses, and vulnerable victims of crime in particular, have a right to expect that the criminal justice system will be designed to avoid unnecessary harm to them and to facilitate them in giving their “best evidence”, consistent with the overall aim of providing a fair trial. These objectives are not incompatible. Many academics and judges have written about the rights of the accused. This report looks at the system from the position of witnesses, particularly the victims of crime, and makes proposals to improve their experience within the criminal justice system and their evidence. These proposals can be adopted within a system that guarantees the presumption of innocence and the right to a fair trial. In considering these issues, we recognise that many of the same concerns arise in cases involving vulnerable accused persons and recommend that the same improvements be put in place, where practicable, for such accused persons.

Vulnerable Witnesses: Who are they?

“Vulnerable witnesses” are not defined in statute in Ireland. We use the term to refer to all witnesses whose capacity to take part fully in criminal proceedings is reduced for some reason or reasons connected with personal characteristics, such as youth (meaning, under 18 years of age), or a physical or intellectual disability, or with the nature of the offence (sexual and/or violent crimes, for instance). Our definition includes all those who are victims of a “relevant offence” as defined in Section 30 of the Criminal Justice (Victims of Crime) Act 2017 (CJVoCA 2017)², as well as those who are under 18 years of age, and those who

¹For instance, among victims of rape: see “Rape and Justice in Ireland “ (2009), (Hanly et al) Liffey Press, the research report of a study of attrition at each stage of the criminal justice process, which sets out fear of the criminal justice process as prominent among the reasons cited for failure to report at all, and also, withdrawal of reports once made. The Executive Summary is available to view online here: <http://www.rcni.ie/wp-content/uploads/Exec-Summary.pdf>

² Broadly, “relevant offence” means sexual or violent offence. See statute online through this web-link: <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>

have a “mental disorder” again as defined by Section 19 of the CJVoCA 2017³. As far as physical disability is concerned, we regard witnesses of any age as vulnerable if they have any disability which impairs significantly their ability to participate in criminal justice proceedings as a witness, such as communication difficulties. We also consider that the definition should encompass any accused person who is vulnerable in any one of these ways.

Vulnerable Witnesses and the Rights of the Accused

In this Report, we put forward our view that the twin aims of preventing unnecessary harm to vulnerable victims and other witnesses, and facilitating them to give their best evidence, do not conflict with the rights of the accused person. There can be no doubt that in our system, the rights of the accused have priority over the rights of others concerned in the criminal justice process,⁴ if there were a conflict. This is the combined effect of Article 38(1) of the Constitution of Ireland, the volume of case-law interpreting that Article, and Article 6(1) of the European Convention on Human Rights and case-law based upon it. We have not made proposals which would be incompatible with these important rights.

The Group also advises that vulnerable accused persons be included within the reach of any special measures designed to address their specific needs as witnesses. This is not only to support the rights of all vulnerable persons coming before the courts but also because experience in other jurisdictions suggests that once defence lawyers see the benefits of special measures for their own clients, they become more amenable to, and supportive of, such measures being used for the benefit of vulnerable victims of crime and other witnesses besides accused persons.

Vulnerable Witnesses in other Common-Law Jurisdictions

Most other countries with common-law systems have a more highly developed system of “special measures”, to combat trauma and to assist witnesses to give their best evidence, than we do. In many countries, it is now normal to have victims of sexual crime give their evidence by pre-recorded statement, by video link, or both, from outside court (England and Wales), and in some, the practice is to pre-record the witness’s testimony (examination in chief), and play the video in court, instead of obliging the victim to give live evidence (almost all jurisdictions in Australia). In England & Wales, the pre-recording of cross-examination has just been piloted in three centres, a process that was evaluated in a report by John Baverstock⁵. In much of Australia, pre-recording of both examination in chief and cross-examination is now the norm for all victims of sexual violence⁶. In Scotland, there is a special procedure (evidence taken on Commission) for taking evidence from victims of sexual violence, which occurs at the pre-trial stage.

³ Note that Sections 19(3)(c) and 30 Criminal Justice (Victims of Crime) is not in force as of 16 March 2018

⁴ D v DPP [1994] 2 IR 465

⁵ An evaluation of this pilot can be accessed online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf: Process Evaluation of pre-recorded Cross Examination Pilot (Section 28), (Baverstock, John), published by UK Home Office 2016

⁶ See pages 15-18 print version of the Evidence and Procedure Review Report (2015), cited at note 7 below;

Following a detailed study⁷ by the Scottish Courts and Tribunals Service, extensive consultation among lawyers, academics, judges, and others, and a training initiative led by the Scottish Faculty of Advocates, a consensus is emerging there that the system must improve for these and other vulnerable witnesses. In Northern Ireland, a wide-ranging improvement of special measures for vulnerable witnesses is now under discussion.

It should be noted also that in some non-common law countries, such as Norway, a more wraparound, inquisitorial system is finding expression in the Barnehus initiative⁸, now being piloted in England and Wales (the word means Child House: a child friendly environment where questions are asked about sexual and other crimes, only by neutral, qualified professionals, not by lawyers, and a panoply of ancillary supports for parents as well as children, is available). This system has been used for years in several European countries.

Vulnerable Witnesses in Irish Criminal Courts: Victims of Sexual Offences

Under this heading, the position of victims of sexual violence is explored, as it is relatively privileged in comparison to that of victims of non-sexual violence (and/or other crimes). For most other categories of vulnerable witness, there is *less* support available, though this is now going to change to some extent⁹. The description of the special measures available to victims of sexual violence therefore represents the *maximum* that the system now offers to vulnerable witnesses in our criminal courts.

Victims of Sexual Offences: Currently Available Special Measures in Court

In Irish courts, victims of sexual violence can expect to have their evidence in chief pre-recorded, up to the age of 14¹⁰ no matter what the offence, and up to the age 18 in respect of certain offences only¹¹. Although the relevant Section 16(1) (b) of the Criminal Evidence Act 1992 was enacted some 25 years ago, it was not commenced until 2008¹², and the first case in which a Section 16 (1)(b) pre-recording was

⁷ Evidence and Procedure Review Report (2015), published by Scottish Courts Service and available online through this web-link: <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>; see also follow up Report, the Evidence and Procedure Review – Next Steps (2016), available online through this web-link: <https://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-report---next-steps---february-2016.pdf?sfvrsn=2>

⁸ See pages 24 to 37 of the Evidence and Procedure Review Report 2015 (see footnote 7 for full reference including web-link) - for a full discussion of the Barnehus system (print version). On page 24 there is a reference to a broadly positive evaluation of the system in Norway dating from 2012.

⁹ See generally the Criminal Justice (Victims of Crime) Act 2017, available online through this web-link: <http://www.oireachtas.ie/documents/bills28/acts/2017/a2817.pdf>; however, the Sections dealing with special measures in Court was not commenced on 27 November 2017, the date scheduled for commencement of the bulk of the Act.

¹⁰ Section 13, Part III of the Criminal Evidence Act 1992 as amended. See this web-link for a version of the Act consolidated up to 27 March 2017: http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/en_act_1992_0012.htm

¹¹ Once Part 6 (Section 37) of the new Criminal Law (Sexual Offences) Act 2017 comes into force, this provision will extend to all victims of sexual offences as defined in the Act, - who are under the age of 18 at the time that the pre-recording takes place.

¹² SI 401/2008, available online at: <http://www.irishstatutebook.ie/eli/2008/si/401/made/en/print>

admitted as the complainant's evidence in chief, was not till 2010. It is a very significant special measure, as it means that the jury will see and hear the complainant's evidence as it was shortly after the offence. While its use has become routine, so too have defence challenges to the admissibility of pre-recorded statements, usually in the form of a protracted "voir dire" (trial within a trial) in which adherence (or lack of it) to the Garda Síochána Good Practice Guidelines on Specialist Interviews - may be an issue.

Under the age of 18, victims can give evidence by video-link, i.e. from a special video-link room in the court building but outside the court room itself. Once they are over the age of 18, the judge has power to allow them to give evidence by video-link, in theory up to any age. If they are over 18 when they come to court, regardless of whether they were over or under 18 when they made their complaint to the Gardaí, they will not be allowed to give evidence by video-link. Further, once they are over 18, they may not have their evidence in chief pre-recorded as their direct evidence, – unless they have "a mental disorder"¹³, as specified by the Criminal Evidence Act 1992 as it will shortly be amended by the Criminal Justice (Victims of Crime) Act 2017 (CJVoCA), once the relevant section comes into force¹⁴. There is no provision for cross-examination to be pre-recorded and that testimony must be offered at trial, whatever the age, health and/or mental capacity of the victim or other witness.

Court Accompaniment by a trained person is now a right¹⁵.¹⁶ For most trials of sexual offences, the hearing is in camera, and in all such cases the person making the complaint is entitled to her/his anonymity. As the law stands, there is nothing to prevent an accused person defending himself and cross-examining the victim in person (this too is scheduled to change soon for certain limited categories of victims)¹⁷.

Victims of Sexual Offences: Use of Intermediaries

If the witness is a child, or has some form of intellectual disability, an intermediary may be called upon¹⁸. In practice, an intermediary is very rarely used in Irish courts, in part because the legislation is vague about how, when and for what purpose they should be used, and there have never been any Rules of Court to address these issues. They were appointed in two rape cases, in one of which the complainant had Downs

¹³ Defined as: "mental illness, mental disability, dementia or any disease of the mind" in Section 5 Criminal Justice Act 1993 as amended

¹⁴ Section 19 of CEA 1992 as amended;

¹⁵ See Section 20 Criminal Justice (Victims of Crime) Act 2017 available through this web-link: <http://www.irishstatutebook.ie/eli/2017/act/28/section/20/enacted/en/html>

¹⁶ This is scheduled to become a statutory right in the near future for some categories of victims and parties to Domestic Violence Act proceedings.

¹⁷ This will change as soon as the relevant section of incoming CJVoCA comes into force; also, in relation to victims of specified sexual offences, the position will change once the relevant section of the Criminal Law (Sexual Offences) Act 2017, - comes into force.

¹⁸ Section 14 CEA 1992 as amended (extract): "...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..."

Syndrome¹⁹, and in the other of which, it was decided that the child complainant would be unable to give evidence without the help of an intermediary²⁰ and in each case, there was a form of "Ground Rules [preliminary pre-trial] Hearing" beforehand. In the absence of dedicated Rules of Court, the Court relied on its inherent jurisdiction to conduct these preliminary hearings in each case.

One significant impediment to the use of intermediaries is: resources. A lack of resources has significantly limited the availability of intermediaries for defendants in criminal proceedings in England and Wales.²¹ For instance, in *R (on the application of OP) v The Secretary of State for Justice and Others* [2014] EWHC 1944 (Admin) the Court of Appeal ruled that intermediaries should only be available to a defendant when the "most pressing need" arises (i.e. for the duration of a vulnerable defendant's testimony, and not for the entirety of the trial). More recently, the Court of Appeal repeated this view in *R v Rashid* [2017] EWCA Crime 2. This conservative approach is also mimicked in the updated Criminal Practice Directions; section 3F.13 of which provides as follows: "Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare". See Criminal Practice Directions, October 2015 edition, amended April 2016.

There are very few trained intermediaries in this jurisdiction although there are specialist companies offering such services in England and Wales²². However, the legislation is clear on one point: intermediaries may only be used to convey questions to the witness, not to convey the witness's answers back to the court. This means that they may be of limited use. (Victims who are deemed to be persons with a "mental handicap"²³ within the terms of the legislation, face an additional hurdle: it is possible that an attack will be mounted on their case on the basis that they lack the capacity to give reliable evidence, and that their case will be withdrawn from the jury).

Victims of Sexual Offences: Cross-examination

Many victims of sexual violence, regardless of their age and/or capacity or any disability issues, are at risk of being cross-examined without limit other than relevance, by defence lawyers. The one statutory rule

¹⁹ DPP vs FE [2015] unreported, (Hunt J) (Bill No.84/2013 Central Criminal Court) trial in Nov-Dec 2015 Downs Syndrome, adult female complainant

²⁰ DPP vs NR & RN [2016] IECCC 2 (Central Criminal Court) trial in April-May 2016, 12 year child allegations against parents; intermediary nominated and used throughout trial on basis of psychological trauma to child of giving evidence against both parents of depraved abuse. Expert report put before court to substantiate risk of harm.

²¹ For further discussion, see S. Fairclough, "It Doesn't Happen... And I've Never Thought it was Necessary for it to Happen': Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2016) *The International Journal of Evidence and Proof* 1.

²² For a comprehensive review of the operation of the registered intermediary scheme in England and Wales, see Victims' Commissioner, *A Voice for the Voiceless: The Victims' Commissioner's Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses* (January 2018).

²³ This terminology is due to change to "mental disorder, within the meaning of Section 5 of the Criminal Justice Act 1993" [as amended by the Criminal Procedure Act 2010 Section 4).

limiting cross-examination is in relation to the sexual history of a complainant in a rape case²⁴. Given that the credibility of the witness is relevant, this can lead to a very wide-ranging cross-examination. Some judges are reluctant to intervene when witnesses are clearly overwhelmed, upset, are feeling bullied, and/or confused by the form or the content of the questions. Small inconsistencies between statements made years ago, are mined as if they are of significance and not merely the natural outcome of the long delay between report and trial; and the witness's every character flaw and/or experience of mental illness can be explored in oppressive detail. Vulnerable witnesses can find themselves being questioned for lengthy periods, sometimes even extending over some days, and they can and do emerge from the witness box feeling that the experience was as bad as, or even worse than, the sexual violence itself.

It is possible to do justice without resort to oppressive questioning, and with no disadvantage to the rights of the accused. Ironically, the kind of questioning referred to above is often avoided in jury cases as it is usually clear to a jury when questions are designed to deflect from the case itself and to reflect badly on the witness; the result often is that the questions reflect poorly on the accused, who is usually identified with his or her advocate.

There have been positive developments in recent times, especially in the EU Directive 2012/29²⁵, which now has statutory effect under the Criminal Justice (Victims of Crime) Act 2017. This has now been enacted, though not commenced as far as special measures in Court are concerned. It is time to look at more radical solutions than the old, trial-based procedures which rely too much on memory and performance on a given day, years after the event and on the ability to articulate simple answers swiftly, clearly and unambiguously to complex, sometimes unclear, or even occasionally misleading questions.

Vulnerable Witnesses – Victims of Non-Sexual Crimes

Victims of non-sexual crimes have only limited entitlement to the use of video-link in court. They are not entitled to have their complaint pre-recorded as their direct evidence, unless it is a violent crime, and they are either under 18 or have a “mental handicap” as defined in the legislation. They are entitled in theory to have questions put to them via an intermediary under certain conditions, but we can find no example of an intermediary having been used in any non-sexual case.

Hearing Every Voice – Structure:

This paper will examine current practice with regard to vulnerable witnesses in England & Wales and in other common-law jurisdictions. It will also describe the Barnehus²⁶ model for gathering the evidence of

²⁴ The extent to which leave was sought to adduce evidence of “other sexual experience” and the reasons for which it was sought, were the subject of a study led by Prof Ivana Bacik in Trinity College, Dublin in 2007-2009. The results were summarised in a presentation which may be accessed online via this web-link, but have not been published in full: <http://www.drcc.ie/2010/01/rape-law-victims-on-trial/>

²⁵ 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, available online through this web-link: <http://eujusticia.net/images/uploads/pdf/directive-2012-29-victims-rights.pdf>

²⁶ A useful summary of this approach is cited in the Section 12 Audit Report by Dr Geoffrey Shannon, Special Rapporteur to the Oireachtas on Child Protection (2017), from Iceland, and available to view online at: <http://www.bvs.is/media/forsida/Barnahus,-an-overview.pdf>

children, now operating in Norway, Iceland and other countries, not all of which have legal systems which are based on the common law. (See under England and Wales and Norway in next Chapter on vulnerable witnesses in other countries, for more information on how this works in practice).

The paper will then examine in detail the current menu of special measures available to vulnerable witnesses in Ireland. Finally, it will list its conclusions, following consultations with victims, NGO specialist support services, defence lawyers, prosecutors, academics and others working within the criminal justice system, and its recommendations as to how the current system might be adapted to address the many difficulties faced by vulnerable witnesses seeking to have their evidence heard and understood by investigators, prosecutors, judges, juries and the wider audience beyond the court boundary.

II Vulnerable Witnesses: How are their needs met in other countries?

England and Wales: Vulnerable Witnesses

Special Measures in Court: Statutory Framework in England and Wales

In England and Wales, witnesses other than the accused who are deemed to be “eligible for assistance” under either Section 16 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA)²⁷ (because of age or incapacity) or Section 17 YJCEA, (because of fear or distress about testifying), may avail of one or more special measures. Either party can apply for such directions, or the judge may make them him/herself. There are also additional special measures available to child witnesses only, set out in Section 21, providing for pre-recorded statements to stand as evidence-in-chief (direct evidence) and for any other evidence to be given by video-link. These apply where the offence being tried is either a sexual one or one involving violence, within the meanings of Section 35 (3)(a) and Section 35(3)(b), (c) or (d) YJCEA respectively. The term “vulnerable witness” does not appear in the legislation but is in common use in England and Wales to mean any person who is under 17, or lacks capacity in some way, or is fearful or distressed by the prospect of giving evidence (generally understood to mean a victim of sexual and/or other violent crime, particularly anyone at risk of intimidation by the accused or others acting on his/her behalf).

The criterion for determining whether a particular witness, other than someone under 17, is “eligible for assistance” is whether the court considers that the quality of their evidence is likely to be diminished “by reason of” a mental disorder, or other “significant impairment of intelligence and social functioning”, or physical disability or disorder (Section 16). If the court is satisfied that the quality of their evidence is likely to be diminished “by reason of” their fear or distress about giving evidence in the case, a witness may be deemed “eligible for assistance” under Section 17 YJCEA.

The range of special measures for victims and other witnesses who are deemed “eligible for assistance” in the YJCEA includes:

Section 23 – Use of screens in the courtroom

²⁷ See Part II, Chapter 1 of YJCEA 1999 as amended via this web-link: <http://www.legislation.gov.uk/ukpga/1999/23/section/16?view=plain> NB: this is the first Section in Part II. The others follow in sequence from this first online page.

Section 24 – Giving evidence via live link

Section 25 – Giving evidence in private

Section 26 – Removal of wigs

Section 27 – Video-recording evidence-in-chief before trial

Section 28 Video-recording cross-examination and re-examination before trial of a witness whose evidence-in-chief is given under Section 27 (not yet in force apart from in the three pilot Crown Court centres, see below)

Section 29 – Examination of witness through an intermediary

Section 30 – Use of physical aids to communication

England and Wales: Section 28 Pilot – Pre-recorded cross-examination

In England and Wales, Section 27, that is, the use of pre-recorded evidence-in-chief (direct evidence) for witnesses deemed eligible for assistance, is now routine for children²⁸. However, Section 28 had not been commenced to any extent before England and Wales allowed vulnerable and intimidated victims and other witnesses to pre-record their evidence-in-chief and cross-examination evidence under the Section 28 Pilot Program of YJCEA 1999. In 2013, Section 28 was commenced to a very limited extent to facilitate the running of the Pilot Program in three designated Crown Courts only²⁹. In 2016, this Section was re-commenced in the same three Crown Courts, but this time its reach was extended from eligible witnesses under the age of 16 at the time of trial, to eligible witnesses aged 16 and 17 at the time of trial³⁰. To date, Section 28 has not been commenced in England and Wales outside these three Crown Courts.

Section 27 of the YJCEA 1999 allows vulnerable or intimidated victims and witnesses to pre-record their evidence-in-chief before trial, but cross-examination must still occur during the trial itself. The addition of pre-recording cross-examinations under Section 28 YJCEA 1999 was piloted in the Crown Courts of Liverpool, Leeds, and Kingston-upon-Thames for a period of ten months in 2013 and 2014.

Section 28 Pilot – Eligibility Criteria and Procedure

Witnesses were eligible for the program if they had received a Section 27 direction, were under 16 and thus deemed vulnerable for their age, or suffered a mental disorder or physical disability. The goals of the program were to provide cross-examinations significantly earlier in order to aid recall and to improve the quality of the evidence provided by the victims and other witnesses, and secondly, to reduce stress and the risk of re-traumatisation for victims and other witnesses. This was achieved by reducing the length of time

²⁸ See for instance, HM Justice Inspectorate Report (2014), available online: https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2014/12/CJI_ABE_Dec14_rpt.pdf

²⁹ <http://www.legislation.gov.uk/uksi/2013/3236/article/2/made>

³⁰ <http://www.legislation.gov.uk/uksi/2016/1201/note/made>

before cross-examinations to enable victims and witnesses to recount events more clearly and by utilizing the pre-recorded cross-examinations at trials so that victims and witnesses would not need to be present, either physically or through a live TV link. The majority of cases included under the Section 28 program were sexual cases, and under the pilot, about 50% of Section 27 cases became Section 28 cases (194 cases).³¹ The Process Evaluation cited below was conducted using semi-structured interviews with 2 groups, witnesses and practitioners (including police officers, judges, intermediaries, prosecutors, CPS staff and defence lawyers)³².

Section 28 Pilot: Quality of Evidence and Quality of Experience for Witnesses

The pilot protocols included a mandatory Ground Rules Hearing for each Section 28 case, where judges would conduct a comprehensive review of the defence's questions and give directions for the conduct of the upcoming pre-recorded cross-examination of the vulnerable witness. Most practitioners attending Section 28 cross-examinations felt the process reduced levels of stress and trauma for the victims and witnesses.³³ Questions were more direct and focused than those at Section 27 cross-examinations, and this was thought to be a result of the increased scrutiny of Ground Rules Hearings.³⁴ Some thought that the quality of evidence was higher in Section 28 trials (6 practitioners), and almost all agreed that it resulted in a much shorter cross-examination period for Section 28 witnesses, generally between 20 and 45 minutes as opposed to 45 minutes to three hours in Section 27 cases.³⁵ Although the content of cross-examinations and the general questioning process was stressful for both Section 27 and 28 victims and witnesses alike, the experience improved when the defence conducted questioning in a pleasant or straightforward manner.³⁶ This latter factor was a significant one to most victims and applied under both Section 27 and Section 28 procedures. The experiences significantly worsened when defence counsel were perceived as attacking or discrediting the victims or witnesses instead of directing their challenges to the evidence. The overall length of the trials did not change dramatically, particularly when lengthier pre-trial hearings were taken into account. The average waiting period before cross-examination for a Section 28 case was almost four months from date of charge, compared to an average of 7.5 months from date of return for trial to trial for cases which were dealt with under Section 27 only³⁷. Most felt there were clear improvements in victims and witness ability to recall events in Section 28 cases. There was a more positive response to participants in Section 28 trials as opposed to more negative responses in Section 27 trials, suggesting that

³¹ Process Evaluation of Pre-Recorded Cross-examination Pilot (Section 28) (2016), Baverstock, John, page 58, available online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

³² Ibid

³³ Ibid, page 7

³⁴ Ibid, Page 7

³⁵ Ibid, page 53

³⁶ Ibid, page 54

³⁷ See table C.2, page 78, ibid

the Ground Rules Hearings were quite helpful, leading to a more positive experience for the victims and witnesses.³⁸

Section 28 Pilot: Results on Delay and on Trials’ Failure to Proceed as Listed

Section 28 cases showed fewer trials which failed to proceed as expected, and more early guilty pleas than Section 27 cases; however, it could also be the case that some early guilty pleas within Section 27 cases were not recorded.³⁹ Delays were still present within both sets of cases, with defendants’ availability causing delay for Section 28 cases and a broader set of reasons, including judges’ schedules and procedural delays, deferring Section 27 cases.⁴⁰

Section 28 Pilot: Training and Communication Issues

A factor that could be improved in the program was the ability of the police to identify potential Section 28 cases at an early stage so as to prevent delay and the exclusion of some eligible witnesses from the pilot.⁴¹ With regard to Achieving Best Evidence interviews, an interviewing precursor for the Section 28 provision complete with detailed protocols, techniques, special training, and manuals, police staff noted a shortage of both officers trained in conducting ABE interviews and available recording facilities in which to conduct the interviews.⁴² Victims and witnesses involved in the pilot suggested that there could also be improvement in clearly communicating the processes and goals of Section 28 to victims and other witnesses.

Section 28: Professional Interviewees’ Responses

Across the 40 interviews with lawyers, judges, and police officers, Section 28 cases had a noted influence on the work load of all practitioners involved, specifically due to the expedited time frames and additional required hearings. Many judges within the sample saw benefit in front-loading the work, as there was less work during cross-examination and trial stages.⁴³ However, defence lawyers in particular felt the accelerated hearings gave them less time to build rapport with their clients and to prepare overall. Some defence lawyers also felt that having to submit their cross-examination questions to the judge in advance for his/her approval – could make it difficult to react appropriately to unexpected answers to their

³⁸ Ibid, Page 8

³⁹ Ibid, Page 9

⁴⁰ Ibid, Page 6

⁴¹ Ibid, Page 5

⁴² Ibid, Page 28

⁴³ Ibid, Page 5

questions⁴⁴. That said, another defence lawyer said that a “pragmatic approach by judges meant that advocates were still able to ask appropriate and sensitively worded follow-up questions”.⁴⁵

Section 28 Pilot: Timing Issues

Most practitioners involved felt that the accelerated time frames were challenging but achievable, but that non-Section 28 cases had to be deprioritized in order to meet the accelerated schedules of Section 28 cases. One element that affected scheduling was making sure to book children’s Section 28 hearings in the mornings, when the children were freshest and most alert.⁴⁶ Overall, the report advised re-examining the time frames of Section 28 cases before any further implementation in the court system.

Section 28 Pilot: Technical Issues

Many of those interviewed felt the pilot technology was inadequate due to insufficient screen space and sound quality. The use of Section 28 equipment had various challenges and learning curves, the majority of which were normal issues readily solved by court technicians. However, there was a consensus that high sound and video quality would be essential to ensure the future success of the program.

Section 28 Pilot: Would this approach work in Ireland? Two Issues:

1. Pre-submission of cross-examination questions to judge at Ground Rules Hearing

Defence lawyers must submit any questions they consider important for the defence case to the judge at the Ground Rules Hearing for his/her approval. This requires defence lawyers to prepare the case well in advance of the trial, so that the questions submitted are direct, succinct, and less combative than has been permitted in traditional cross-examinations. Irrelevant, unnecessarily complex, and repetitive questions are not permitted as acceptable lines of questioning for such victims or witnesses. In so doing, the Court is guided by the general guidelines on the questioning of various groups of vulnerable witnesses provided by The Advocates’ Gateway⁴⁷, and by the specific advice of any intermediary who has been asked to assess the particular communication needs of the witness. This approach reflects the experience of most court practitioners in recent cases involving children or vulnerable witnesses but the practice of more careful questioning of a vulnerable witness has not been a protection specifically afforded to such witnesses to date, rather a recognition of the damage done to the defence case in the eyes of the tribunal of fact by oppressive questioning. It should be noted that criminal procedure in this country diverges from that of England and Wales in that there, the general outlines of the defence must be disclosed in advance of the trial. Here, defence disclosure obligations are much more limited, but it should not be forgotten that all pre-trial hearings are regarded as part of the trial itself, and that the defence case must be unveiled to

⁴⁴Ibid, page 40 (Summary of Interviews). Note that the Process Evaluation does not purport to reflect the views of all professionals involved in the pilot, or even a representative cross-section (only 3 defence lawyers were interviewed).

⁴⁵ Ibid, page 28

⁴⁶ Ibid, Page 32

⁴⁷ See www.theadvocatesgateway.org for more information

some extent during cross-examination in any event. Accordingly, we do not think that the rights of an accused person would be disproportionately endangered by the introduction of preliminary “Ground Rules Hearings”, under rules adapted to our own jurisdiction.

Finally, we note that in effect, a form of “Ground Rules Hearing” has been held in each one of two recent rape cases in this country, on the basis of the Court’s inherent jurisdiction to do so⁴⁸. These “Hearings” demonstrate that even without the benefit of specific Rules of Court, the Court can, does and no doubt will again in similar (or other) unusual circumstances, make imaginative use of its inherent jurisdiction powers to do justice.

2. The Use of Intermediaries at Ground Rules Hearing

Specialist intermediaries are always used when a child witness is aged under 11, in England and Wales, to offer advice concerning the phrasing of questions, their order, the length of time permitted for questioning, and related topics as much as possible during the pre-trial stage (Ground Rules Hearing) when the judge is outlining the directions for the pre-recorded cross-examination. Over that age, an intermediary may be used if there are particular communication difficulties.

There is no equivalent cadre of specialist intermediaries in this country, and there is also a view among experienced criminal lawyers and legal educators that in most cases, the quality of the evidence obtained is better if obtained by a lawyer who is very familiar with the case, assuming that such a lawyer has the training and skills needed to cross-examine vulnerable witnesses, including children. For some witnesses with more severe communication difficulties, it will be necessary to use a professional intermediary with the appropriate skills, and for some others, it will be most appropriate to use an intermediary without professional training, but with a very good understanding of the witness’s particular style of verbal (and sometimes, partly non-verbal) communication. It seems to us, therefore, that in this country, a flexible approach to the use of intermediaries (only where strictly necessary), is appropriate instead of fixed rules based on the age of the witness.

England and Wales: The Child House Pilot – an English version of Barnehus

There is now an England and Wales-based pilot of the Barnehus approach, referred to there as the Child House approach⁴⁹ which is ongoing (2016-2018) in two areas in England (two sites in London and one in Durham), following an NHS review recommending a change in this direction in 2015⁵⁰. This new approach is confined to victims of (non-historic) child sexual abuse. So far, no formal evaluation has been done, but

⁴⁸ See footnotes 19 and 20 above for references to these two cases (DPP vs FE and DPP vs NR and RN)

⁴⁹ A helpful overview of the Child House approach can be found in this conference presentation by NHS: <https://www.nspcc.org.uk/globalassets/documents/conferences/how-safe-2016-presentation-childs-house-model-emma-harewood.pdf>

⁵⁰ “Review of pathway following sexual assault for children and young people in London”: Summary Report online at: <https://www.england.nhs.uk/london/wp-content/uploads/sites/8/2015/03/review-pathway-cyp-london-summary.pdf>

indications from the use of this model in Iceland (Barnahus there) are that convictions have almost doubled since its introduction⁵¹.

Scotland

The Scottish Courts and Tribunals Service has recognized the potential for special measures to improve the trial process for vulnerable adult and child witnesses in sexual offence cases⁵². A clear benefit to pre-recording evidence is that victims and witnesses are able to recount details much closer to the initial events. This creates much higher quality evidence that can be edited later if some material becomes irrelevant or inadmissible. Pre-recording evidence alleviates the problem of prior statements being used as scripts in Scottish courts, from which any slight deviation or omission is targeted against a rigid reading of the statement. Pre-recording would also reduce delay, where trials are adjourned either immediately before the first day of hearing or on the first day, to another date, sometimes more than once. A large factor that affects the length of delay between first listing for hearing and final determination is the failure of victims and witnesses to attend trial on their appointed court day, a figure that can be reduced with the wider use of special measure provisions.

Special measures for child and vulnerable victims and witnesses are in Part XII of the Criminal Procedure (Scotland) Act 1995⁵³:

271H Special Measures

- a) Taking of evidence by a commissioner.
-A commissioner is an individual appointed by the courts to take the evidence.
- b) Use of a live television link
- c) Use of a screen
- d) Use of a supporter.
-This means the ability to be accompanied by a support worker or another person chosen by the victim or witness.
- e) Giving evidence-in-chief in the form of a prior statement.
-A prior statement is not a pre-recorded statement, but it is a statement by the victim or witness that is lodged in evidence without the witness speaking in court.
- f) Such other measures as the Scottish Ministers may, by order made by statutory instrument, prescribe.

The Victims and Witnesses (Scotland) Act of 2014⁵⁴ expanded the term ‘vulnerable witness’ to automatically include any victim or witness including accused persons under 18, and any victim in specified

⁵¹ Set out in presentation referred to at footnote 49 above

⁵² See the Evidence and Procedure Review (2015), published by the Scottish Courts and Tribunals Service in 2015 and fully referenced at footnote 3 above; see also Evidence and Procedure Review – Next Steps (2016), also published by the Scottish Courts and Tribunals Service and also fully referenced at footnote 7 above.

⁵³ Available to view online here: <http://www.legislation.gov.uk/1995?title=Criminal%20Procedure%20Act%20%28Scotland%29>

⁵⁴ Available online here: <http://www.legislation.gov.uk/asp/2014/1/contents>

sexual, trafficking, domestic abuse, or stalking offences. Automatic standard special measures include the ability to use live TV-link from any location, the use of a screen, and the aid of a supporter. Asking that the public be excluded from court is another available special measure and an example of one that must be requested from the court.⁵⁵

A court can determine that a witness is vulnerable if there is significant risk that the quality of a witness's evidence will be diminished by reason of mental disorder, or by fear or distress in connection with giving evidence at the hearing. Such witnesses are also considered vulnerable if there is deemed to be considerable risk of harm to the person because the person is giving or will give evidence in the proceedings. However, while these witnesses may apply to use any of the aforementioned measures, the decision to grant such measures is at the discretion of the court.

Between July 2011 and June 2014, about 99% of the 23,000 applications made were made for the standard screen, for a supporter, or for live video-link special measures⁵⁶. There was almost no use of the prior-recorded statement or of evidence under commission. The special measures in Scotland are predominantly used on an ad-hoc basis and there is no systematic framework to promote their use. Recently, there has been an increase in applications for giving evidence-in-chief in the form of a prior statement. Numbers are expected to rise to almost 17,000 cases requiring special measures each year,⁵⁷ from a yearly average of just over 7,500 for the period from July 2011 to June 2014. This increase is the result of the wider age range for vulnerable victims and witnesses and additional complainants in applicable offences.⁵⁸

Scotland also envisages pre-recording and video-link evidence measures as tools that can aid non-vulnerable witnesses, such as police officers and expert witnesses. Instead of taking valuable time from their immediate duties, officers could pre-record statements or give evidence via live-link from their stations, eliminating travel time interruptions and lessening the amount of missed work. These processes could be applied to any trial participants who may have issues being physically present at court, saving the system much time and money from delayed trials.⁵⁹

The Scottish Courts Service took keen interest in special measures programs within Norway, Australia, and England. Norway has implemented child-friendly Barnehus sites for the pre-recording of child witness testimonies⁶⁰. In the Evidence and Procedure Review, a broadly positive Norwegian Police review of the

⁵⁵ "Giving Evidence at Court", see web-link: <https://www.mygov.scot/evidence-court/giving-evidence/>

⁵⁶ Evidence and Procedure Review (2015), page 13 – see footnote 3 for full reference

⁵⁷ Ibid, page 14

⁵⁸ Ibid, Page 14

⁵⁹ Ibid, Page 9

⁶⁰ See footnote 7 above for a full reference and web-link to an introduction to this approach and see further under England and Wales and Norway in this Chapter

Barnehus approach is cited in their Conclusion at page 24⁶¹, cited here in full at the end of a detailed description⁶² of how it works in Norway:

"2.62 Practitioners in Norway were clear that this approach was producing far better results, both in terms of the quality of evidence and the promotion of the child's wellbeing, than police-station or court-based alternatives. An evaluation of the Barnehus system in 2012 [*Barneshus-evalueringen*, Politihogskolen (Norwegian Police University College) 2012] concluded that the model was working as it was intended, although there were issues that needed to be addressed around the future governance of the network, the likely resource requirements in the face of increasing demand, and the capacity for the network to cope with children with special needs. There was also evidence that the witnesses themselves found this process helpful and positive".

While no pre-recorded cross-examination pilot along the lines of the one in England and Wales has been undertaken in Scotland to date, on foot of the publication of the Evidence and Procedure Review: Next Steps Report in 2016⁶³, an inter-agency working group was set up, chaired by senior judge HH Lady Justice Dorrian QC, to examine in detail further pre-recording of the evidence of vulnerable witnesses, including child "complainers" (victims) and vulnerable accused persons. Their Report was published in September 2017, and recommended that the entire evidence of child victims under 16 be taken by an expert forensic interviewer and pre-recorded, with no questioning by lawyers at all, in the majority of cases; and that this procedure should also be used occasionally for child witnesses under 18, and for adult vulnerable witnesses very occasionally, where s/he is vulnerable in multiple ways⁶⁴. The Report also recommended that more extensive use be made of the currently available "live" procedure for recording evidence pre-trial (taking evidence on Commission).⁶⁵

Australia

Almost all Australian States have enacted statutory provisions under which it is possible to complete pre-trial video recording of evidence-in-chief and cross-examination of (varying categories of) vulnerable witnesses⁶⁶.

⁶¹Evidence and Procedure Review (2015), page 24, see footnote 7 for full reference including web-link

⁶² The full description of Barnehus in Norway from the Evidence and Procedure Review is at Appendix 2 below

⁶³ See footnote 7 for full reference to this Report

⁶⁴ Page 41, Evidence and Procedure Review Child and Vulnerable Witnesses Project Pre-Recorded Evidence Report, available online at: <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2>

⁶⁵ Ibid, page 41

⁶⁶ This is often referred to as the "Full Pigot" approach to recording evidence. The term derives from the Pigot Report", the *Report of the Advisory Group on Video Evidence* issued in 1989⁶⁶, written by HHJ Thomas Pigot QC. The term "Half-Pigot" refers to procedures which only allow pre-recording of the evidence-in-chief, not cross-examination, such as Section 16 of the Criminal Evidence Act 1992 as amended, in this country.

Western Australia (as an example)

Western Australia was the first state within Australia to adopt both pre-recorded evidence and cross-examination evidence practices. It has been a leader in these special measures for the country as a whole. New South Wales is now the only part of Australia with no provision at all for allowing pre-recorded cross-examinations to be admissible as evidence at trial. Under Western Australian provisions⁶⁷, a child who is a victim of any sexual offence, including prostitution offences, or various offences involving violence against a child by a close relative or a person acting in the role of a parent is eligible for pre-recording evidence-in-chief and cross-examination. Under certain conditions, a person with a “mental impairment” is also so eligible⁶⁸. The process usually requires a Visually Recorded Interview⁶⁹ conducted by specially trained police officers which will become the child’s evidence-in-chief.

The child is admitted to the Child Witness Service, a comprehensive department staffed by trained counsellors and psychologists available to any party. Before the trial, the child participates in a special hearing without a jury or any legal speeches or submissions being made. For this process, the child sits in a live TV-link room while the judge and lawyers sit in court. The Visually Recorded Interview is played, and the child is then cross-examined by the defence. A support person and a “child communicator” are able to accompany the child, and the child can take as many breaks as they like, since the video can always be edited later on. This recording is part of the evidence at trial and the child need not be physically present. In addition to strengthening the witness’s ability to recall events, another benefit of pre-recording is that the footage can be used in the event of a retrial. Most of all, this system greatly speeds along the healing process for child victims and other witnesses; after the recordings are finished, the children do not have to perform at a pending trial.

In a critique of the procedure by practising barrister Scott Corish, the importance of high quality picture and sound technology was stressed, particularly when the evidence is given to a jury⁷⁰. There could also be great difficulty in scheduling the special hearings early in the cases, with regular delays resulting from time needed to gather evidence, to secure disclosures, and the overall readiness of all parties.⁷¹ However, overall the author’s conclusion is that these practical issues can be surmounted fairly easily, and there is no reason not to continue with this approach.

Norway

⁶⁷ Evidence Act (Western Australia) 1906 as amended, see Sections 106I-K and 106RA especially. It is available online at: [https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_37044.pdf/\\$FILE/Evidence%20Act%201906%20-%20%5B16-i0-00%5D.pdf?OpenElement](https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_37044.pdf/$FILE/Evidence%20Act%201906%20-%20%5B16-i0-00%5D.pdf?OpenElement)

⁶⁸ Ibid, Section 106HB

⁶⁹ A detailed analysis of how pre-recorded cross-examinations work in practice may be found in a paper by Scott Corish (Barrister), entitled “Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses” (2015), and available online at: http://criminalcpd.net.au/wp-content/uploads/2016/09/prerecorded_evidence_paper__Scott_Corish.pdf

⁷⁰ Ibid

⁷¹ Ibid

In Norway, witnesses who are under 16 years old or who have a mental disability, are the alleged victims of sexual offences or offences of violence, or who have been witnesses to violence are all eligible to apply for judicial hearings to take evidence before trial. The law requires that these judicial hearings take place within two weeks after an incident is reported, but in practice less than half of cases in Oslo meet this deadline.⁷²

Barnehus⁷³ sites across Norway are the location for these hearings as well as various psychological and medical support facilities for child victims and witnesses. These sites are specifically designed for children’s interviews within the trial process, and with instant support staff on hand, the sites facilitate much more positive experiences for children. Their use also results in better quality of evidence. Interviews also include subsequent medical examinations that may be useful to the investigation if a child is more comfortable divulging information to medical professionals instead of court officials. The procedure used is described in detail in the Scottish Evidence and Procedure Review Report (2015)⁷⁴ and appears as an extract in Appendix 2 hereto.

United States

The American Supreme Court has held that pre-recorded evidence may be incompatible with the US Constitution 6th Amendment⁷⁵ right of the accused to be confronted by the witnesses against him or her. The 2004 Supreme Court case of *Crawford v. Washington*⁷⁶ distinguished between testimonial hearsay, or speech which was given in preparation for trial (such as a deposition or statement to police), and non-testimonial hearsay, any spontaneous speech not specifically given for trial. In that case, it was held that a prosecution witness’s prior out-of-court statement to police should not have been admitted as it was testimonial hearsay, and as the witness was unavailable to give evidence, there had been, and would not be, any opportunity to cross-examine (“confront”) her on its content. However, there is also Supreme Court authority for the admission of pre-recorded evidence in the case of an especially vulnerable child victim of sexual abuse on a case-by-case basis, provided that the accused has an opportunity to challenge that statement in cross-examination (not necessarily in person): see *Maryland vs Craig*⁷⁷ in 1990, for example.

This is the backdrop to the generally limited range of special measures available to vulnerable witnesses across the US. See for example the State of California:

⁷² Evidence and Procedure Review: Scotland (2015), Scottish Courts and Tribunals Service, Page 22, full reference at footnote 7 above. See also Appendix 2 hereto

⁷³ The term means Child House in Norwegian

⁷⁴ See footnote 7 above for full reference.

⁷⁵ <http://constitution.findlaw.com/amendment6.html>

⁷⁶ *Crawford vs Washington*, 541 U.S. 36 (2004). Text of judgement is available online at: <https://supreme.justia.com/cases/federal/us/541/36/>

⁷⁷ *Maryland vs Craig*, 497 US 836 (1990): Text of judgement is available online at: <https://supreme.justia.com/cases/federal/us/497/836/case.html>

Under the California Hearsay Rule Evidence Code 1200 EC, exceptions to the hearsay rule are allowed for the crimes of rape of a child, incest against a child, and lewd acts with a child. Statements outside of court are allowed if all of the following apply:

1. They were made by a child under the age of 12 and included in a written report by a law enforcement officer or county welfare worker
2. They describe a sex crime that was committed against that child
3. They were made prior to a confession by the defendant
4. They were not made under circumstances that would suggest the statement was unreliable.
5. Were taken down in a trustworthy way by a law enforcement official and
6. Outside evidence is only allowed if the child is unavailable to act as a witness at trial or refuses to testify. (Outside evidence is any evidence that is not orally presented live at trial)⁷⁸.

A slightly more liberal regime prevails in the State of New York:

Under Title D of the New York State Criminal Procedure Act, Section 65⁷⁹, a child witness under 14 may be allowed to give all his/her evidence by video-link, provided that the Court is satisfied that s/he is vulnerable. There is no mention of pre-recorded evidence in chief, much less cross-examination, being admissible in any circumstances, and no mention either of adult vulnerable witnesses being allowed to give evidence by video-link.

Nevertheless, Child Advocacy Centers⁸⁰ in that State do offer co-ordinated care programs to child victims of sexual abuse who have reported the crime to police. They aim to ensure the number of interviews which the child has to undergo is kept to a minimum, and to maintain close and effective liaison with local police officers and with the District Attorney's office, but there is no provision to circumvent the necessity of the child giving live evidence in court, albeit through video-link, and no automatic application of this special measure.

Canada

Support measures for vulnerable adult victims and other witnesses are found within Section 486 and Section 715.2 of Canada's Criminal Code.

s. 486.1 – Support person

- On application by the prosecutor, a victim or witness under 18 years of age, or a victim or witness with a mental or physical disability, may have a support person present so long as it would not interfere with the administration of justice.
- On application of a prosecutor or a victim or witness, a support person may be present while an adult victim or witness testifies if the judge thinks it is necessary to obtain a full and candid account of the evidence. Factors for this provision include the age of the victim or witness, whether the person has a

⁷⁸ California Evidence Code paragraph 1228, available online at <http://law.onecle.com/california/evidence/1228.html>

⁷⁹ <https://www.nysenate.gov/legislation/laws/CPL/A65>

⁸⁰ See for example, Bronx Child Advocacy Center: <https://www.safehorizon.org/location/auto-draft/>

mental or physical disability, the nature of the offence, the nature of the relationship between the victim or witness and the accused, and other considerations the judge or justice deems relevant.⁸¹

s. 486.2 – Testimony outside the courtroom or behind a screen

- On application, a victim or witness under 18 years of age or who may have trouble communicating evidence due to a physical or mental disability may testify outside of the courtroom or by using a screen unless the judge or justice believes it would interfere with the administration of justice.
- On application, a judge or justice must be satisfied that an order is necessary for vulnerable adult victims and witnesses to have a testimonial accommodation in order to provide a full and candid account of evidence.

s. 486.3 – Accused not to cross-examine witness under 18/Complainant – certain offences/other witnesses

- This Section provides for restrictions on personal cross-examination by the accused of any witness under 18, any complainant of certain offences, and any other witness. It is most restrictive for witnesses under 18 and complainants of certain offences [assault, including various forms of sexual assault], where it is worded almost as a presumption against allowing such cross-examination, and least restrictive for any "other witness" who is not a complainant of certain offences, or a person under 18, under which the court "may" grant an order prohibiting personal cross-examination, if the order "would allow the giving of a full and candid account from the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice"⁸²

s. 486.4 – Order restricting publication — sexual offences

- A victim of a sexual or other listed offence under this section, of any age, and any witness to a sexual offence, or other listed offence under this this section who is under 18, will be granted an order restricting publication of any identifying information on application, in criminal proceedings related to the relevant sexual offence(s). Victims and witnesses over 18 of other offences besides those listed in the section, may be granted an order restricting such publication; however, victims of any offence which is not listed under this section will be granted an order restricting publication of identifying information, if they are under 18.

s. 715.2 – Video-recorded evidence

- A victim or other witness who may have trouble communicating due to a mental or physical disability may utilize a video-recording provided that the person adopts the contents of the recording while testifying, so long as the judge or justice finds the admission to be in the interests of justice. This provision does not make any reference to cross-examination being pre-recorded.

⁸¹ "Vulnerable Adult Witnesses: The perceptions and experiences of Crown Prosecutors and Victim Services Providers in the use of testimonial support provisions" (2013), Hurley, PM, Department of Justice, Canada, page 5-6, available online through this web-link: http://publications.gc.ca/collections/collection_2013/jus/J4-18-2013-eng.pdf

⁸² <http://laws-lois.justice.gc.ca/eng/acts/C-46/section-486.3-20150723.html#wb-cont>

The Department of Justice of Canada's report⁸³ analysing vulnerable adult witnesses' experiences in the courtroom took data from 18 Crown Courts in eight different jurisdictions and eleven victim services providers from five jurisdictions. The study found that witness screens were the most utilized special measure, closely followed by the use of a support person. Applications for support persons were commonly combined with screen or CCTV applications. Applications for the use of CCTV outside of the courtroom were half as frequent as applications for screens.⁸⁴ Applications were made in a wide time frame, with some submitted weeks before trial, others a week before trial, and most on the first day of court.⁸⁵ Prosecutors noted that factors such as case-loads, the time involved in making the application, and late identification of the specific needs of the victim or witness were relevant in submitting applications. Overall, many "presumptive" applications were successful compared to lower amounts of "discretionary" applications being accepted. Reasons cited for denying an application included the victim or witness not being so mentally distraught as to prevent a full and candid account of the evidence, the application not meeting the high bar of "fear of the accused", and the varying practices of judges.⁸⁶ Pre-recorded video evidence applications under Section 715.2 are rare for vulnerable adult witnesses.⁸⁷

Victim Services providers reported that several meetings with the victims or witnesses are needed to properly assess and meet their needs through the trial process. Late applications are common with last-minute identification of witnesses who choose not to utilize their services. Support applications can also result in delays and adjournments of the trial process. Some study participants noted they request screens for their clients instead of CCTV because the CCTV provision would result in delay.⁸⁸ Other Crown prosecutors described CCTV demonstrations to defence counsel who have not encountered the technology before as very helpful; this can allay various concerns and result in less opposition to the application from the defence.⁸⁹ General access to technology was a concern for many Northern communities, as well as funding for electronic equipment.⁹⁰ Overall, there is still a large assumption that adults are 'okay' without testimonial aid, and CCTV is "hard to impossible" to obtain for adult witnesses. As in other jurisdictions, late identification of potential testimonial aid-users is a barrier to providing victims and other witnesses with appropriate testimonial support.⁹¹ Defence counsel were not surveyed directly in this study. The prosecutors' view was that the defence were more likely to oppose discretionary applications than

⁸³ Full reference to this Vulnerable Adult Witnesses Report is at footnote 81 above

⁸⁴ Ibid, page 4

⁸⁵ Ibid, page 14

⁸⁶ Ibid, page 17

⁸⁷ Ibid, page 20

⁸⁸ Ibid, page 17

⁸⁹ Ibid,, page 18

⁹⁰ Ibid, page 19

⁹¹ Ibid, page 22

presumptive ones. They also thought that applications were generally⁹² more likely to be resolved on consent in small communities, where there is only a small pool of lawyers who all know each other well, and contrariwise, in a couple of large jurisdictions where there are more applications and lawyers on both sides are more familiar with the process.

New Zealand

New Zealand provides for both pre-recorded video and live-link evidence for victims and other witnesses in sexual offence cases. Under Section 106 as amended of the Evidence Amendment Act⁹³, a prosecutor must provide video recorded evidence to the defence counsel unless the video is of a child complainant or any witness, including an adult complainant, in a sexual case or a violent case. In these cases, if there is an application made on behalf of a defendant, a judge may allow a portion or a full copy of the video evidence to be given to the defendant's counsel. This is determined by the judge considering the interests of justice, the nature of the evidence on the recording, and whether the defendant's lawyer could be just as prepared with a transcript of the video evidence instead.

Section 107⁹⁴ as amended specifically outlines the ways child witnesses are able to give evidence. Available methods include a video recording made in advance of trial, speaking with a screen in the courtroom, or providing video-link evidence from a remote location outside of the courtroom. Any party calling a child witness must notify the court and all other parties with a written notice detailing the alternative methods the child will use when giving evidence. Children and their families are also able to utilize Court Victim Advisers to assist them and their caregivers. Court and police funds are also offered to reimburse victims for their travel to and from court.

Section 95⁹⁵, as amended, is another special provision that prevents the defendant in a sexual offence, domestic violence, or harassment case from personally cross-examining the victim. The defendant may not personally cross-examine a child witness who is not a complainant unless this is deemed permissible by the judge. Section 44A of the Evidence Amendment Act⁹⁶ provides that a party that wishes to offer evidence as to a complainant's sexual history must complete a written application to the court including the identity of the person giving the evidence and the subject matter and scope of the evidence. If a party wishes to ask questions regarding sexual experience, the application must include the identity of the person who will be asked the question, the question, and how the direction of questioning will progress from the initial questions. However, the judge may waive adherence to these written requirements if no party is substantially prejudiced by failure to comply or if the compliance was not reasonably practicable in the circumstances.

⁹² Ibid, page 16/17

⁹³ Available online at: <http://www.legislation.govt.nz/act/public/2016/0044/latest/DLM6488753.html>

⁹⁴ Available online at: <http://www.legislation.govt.nz/act/public/2016/0044/latest/DLM6488756.html>

⁹⁵ Available online at: <http://www.legislation.govt.nz/act/public/2016/0044/latest/DLM6488750.html>

⁹⁶ Available online at: <http://www.legislation.govt.nz/act/public/2016/0044/latest/DLM6488737.html>

In addition to these trial procedures, it is interesting to note that police in New Zealand are using video recordings from their cell phones as statements for victims in domestic violence situations⁹⁷. This allows victims to give their statements via the recording instead of completing a written statement with the police. The amendment permitting the changes came into effect on 9 January 2017⁹⁸.

Malaysia

Malaysia's Criminal Procedure (Amendment) Act 2006 includes provisions for video conferencing and live TV link measures in Act 593, Section 272B. This allows for a victim or witness other than the accused to give either video or live evidence through a TV link in any trial or inquiry if it is in the interest of justice to do so.⁹⁹ Legislation in Malaysia has not outlined any specific definition for the term 'vulnerable witness' or 'vulnerability', but those eligible for special provisions include child victims and witnesses, victims and witnesses of sexual offences and sexual abuse, victims and witnesses of domestic violence, and victims and witnesses with mental impairments and/or physical disabilities.¹⁰⁰ There is no provision in the legislation for the admission of pre-recorded evidence.

III Vulnerable Witnesses: Analysis of Special Measures in Ireland

The Primacy of Oral Evidence in our Criminal Justice System

Great importance is attached to oral testimony in this jurisdiction, as in several others based on the common law. Evidence not presented in person at the trial (albeit with some exceptions) is considered hearsay and inadmissible at trial. The value of viva voce or "live" evidence to the defence lies in the opportunity to observe a witness's demeanour and tone and the ability to confront the witness during cross-examination.¹⁰¹ In the words of John H. Wigmore, "Cross-examination is the greatest legal engine ever invented for the discovery of truth."¹⁰² However, modern psychology has shown that this is not necessarily the case¹⁰³. To give one example: child witnesses, whose vocabulary and comprehension are less well developed than those of adult witnesses, are particularly vulnerable to the use of complicated or adult language, sentence tags (ex: He didn't do that, did he?) and double negatives that make cross-examination hard to manage. If lawyers do not use age-appropriate expressions and short, simple,

⁹⁷ See this online article: <https://nzfvc.org.nz/news/police-trial-video-recording-victim-statements>

⁹⁸ Note that evidence recorded by body cam has also been used successfully in Northern Ireland at first instance, and the use of body cams in this country is now being explored by An Garda Síochána, in relation to crimes of domestic violence,

⁹⁹ Criminal Procedure Code, Act 593, Section 272B

¹⁰⁰Special Measures' Applications for Victims and Vulnerable Intimidated Witnesses in Malaysia: New Frontiers to Right to a Fair Trial?, pages 6-9, see web-link here: http://repo.uum.edu.my/16029/1/2014_6.pdf

¹⁰¹ Scottish Court Service, Evidence and Procedure Review Report, March 2015, page 40

¹⁰² *Lilly v. Virginia*, 527 U.S. 116 (1999)

¹⁰³ See, for instance, M.R. Kebbell, C. Hatton and S.D. Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions are Asked and what Influence do they have?' (2004) 9 *Legal and Criminological Psychology* 23.

unambiguous sentences, there is a real risk that these witnesses may not be able to give their best evidence, especially when their case is being challenged, as it must be, in cross-examination.

Cross-examination may also be used to attach great weight to minor inconsistencies between two or more accounts of the same incident¹⁰⁴. Cognitive psychology has shown that minor inconsistencies are normal after a significant period of time, and these do not necessarily indicate that a witness is lying¹⁰⁵.

Adult victims of sexual offences are likewise vulnerable within the traditional trial procedures and should be seen as inherently in need of special measures. Cross-examination is the critical point of concern for victims of sexual offences because it is the point where they are at the greatest risk of re-traumatisation. It is still the case that some cross-examinations in sexual cases are based on outdated, unfounded but pervasive and extremely prejudicial myths about rape and sexual assault.

The role of cross-examination of complainants in sexual cases has been well summarised in this extract from a recent academic journal article by Sarah Zydervelt and her colleagues:¹⁰⁶

"The fundamental goal of cross-examination is to discredit both the evidence and the person providing it while eliciting information that is helpful to one's case. Because cross-examination by definition involves testing a witness's credibility and reliability, some of the difficulties that rape complainants experience may be inherent in the process. Indeed, cross-examination is not a pleasant process for any witness, including expert witnesses and police officers (Brereton 1997; Ellison 1998; Brodsky 2004). Nevertheless, in an adversarial trial the defendant is presumed innocent, and defence lawyers have a duty to defend their clients by discrediting the evidence against them, whatever form that evidence takes. Because a complainant's evidence in rape cases is central to establishing the alleged offending, defence lawyers' main - and often only - avenue of defence is to discredit the complainant's account through cross-examination (Temkin 2000). But there are various ways of challenging a complainant's evidence. Asking a complainant why two aspects of her account contradict each other, for example, would be considered by many to be a valid tactic. On the other hand, many would consider asking the complainant why she didn't physically resist the defendant to be an unreasonable tactic. Inherent in these latter types of questions are a number of myths about the context, causes and consequences of sexual assault - often referred to as rape myths (Burt 1980; Costin 1985; Lonsway and Fitzgerald 1994)."

The right of the accused to a fair trial

When discussing special measures for vulnerable victims and witnesses, it is imperative to recognize that the right of the accused to a fair trial is **fundamental**. Article 38(1) of the Irish Constitution states that no person shall be tried on any criminal charge save in due course of law. Court interpretations of the

¹⁰⁴ L. Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 21(3) *Legal Studies* 353.

¹⁰⁵ G.H. Gudjonsson and J. Gunn, 'The Competence and Reliability of a Witness in a Criminal Court' (1982) 141 *British Journal of Psychiatry* 624.

¹⁰⁶ "Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?" (2017) 57 *British J. Criminol.* 551-69, at 553, by Sarah Zydervelt, Rachel Zajac, Andy Kaladelfos and Nina Westera

Constitution since 1937 have held that where there is a conflict the rights of the accused should be regarded as paramount over the rights of others. Article 6(1) of the European Convention on Human Rights guarantees the right to a fair trial and reinforces this emphasis on the rights of the accused. However, the fundamental nature and paramountcy of this right do not prevent our courts from recognizing that victims have also got constitutional rights. See the judgement of HHJ Peter Charleton in the Court of Appeal rape case of *DPP vs O'R*¹⁰⁷, at paragraph 31: "A woman has a constitutional right to her bodily integrity", and later at paragraph 47: "The crime of rape is about the right of a woman to be protected against a gross violation of her mental and physical integrity. Those rights are protected by the Constitution as part of the collection of rights which the State guarantees to respect and, specifically by making rape an offence, to defend and vindicate as far as practicable"¹⁰⁸.

Indeed, the notion of a State-orientated obligation to afford greater visibility to, and increased accommodation of, crime victims within the legal process on account of their personal, private rights is a theory that has gained considerable support within the courts of Strasbourg in recent years. In *MC v Bulgaria*,¹⁰⁹ for instance, the European Court of Human Rights ruled that the respondent State failed to fulfil its obligations under the European Convention of Human Rights "to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse".¹¹⁰ Significantly, in arriving at this conclusion, the Strasbourg court was heavily influenced by the respective requirements of Article 3 and Article 8 of the Convention which, together, were viewed by the Court as creating a positive obligation on all Member States to enact and apply criminal laws which effectively punish rape.

EU Directive 2012/29 establishing minimum standards on the rights, supports, and protection of victims of crime and replacing Council Framework Decision 2001/220/RHA as well as the Criminal Justice (Victims of Crime) Act 2017 demonstrate that it is legally possible to bolster victim supports in ways that do not threaten the rights of the accused. Our view is that the process of pre-recording both direct and cross-examinations does not interfere with the right of an accused person to a fair trial, as long as defence lawyers have sufficient time to prepare for these examinations, and provided also that resources are allocated to ensure good quality sound and picture. In this we are supported by dicta in the House of Lords judgment in the case of *R v Camberwell Youth Court, ex parte D/G [2005] UKHL 4*¹¹¹. This case concerned the appropriate use of special measures for witnesses under 17, under Section 21 of the Youth Justice and Criminal Evidence Act 1999. It is clear from the judgement that in the view of that Court, there is no

¹⁰⁷ *DPP vs O'R* [2016] IESC 64. Available online through this web-link:

<http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/ef35c763b26550ef802580680048810c?OpenDocument>

¹⁰⁸ For similar judicial reasoning, see *B v DPP* [1997] 3 IR 140, 196, *Scully v DPP* [2005] 1 IR 242, 249 and *People (DPP) v Kelly* [2006] IESC 20. See also, Balance in the Criminal Law Review Group, *Final Report of the Balance in the Criminal Law Review Group* (Stationery Office 2007) 3.

¹⁰⁹ *MC v Bulgaria* (2005) 40 EHRR 20.

¹¹⁰ *MC v Bulgaria* (2005) 40 EHRR 20, para. 185.

¹¹¹ Available online at: <https://publications.parliament.uk/pa/ld200405/ldjudgmt/jd050127/camb-1.htm>

necessity for the witness to be in the same room as the accused when giving evidence, or for the witness to give his or her evidence at trial. As Lord Rodger concludes at paragraph 15 of the judgement: "what matters as *Kostovski v Netherlands* [one of a series of European cases discussed in the judgement] shows, is that the defence should have a proper opportunity to challenge and question the witness against the accused."¹¹²

In Ireland, the absence of a right to face-to-face confrontation has been confirmed as a matter of constitutional law. In harmony with the approach of Lord Roger in *R v Camberwell Youth Court, ex parte D/G [2005] UKHL 4*¹¹³, and the approach of the European Court of Human Rights in *Kostovski v Netherlands* (1989) 12 EHRR 434, the Irish judiciary have drawn a sharp distinction between the right to cross-examine on the one hand - which is a constituent element of a fair trial under Article 38.1 of Bunreacht na hÉireann - and the opportunity to physically confront a witness on the other which is devoid of any substantive legal character. The unavailability of the former right was confirmed in *State (Healy) v Donoghue*¹¹⁴ whereas the discretionary nature of the latter was confirmed in the cases of *White v Ireland*¹¹⁵ and *Donnelly v Ireland*¹¹⁶.

Vulnerable Witnesses: Prolonged Delay between Complaint and Hearing

Vulnerable witnesses are particularly at risk of re-traumatisation during traditional trial direct evidence and cross-examination procedures. The current trial system in Ireland results in long delays for victims and other witnesses between the conduct complained of and giving evidence. Many trials do not take place for over two years following the initial complaint. This hinders victims' ability to heal and move on with their lives, and is stressful in itself. Prolonged delay makes it extremely difficult for vulnerable victims, and other witnesses, to give a coherent oral account of what happened. Delay is similarly damaging to an accused person who seeks to challenge an account given by such a witness.

There is much that can be done about this. One example, explored in this report, is the pre-recording of both direct evidence and cross-examination. This allows vulnerable witnesses to deliver more accurate and detailed accounts of events closer in time to the original complaint. If, as now occurs in other jurisdictions, cross-examination is pre-recorded in certain cases, this can circumvent the need for certain witnesses to be present in an intimidating and formal courtroom setting in the presence of the accused, and can result in speedier and more efficient trials. It will very likely to result in better evidence being obtained. If enacted with appropriate protection for the accused, such measures will not affect his/her right to a fair trial.

¹¹² See also, *SN v Sweden* (2002) ECHR 546 where it was held that Article 6(3)(d) of the Convention could not be construed as requiring in all cases that questions be put directly by the accused or his or her defence counsel through cross-examination or other means.

¹¹³ Available online at: <https://publications.parliament.uk/pa/ld200405/ldjudgmt/jd050127/camb-1.htm>

¹¹⁴ [1976] IR 325.

¹¹⁵ [1995] 1 IR 268.

¹¹⁶ [1998] 1 IR 321.

Legislation on Special Measures for Vulnerable Witnesses:**Criminal Evidence Act of 1992:**

Part III of Ireland’s Criminal Evidence Act of 1992 (CEA 1992) outlines measures to protect some vulnerable victims and witnesses in criminal courts. Part III applies to an offence that is a sexual offence, an offence involving violence or the threat of violence to a person, an offence under section 3, 4, 5, or 6 of the Child Trafficking and Pornography Act 1998, an offence under section 2, 4, or 7 of the Criminal Law (Human Trafficking) Act 2008, or an offence of attempting or conspiring to commit, or aiding or abetting, counselling, procuring or inciting the commission of, any of these offences.

It is important to note that Part III sections apply only to **victims and other witnesses** and not to accused persons – this is not the case in Scotland, for example.

The relevant sections are as follows:

- Section 13 – Evidence through television link
- Section 14 – Evidence through intermediary
- *Section 14A- Placement of screen etc. for giving of evidence¹¹⁷*
- *Section 14B-Wigs and Gowns*
- *Section 14C-Protection against cross-examination by accused*
- Section 15 – [Procedural only]
- Section 16 – Video recording as evidence at trial
- Section 19 – Application of Part III to persons with “mental disorder [etc]”.
- *Section 19A – Disclosure of third party records in certain trials*

NOTE 1: The discussion of each special measure set out below is in two parts:

A. the current position, before either the Criminal Law (Sexual Offences) Act 2017 or the Criminal Justice (Victims of Crime) Act 2017 takes full effect; and

B. the position taking into account under each heading the law as it will be, when amended by the combined effect of Part 6 of the Criminal Law (Sexual Offences) Act 2017 when it is commenced at the end of 2017, and Parts 3 and 4 of the CJVoCA 2017, due for commencement towards the end of this year. Further changes to the CEA 1992 which are envisaged by the forthcoming Domestic Violence Bill 2017 (DV Bill) are also identified under each heading, as they are presented in the Bill as passed by Seanad Éireann¹¹⁸. Special measures under the DV Bill in civil proceedings are also mentioned under a separate heading below.

NOTE 2: Once the CJVoCA Parts 3 and 4 come into full effect, the Court may be addressed on special measures based on the contents of the assessment report on the victim’s specific protection needs, which will be made available to the prosecutor by the investigator (member of An Garda Síochána or Garda

¹¹⁷ The Sections in italics are entirely new Sections, which will be introduced by CLSOA 2017 and CJVoCA 2017 (none of which is yet in force as at 16 March 2018)

¹¹⁸ <http://www.oireachtas.ie/documents/bills28/bills/2017/1317/b13a17s.pdf> (as at 30 November 2017)

Ombudsman Commission) who prepared it in accordance with Section 15 of the CJVoCA 2017. However, the findings of the assessment report are not binding on either the Court or the prosecutor. The prosecuting lawyer is under no obligation to rely on the findings of the report in making any application for special measure(s), or to bring it to the attention of the Court. Neither is the Court in any way bound to read the assessment report or to make orders in line with its findings.

Special measures for victims and witnesses under 18 years of age

A. Live Television Link (Video-Link): Under **Section 13**, victims and witnesses under 18 years of age may give evidence through a live television link in any proceedings for a “an offence to which this Part applies” from within or outside Ireland, unless the court sees good reason to the contrary, and the evidence will be recorded. Thus, there is a presumption in favour of allowing video-link evidence for this category of witnesses. An “offence to which this Part applies” includes: sexual offences, those involving the use or threat of violence, certain specified offences under both the Child Trafficking and Pornography Act 1998 and the Criminal Justice (Human Trafficking) Act 2008, and inchoate versions of any of these. The section does not set out any criteria which must be used to determine whether there is “good reason” to overcome the presumption in favour of allowing the use of video-link for witnesses of relevant offences who are under 18, and it does not set out the procedure for making application for this special measure either.

B. Live Television Link (Video-Link): Under **Section 13 as it will be amended**, victims and witnesses under 18 years of age may still give evidence through a live television link in any proceedings for a “relevant offence” from within or outside Ireland, unless the court sees good reason to the contrary, and the evidence will be recorded. Thus, there is still a presumption in favour of allowing video-link evidence for this category of witnesses. “A relevant offence” is defined in the same way as the previous “offence to which this Part applies, as a sexual offence, one involving violence or the threat of violence against a person, one of a number of specified offences under the Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking) Act 2008, or any inchoate version of any one of these offences.

Victims under 18 may also be granted leave under this Section to give evidence by video-link relating to an offence other than a relevant one, subject to the provisions of Section 14AA, which obliges the Court to take into account the need to protect the victim from “secondary and repeat victimisation, intimidation or retaliation, with regard to both the “nature and circumstances of the case” and the “personal characteristics” of the victim.

A and B: Finally, it should be noted that while the presumption operates to allow video-link evidence to be given by any witness involved in proceedings for a relevant offence who is under 18, there is no such presumption in favour of video-link evidence where the offence happened when the young person was still under 18 but is over 18 by the time the case comes to court.

A. Use of Intermediaries: **Section 14** provides that when a victim of a relevant offence under 18 years of age is giving, or is to give, evidence through a live television link, the judge may direct that questions may be put to the witness through an intermediary in a manner which is appropriate for the age “and mental condition” of the witness, if “the interests of justice” so require. However,

there is no mention of the responses given by the person under 18 being put to the judge and jury by the intermediary, and nor is there any detail as to the procedure through which an intermediary should be selected, or as to how and when the application should be made to use one, except that it is specified that either the prosecutor OR the accused may apply for leave to use an intermediary, and that the intermediary used must be one who, in the opinion of the court, is “competent to act as such”.

B. Use of Intermediaries: Section 14 is unchanged from the previous text, except that “relevant offence” is substituted for “an offence to which this Part applies” but the meaning of each expression is the same. It will also be possible under CJVoCA 2017 for **victims under 18** to benefit from the use of intermediaries if the offence concerned is “other than a relevant offence”, subject to the new Section 14AA, which obliges the Court to take into account the need to protect the victim from “secondary and repeat victimisation, intimidation or retaliation, with regard to both the “nature and circumstances of the case” and the “personal characteristics” of the victim. The use of intermediaries is not extended to the witness’s or victim’s responses, and the procedure in relation to the selection of and/or application to use an intermediary, is not further specified.

B only: Screens: A New Special Measure: Section 14A provides that when a person under 18 is giving evidence other than through a live television link, the court may direct that the evidence be given from behind a screen or similar device to prevent the person from seeing the accused. The person can still see and hear and be seen and heard by the judge and jury, if there is one, the legal representatives for all parties, and any appointed interpreter or intermediary. This measure applies to victims and witnesses under 18 who are to give evidence in proceedings for a relevant offence, and to **victims under 18 only** who are giving evidence in proceedings for an offence “other than a relevant one”.

A. Absence of Wigs and Gowns: Section 13(3) does not allow either judges or advocates to wear wigs or gowns, while any witness is giving evidence by video-link, unless they are doing so with the assistance of an intermediary. In practice, judges and advocates do not wear wigs and gowns when a child victim or witness is in court or in the video-link room;

B. Section 14B provides that when the victim or witness **under 18 years of age** is giving evidence, neither the judge nor the barrister or solicitor involved in the witness examination shall wear a wig or gown, regardless of whether evidence is being given by video-link or not, and regardless of whether an intermediary is being used or not.

B only: Protection against cross-examination by accused – Section 14C says that the Court “shall” make an order preventing the accused from cross-examining any victim or other witness under 18 in person, unless its view is that “the interests of justice require the accused to conduct the cross-examination personally”. Thus, a presumption against cross-examination in person is created for this category of witness, and this is in relation to any offence “to which this Part applies”. The Section goes into detail as to arrangements to be made for the accused person to have legal representation (to put the cross-examination questions on his behalf) and gives the Court the power to appoint a legal representative, if the accused does not find one him/herself.

A. Pre-recorded Statements as Evidence: Under **Section 16**, victims under 14 years of age will be able to submit 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) as evidence at trial in relation to any offence and witnesses under 18 other than an accused, may submit a video recording of any statement made during an interview with a member of An Garda Síochána in relation to any offence under Section 3 (1), (2), or (3) of the Child Trafficking and Pornography Act 1998 or Section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008. This will be permitted so long as the person is available at trial for cross-examination. A video recording can be excluded if the court finds it is in the interests of justice for it not to be admitted, and the section does provide some guidance as to where the interests of justice lie and in relation to the weight to be attached to the video-recording. It often happens that the admissibility of pre-recordings is strongly contested by the defence on the basis that the recording was made in breach of the Garda Good Practice Guidelines (2003), however not always with success. See for instance *DPP vs TV* [2017]¹¹⁹, in which the Court of Appeal refused to allow the appeal on the grounds that there had been substantial breaches of the Guidelines which had resulted in incurable unfairness to the appellant. On the related issue of the reliability of child witnesses’ evidence, pre-recorded or live, there is some persuasive authority for the view that the reliability and accuracy of their evidence should be assessed differently from that of adults. See the leading case of *R v Krezolek*¹²⁰, an English Court of Appeal case in which the accuracy and reliability of pre-recorded interviews of a child witness was in issue. These extracts from the judgement of Lady Justice Hallett at paragraphs 45, 46 and 47 sets out the Court’s position clearly:

“[45...] The judge’s focus should be primarily on the interview and whether its contents are likely to be accurate and reliable[....]”

46. Mr Lambert’s general argument as it seems to us, is based on a false premise, namely that the accounts of children can be subjected to the same kind of forensic analysis as that sometimes applied to adult witnesses. That is not the modern approach: see *Barker* [2010] EWCA Crim 4. Child witnesses are not to be treated as if they are miniature adults. Allowance must be made for the fact that they may well have the kind of difficulties the intermediary observed in A, but that does not render their evidence unreliable and it does not turn them into an incompetent witness.

47. A was not only a competent witness, she had given a perfectly lucid account on the central issues in the case. [.....] Few eye witnesses (whatever their age) tell a completely accurate and reliable story; that does not mean it would be in the interests of justice to exclude the evidence as inaccurate and unreliable. The question “could a reasonable jury properly directed be sure that a witness has given a credible and accurate account on the video tape” does not mean “could a reasonable jury properly directed be sure that every aspect of the account is entirely credible and accurate”.

48. As the judge directed the jury here, the question for them was whether A’s evidence was credible and accurate when it came to the essentials of the prosecution case against the accused. Such a direction was neither wrong, nor insufficient”

¹¹⁹ *DPP vs TV* [2017] IECA 200.

¹²⁰ [2014]EWCA 2782

- B. Pre-recorded Statements as Evidence: Under Section 16, victims of any crime** under 18 years of age will be able to submit 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, as evidence at trial in relation to any offence. This will be permitted, as previously, as long as the person is available at trial for cross-examination, and a video recording can be excluded if the court finds it is not in the interests of justice for it to be admitted. The same guidance applies as before in deciding where the interests of justice lie and in relation to the weight to be attached to the video-recording.

Special measures for victims and witnesses over 18 years of age

- A. Video-link Evidence – Section 13:** Victims and witnesses over the age of 18 and engaged in proceedings for any “offence to which this Part applies” as defined in CEA Part III, Section 12, may give evidence through a live television link “with the leave of the court” from inside or outside the State, under **Section 13 (Evidence by Video-Link)**. An “offence to which this Part applies” is defined as a sexual offence, one involving violence or threat of violence to a person, one of a number of specified offences under Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking) Act 2008, or an inchoate offence based on any of these. This has happened only rarely in practice, to date.
- B. Video-Link Evidence – Section 13:** The new provision is very similar to the old one in relation to victims and witnesses over 18, except that it substitutes “relevant offence” for “an offence to which this Part applies” – but the meaning of both expressions is the same. A “relevant offence” is defined under Section as a sexual offence, one involving violence or threat of violence to a person, one of a number of specified offences under Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking) Act 2008, or an inchoate offence based on any of these.

There is also a new provision under CJVoA 2017 for victims of offences other than relevant ones to give evidence in this way, again with leave from the court, and “subject to [new] Section 14AA”, which obliges the court to take into account the need to protect the victim from “secondary and repeat victimisation, intimidation or retaliation, with regard to the nature and circumstances of the case itself, as well as the personal characteristics of the victim.

The section itself does not set out any criteria or other guidance on the circumstances in which it might be appropriate to direct the use of video-link equipment, for victims and witnesses in relation to the more serious relevant offences. It is silent also on the procedure for making application for such an order. The section is drafted so that any witness of a relevant offence over 18 could benefit from giving evidence by video-link, in theory. In practice, they may be applied inconsistently. As far as we can ascertain, they have not often been made available to victims or other witnesses over 18 who do not have a “mental disorder”, to use the new wording of Section 19 inserted by CJVoCA 2017 (replacing the old “mental handicap”).

It should also be noted that victims who were children at the time of the offence will be considered as adults if they must give evidence over the age of 18, that is, they can only avail of this special measure “with the leave of the court” as there is no presumption that they are entitled to it (as

there is for witnesses under 18). It seems to us that based on practice in other jurisdictions, it is feasible to consider extending the presumption in favour of allowing special measures in the case of this group of witnesses. See Section 22 of the [England and Wales] Youth Justice and Criminal Evidence Act 1999,¹²¹ which allows for the presumption in favour of allowing special measures for child witnesses to be extended to witnesses who were victims of a sexual or other violent offence and made a pre-recorded video statement to the police, while they were still children, but who are over 17 when the case comes to court. It is also worth considering increasing awareness of the difficulties of giving evidence in sexual or other violent cases, particularly those in which a family member is accused – for very young adults in particular, among criminal lawyers and the judiciary through education.

A and B: Intermediaries: There is no provision for any victim or witness over the age of 18 to be allowed to use an intermediary under **Section 14 (Evidence through intermediary)** unless they have a “mental disorder” as outlined in Section 19. However, if the conditions in **Section 14AA** are satisfied, a victim of any crime who is under 18, not just a “relevant offence”, may have an application made on his/her behalf to use an intermediary.

B: Absence of Wigs and Gowns: Wigs or gowns will not be removed under **Section 14B (Wigs and Gowns)** where someone over 18 years is giving evidence, unless they have a “mental disorder” as defined in Section 19.

B only: With regard to the use of screens under **Section 14A (Placement of screen etc for giving of evidence)**, a victim of any offence, who is over the age of 18, may give evidence with the aid of a screen provided that the court “is satisfied that the interests of justice so require”.

B only: Under **Section 14C (Protection against cross-examination by accused)** the Court may grant an order in respect of a victim of any sexual offence, prohibiting an accused person from cross-examining him/her personally, if the victim/witness is over 18 and is not a person who has a “mental disorder”, unless the Court’s view is that the “interests of justice require the accused to conduct the cross-examination personally”.

A and B: Pre-recording of Evidence: Direct evidence which is pre-recorded cannot stand as evidence at trial under **Section 16 (Video-recording as evidence at trial)** for victims and other witnesses above 18 years of age unless they are deemed to have a “mental disorder” under Section 19.

NOTE: Pre-recorded **cross-examination evidence** is not admissible in any circumstances and not provided for either under current provisions or under the incoming Part 6 of the CLSOA 2017 (not yet in force).

Application of Certain Special Measures under CEA 1992 to Victims and Witnesses with a “Mental Disorder” – Section 19

As amended by CJVoA 2017, this Section provides that certain special measures applicable to victims and witnesses under 18 (other than the accused), shall also apply to victims and witnesses with a “mental

¹²¹ Available through this web-link: <http://www.legislation.gov.uk/ukpga/1999/23/section/22>

disorder” as defined in Section 5 Criminal Justice Act 1993 as amended (namely those in Sections 14, 14B, 15 and 16) over the age of 18.

Section 19A – Disclosure of third party records in certain trials

This special measure, designed to restrict the disclosure of counselling records in proceedings for sexual offences, was introduced by Section 39 of CLSOA 2017 (not yet in force). It provides for a procedure through which victims and holders of third party records may object to the disclosure of all or part of any counselling records, and is available in respect of all victims, regardless of age or mental capacity. This section breaks new ground, as it gives an express right to be heard on disclosure both to victims and to third parties. It is hoped that it will go at least some way to ensure that irrelevant and prejudicial material is not put before a jury. Unfortunately, it is expressly confined to “counsellors’ records” and not to records from health professionals generally, which form a large part of the records routinely sought from third parties in sexual offence cases.

Application of Certain Special Measures under CEA 1992 to Breach of a Domestic Violence Act order (Section 33 in the DV Bill)

Section 34 of the DV Bill provides that special measures under CEA 1992, including evidence by video-link, use of intermediaries and application of these measures to those with a mental disorder, will apply with any necessary modifications, to proceedings in respect of section 33 (breach) offences.

Other Special Measures for Vulnerable Witnesses besides those in CEA 1992 as amended:

Anonymity of Children: Children Act 2001 Section 252¹²² provides that no identifying information or image of any child who is a victim or other witness in proceedings for an offence against a child, may be published or broadcast. The judge may only digress from this rule if s/he is satisfied that this is appropriate in the best interests of the child.

Criminal Justice (Victims of Crime) Act 2017 also includes a power of the court to make directions preventing the introduction of evidence relating to, or cross-examination on, the private life of a victim on matters “not related to the offence” (Section 21), if the “nature and circumstances of the case” indicate a need to protect the victim from “secondary or repeat victimisation, intimidation or retaliation”, and it would not be contrary to the interests of justice to do so.

Further, **Criminal Justice (Victims of Crime) Act 2017** includes a power of the court to make directions excluding the public, or a named person(s), from the court, again if the “nature and circumstances of the case” indicate a need to protect the victim from “secondary or repeat victimisation, intimidation or retaliation”, and it would not be contrary to the interests of justice to make such an order (Section 20).

Domestic Violence Bill as passed by Seanad Éireann¹²³

¹²² Available online through this web-link:

<http://www.irishstatutebook.ie/eli/2001/act/24/section/252/enacted/en/html#sec252>

¹²³ Available online through this web-link: <http://www.oireachtas.ie/documents/bills28/bills/2017/1317/b13b17s.pdf>

This Bill breaks some new ground insofar as special measures are concerned, although of course it may still be changed before it is passed by Dáil Éireann. In addition to the measures available in respect of Section 33 proceedings, (breach of a Domestic Violence Act order), it introduces some special measures in respect of DVA proceedings themselves, that is, in **civil** proceedings. These measures include: restrictions on personal cross-examination (Section 17), ability to give evidence by video-link in certain circumstances (Section 25), procedure through which the views of any child affected may be determined (Section 27), and a right to be accompanied in court (Section 26).

Court Accompaniment

It is important to mention that one of the most commonly used and helpful procedures in sexual offence trials, in other criminal trials, and in civil proceedings in respect of Domestic Violence Act orders, is court accompaniment, either by a close friend or family member or a trained professional. Support from court accompaniment can greatly lower stress and uncertainty for victims and other witnesses from as early as the reporting stage through to the conclusion of a case. This has been recognised in both the CJVoCA 2017 and the DV Bill, which provide for court accompaniment by a person of the victim’s choice, including by a support worker from a victim support organisation.

Impact of Criminal Justice (Victims of Crime) Act 2017 on Special Measures:

This Act transposes the relevant Articles in EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Directive 2001/220/JHA¹²⁴.

Section 15, now in force, sets out the procedure through which victims of crime will be assessed by investigators to ascertain their specific protection needs, having regard to a detailed list of factors and circumstances. This provision is innovative, as for the first time, victims’ specific protection needs will be assessed **before** the criminal justice process begins and **outside** the court room. A report on each victim will be prepared on both protection measures (for example, applications for remands in custody or for bail with appropriate conditions), **and** special measures, both during investigation and during court proceedings. With regard to special measures during investigation: these are particularly relevant to victims of sexual crime and other crimes of violence in a close relationship. They include the right to be interviewed by an investigator of the same sex, on request, and the right to be interviewed by investigators specially trained for the purpose. The special measures in court proceedings may include any of those outlined above. Note that while there is an obligation on investigators to prepare the report and ensure that a copy of it is given to the prosecuting agency (An Garda Síochána or DPP), the measures recommended therein are not binding on either the prosecutor or the court. In addition to Specialist Interviewers who are trained to interview persons in accordance with section 16(1)(b) of the Criminal Evidence Act 1992, members of An Garda Síochána are trained as Advanced Interviewers (Level III). Those interviewers are trained in accordance with the Garda Síochána Interview Model specifically in relation to serious and complex crime, which includes sexual crime, and to interview vulnerable interview subjects

¹²⁴ See web-link in footnote to page 6 above

(whether victims, witnesses or suspects) whose circumstances do not meet the criteria provided for in respect of section 16(1)(b) interviews.

Summary and Comparison: Ireland and other jurisdictions

It is now commonplace to use video-link and pre-recorded statements in certain cases. Within the last few months we have joined most common law and civil law systems in providing for further court aids, such as screens, in appropriate cases. While Ireland has kept pace with these developments to some extent, we consider that more action should be taken to deploy some of the measures already enacted but largely unused due to resource and education issues, such as intermediaries.

The use of special measures, as they are known in England and Wales, vary in other jurisdictions in the extent of cases involved. For instance, in some US States, only children are protected (e.g. California and New York) and in other jurisdictions those deemed to be vulnerable witnesses receive more support and are more protected than in our system, such as England and Wales.

The principal improvement for vulnerable witnesses in the trial system in other jurisdictions has been the pre-recording of their evidence, both direct and cross-examination. The system of pre-recording is now used in most of Australia for both examination in chief and cross-examination of child witnesses, and is routine now in England and Wales for examinations in chief of vulnerable witnesses (as defined in their legislation). Pre-recording not only alleviates witnesses' concerns and helps them to deal with attendant trauma more quickly and more effectively, but it also improves the quality of evidence available within the constitutional framework of the criminal trial. The report on the English pilot programme on pre-recorded cross-examination concluded that sufficient resources must be in place to ensure that the sound and picture quality of the recording is good. The defence must be given enough notice and disclosure to ensure that an informed, effective and appropriate cross-examination can take place. The conclusion in the UK, that other cases will suffer delays as vulnerable witness cases are prioritised, points to the kind of effort involved. This should be acknowledged so as not to be unrealistic about the proposals made.

We note with great interest that the current Minister for Children and Youth Affairs, Katherine Zappone, is now examining some models similar to the Barnehus one, in two common-law jurisdictions (State of New York and England & Wales). Her stated objective is to ensure effective co-ordination between police and child protection investigations, so that (inter alia) child victims of abuse are not traumatized by having to repeat what happened to them over and over again. We also note that according to Dr Geoffrey Shannon, an independent expert who is Special Rapporteur on Child Protection to the Oireachtas, this co-ordinated approach "has increased successful prosecution of child abuse perpetrators"¹²⁵. Other advantages of this system, according to Dr Shannon, are much higher rates of forensic medical examinations and of referrals to mental health treatment: "An indirect benefit of the CAC model sees child victims of sexual abuse receiving services at CACs as four times more likely to receive forensic medical examinations and referral for mental

¹²⁵ See Irish Times article dated 28th December 2017 and available through this web-link: <https://www.irishtimes.com/news/politics/zappone-to-open-specialist-child-support-centres-1.3339235>. The quotation is from the Section 12 Audit Report by Dr Shannon and others (2017), at pages 268-9

health treatment, when compared to non-CAC approaches"¹²⁶. He also cites evidence of cost savings as a result of using the CAC approach¹²⁷ and concludes by referring to the ongoing Child House (similar to Barnehus) pilot now running in England and Wales¹²⁸.

In another new and promising development which is attracting interest in this country, we draw attention to the Court Dogs initiative now operating in the US:

Legislation in Virginia, USA, enables "court house dogs" to be used. A dog is brought into court with the witness in appropriate circumstances (including the behaviour of the dog!) and the jury is advised as to the animal's presence. The dog is kept close to the witness but out of sight of the jury.

The dog is seen as a communication aid and is used due to the calming presence of the animal. A less anxious person is better able to communicate. The most recent legislation from Virginia on this accommodation includes the defendant also being able to request this assistance as well as a crime victim/witness, which is in line with this group's thinking on the importance of obtaining the best evidence from all and vindicating the constitutional rights of the accused person¹²⁹.

We further note that An Garda Síochána has already taken some steps in this direction. There are seven dedicated interview suites (an eighth is almost ready for use in the Northern Region) throughout Ireland that are child and family friendly. They are located on sites not associated with Garda stations, with no markings to identify their purpose. The suites are used primarily for the purpose of interviewing children and persons with a "mental disorder" pursuant to section 16(1)(b) of the Criminal Evidence Act 1992. On occasion they are used by Garda advanced interviewers for adult victims of rape. Some advanced interviewers are trained in the Enhanced Cognitive Interview, which encourages and facilitates an uninterrupted narrative from the interview subject. As with the practice for attending SATU's, Gardaí are required to attend these suites in plain clothes and in unmarked cars to avoid the purpose of the suites being identified.

IV Conclusions and Recommendations

Conclusions:

1. **Our criminal justice system is based on the premise that oral evidence at trial is the best evidence which can be obtained**, in all circumstances and regardless of the difficulty of giving live evidence in court for many witnesses (especially, but not confined to, the most vulnerable witnesses). There are no empirical data to support the conclusion that live evidence is the best evidence, particularly since the

¹²⁶ See footnote 26 above

¹²⁷ See footnote 26 above

¹²⁸ Described under England and Wales heading at Chapter II above

¹²⁹ See further <http://lis.virginia.gov/cgi-bin/legp604.exe?181+ful+SB420ER>

advent of high resolution video and video link solutions. In our view, it is time that the limitations of this approach were addressed.

2. **This Group strongly endorses the extension of such special measures to vulnerable accused persons.** It seems to us that this is right in principle, because vulnerability is not confined to prosecution witnesses. It also seems to us appropriate based on the experience in Scotland: the existence there of special measures for vulnerable accused persons has done much to reassure defence lawyers on two points: (a) that the courts will treat their more vulnerable clients fairly and (b) that their clients do not need to fear that the use of special measures for vulnerable prosecution witnesses, must lead to these witnesses having an unfair advantage over the accused.
3. **Considerable harm may be done to vulnerable witnesses** if they must give evidence without the benefit of appropriate special measures;
4. **Better support for vulnerable witnesses is not incompatible with the right of the accused to a fair trial¹³⁰.** As noted above, we recommend support for vulnerable accused persons insofar as this is compatible with their right to a fair trial e.g. an accused person may require special measures if giving evidence. It is possible to safeguard the rights of accused persons, while simultaneously reducing the risk of further harm to vulnerable witnesses and obtaining the best evidence for the tribunal of fact, whether that is a judge or a jury.
5. **Information must be presented simply and unambiguously for child witnesses, whose understanding and range of expressions may be limited.** This means avoiding jargon, technical, academic or simply “adult only” language, complex questions with more than one part, comments (rather than questions), questions with tags, double negatives, and so on. Similar considerations apply to witnesses who have an intellectual or learning disability. Vulnerable witnesses of any age who find it easier to express themselves otherwise than in words should be facilitated to do so where possible and appropriate, by the use of dolls, simple pictures, and so on.
6. **Much has been done to improve the number and range of special measures which will soon be available to vulnerable witnesses both during the investigative phase and during court proceedings.** Since the decision was made in 2012 to opt in to and transpose the EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime (and replacing Council Framework Decision 2001/220/JHA¹³¹), significant progress has been made. In 2017, both the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017 were enacted. Both statutes expanded the range of special measures available to assist victims of crime, and laid particular stress on providing enhanced measures for victims of crime under the age of 18. The former includes some new measures particular to victims of sexual violence, while the latter represents a radical overhaul of the Criminal Evidence Act 1992, providing

¹³⁰ See, A. Cusack, ‘Victims of Crime with Intellectual Disabilities and Ireland’s Adversarial Trial: Some Ontological, Procedural and Attitudinal Concerns’ Northern Ireland Legal Quarterly (2017) 68(4): 433.

¹³¹ See footnote to page 25 for web-link to full text of Directive

for an assessment of each victim’s specific protection needs by investigators before a formal statement of complaint is taken. In recent years, much has also been done to provide training on victims’ issues to lawyers, judges, members of An Garda Síochána, staff in the DPP’s office, the Courts Service, and related agencies.

7. **Certain special measures, such as the use of intermediaries, should be extended to victims who are not under age and do not have a mental disorder as defined by CJVoCA 2017.** These include people who suffer from conditions such as autism, which do not come under the definition of “mental disorder” but nevertheless have a serious impact on their ability to participate fully in criminal justice proceedings. As noted above, the measures should also be extended to vulnerable accused persons.
8. **Two factors which are central to victim attrition from the criminal justice process are lengthy delays before proceedings are determined and the fear of being subjected to oppressive cross-examination.** While both issues can be addressed, it is important to note that no special measures will ever completely eradicate the fear of reliving such an event, for victims or for witnesses, and if there is to be a trial at all, this must form part of the process. Two key factors in a fair trial are speed, so that memories are not eroded, and an opportunity for the defence to test the evidence in a meaningful way.
9. **If both the length of delay before trial and the fear of taking part in the criminal justice process itself are reduced, it becomes easier for vulnerable victims and other witnesses to recall and retell what happened to them at trial.** This proposition is regarded as self-evident by forensic and cognitive psychologists, given the weight of evidence demonstrating that memory deteriorates over time, both in terms of level of detail and accuracy of the material, recalled. The concept is also central to the definition of the right of the accused to a fair trial, which includes the right to a trial without undue delay. This recognises the same difficulties regarding deterioration of memory and reliability of evidence.
10. **Delay between reporting and court proceedings is difficult to tackle, being multi-faceted and involving many different individuals and agencies. Therefore, our emphasis is on making the negative effective of the delay less of a disadvantage to the most vulnerable witnesses.** To this end, we put forward the expansion of the use of pre-recorded statements as evidence, and the introduction of pre-recorded cross-examination. This must be underpinned by changes in the law on issue estoppel and related rules of practice to ensure that disclosure and other issues (such as fresh evidence coming to light) can be dealt with fairly and to encourage pre-recorded cross-examination in the case of every trial involving vulnerable witnesses. These safeguards should ensure that the measures remain constitutionally robust.
11. **There are gaps in existing special measures (including newly enacted and forthcoming provisions), with regard to the use of intermediaries:** intermediaries are difficult to find, only questions (not responses) may to be put via intermediaries, and their use is confined to witnesses under 18 and witnesses with a “mental handicap”. We do not, however, have a fixed view that intermediaries should be used directly in every case concerning a child victim; specially trained

investigators and lawyers, with family members if necessary in exceptional cases, will often be a more appropriate solution. However, their expert advice may still be very useful to the court even if they do not act as intermediaries in particular cases. The entire provision of intermediaries to vulnerable victims and witnesses in Ireland should be considered and provision must be made to collect reliable data in this respect.

- 12. There are issues arising with regard to vulnerable witnesses who have communication difficulties but do not have a “mental disorder”, as defined in the CJVoCA 2017.** There is no reason in principle why these witnesses should not benefit from appropriate special measures in Court. See below for specific recommendations in this regard.

Recommendations to Improve the System for Victims of Sexual Violence and other Vulnerable Witnesses:

1. The use of pre-recorded evidence should be increased:

- We recommend that the use of **pre-recorded direct evidence is expanded and that pre-recorded cross-examination is piloted, as has been done successfully in England & Wales.**
- **Pre-recording of direct evidence by specialist Gardaí should be done in as child-friendly a manner as possible.** Specialist Interviewers in An Garda Síochána and Tusla are indeed trained to conduct interviews in as child-friendly a manner as possible. However a review of the Good Practice Guidelines, developed in 2003 (along with related training) may be appropriate to further develop the skills of Garda and Tusla Specialist Interviewers. An Garda Síochána and Tusla are currently working to develop joint interviewing to reduce the need for multiple interviews. In this regard, it should be noted that the Minister for Children and Youth Affairs is also examining various models of child-friendly approaches to interviewing from other jurisdictions, with a view to adapting one or more of them for use here.
- We think that the **facility to have pre-recorded statements introduced as direct evidence** should be made available to witnesses who are identified by members of An Garda Síochána/Garda Ombudsman Commission OR by the Court, as vulnerable, because of the nature of the offence or the circumstances surrounding it, regardless of their age or mental capacity.
- **Pre-recording of direct evidence** has become routine in some other jurisdictions, e.g. Western Australia and England and Wales, to the extent that objections to it on principle have become rare in recent times, and workable solutions, both legal and administrative, have been found to common technical hitches;
- In our view, pre-recording a statement soon after a complaint has been made maximises the potential of the witness to recall, fully and accurately, what happened – to give his or her best evidence **and** it also helps to minimise the risk of secondary traumatisation by reducing exposure to the criminal justice process itself. However, for some very vulnerable witnesses including young children, pre-recording their statement may actually be **extremely distressing** because they have been subjected to filming during the course of the sexual violence and/or or exploitation itself, so it can never be mandatory in every case. This is a matter already considered by Specialist Interviewers. On occasion, for various reasons, complainants who would be entitled to the special

measure of a pre-recorded interview will opt to make a statement as they wish to be heard in court. This factor is already considered by Specialist Interviewers.

- At present, there is no way in which **pre-recorded cross-examination** may be introduced as evidence in court. This means that the witness must still give live evidence months or (more likely) years after the event, when he or she is at the disadvantage of having to recall the event in just as much detail as he or she provided on the pre-recorded statement and in an adversarial setting.
 - **A practical, flexible approach is recommended to overcome the most common difficulties raised elsewhere about pre-recording cross-examination:** there were fears in England & Wales that, for instance, lack of timely disclosure would pose a huge obstacle to effective cross-examination. It was found that while timely and full disclosure was an issue, it was relatively easy to deal with by way of pre-trial directions to prosecutors to ensure that disclosure was made in a timely manner. Recent disquiet in England and Wales regarding the inadequacy of disclosure in criminal cases is a salutary warning to us that this aspect of the criminal justice system must be highlighted and adequately resourced. The very prospect of a second cross-examination in a case of inadequate disclosure makes the point eloquently that this is a significant, and growing, part of the trial process and must be recognised as such. (New evidence coming to light after the initial cross-examination was recorded, was dealt with in the pilot by a second pre-recorded cross-examination).
 - Finally, if **pre-recorded statements** and eventually, **pre-recorded cross-examinations**, are to become a fair and effective substitute for live evidence from vulnerable witnesses, it is vital that their introduction is underpinned by
 - **new statutory provisions** mandating and regulating pre-trial hearings, in which pre-trial rulings are binding on trial judges, **and**
 - **new statutory provisions** mandating and regulating disclosure obligations¹³², primarily through these pre-trial hearings. See also Recommendation 4 below.
- 2. Special Measures for vulnerable witnesses** should also be available to vulnerable **accused persons** giving evidence at trial, to include those who are under 18, those with a “mental disorder”, and those with communication difficulties (howsoever caused) which impair significantly their ability to participate fully in the criminal proceedings. The principled, and pragmatic, rationale for this recommendation is set out in the Conclusions above. It is clear that such a change would require further amendment of Part III of the Criminal Evidence Act 1992 as amended;
- #### 3. Training:
- **Professional training, which already covers victim-related issues, should also emphasise that** all advocates examining vulnerable witnesses in our criminal courts should ensure that they familiarise themselves with the best techniques to facilitate the witness (whether for the prosecution or the defence) to give their best evidence with the minimum risk of unnecessary confusion or distress;

¹³² This is recommended at page 55, paragraph 3.01 et seq, of the Law Reform Commission Report LRC 112-2014, “Disclosure and Discovery in Criminal Cases” (no web-link available, but the pdf may be downloaded from the website). The same Report also contains a draft Bill setting out a statutory regime for the regulation of disclosure issues in criminal proceedings.

- Resources adequate to ensure that advanced advocacy training is made available to all solicitors as well as barristers working in our criminal courts, must continue to be provided by their professional bodies, their employers (where applicable) and by Government. **Continuing professional development (CPD)** programmes now running for barristers who are members of the Law Library in Ireland include an advanced advocacy course which examines in detail such topics as how to cross-examine without repetition, without using multi-part questions, without putting tags on questions, without using obscure language and complicated structures, and without hectoring, lecturing, demeaning, or otherwise badgering the witness. This is especially important for vulnerable witnesses.
- **CPD programmes on issues relevant to vulnerable witnesses must also continue to develop and must be resourced adequately**, for judges, members of An Garda Síochána and the Courts Service, so that it is feasible for each of these professions to attend this training.

4. Statutory Pre-Trial Hearings should be the primary means through which special measures to address witnesses' specific protection needs are raised and determined (see also Recommendation 2 above)

- We recommend that the issue of specific protection needs for all witnesses, including but not limited to, those already recognised by An Garda Síochána – should always be a focus at **pre-trial hearings**. This is the appropriate forum for most (it can never be all) necessary applications and directions to be made, in respect of e.g. video-link arrangements, the use of intermediaries, and so on.
- Significant changes in the law relating to issue estoppel **are necessary** to allow greater use of pre-trial hearings to be made. Some groundwork in this area has already been done, in the Revised General Scheme of the Criminal Procedure Bill (2015)¹³³. **It should be re-amended if necessary to ensure that pre-trial rulings are binding on the trial judge;**
- Our view is that in line with this Scheme, **pre-trial hearings** should be placed on a statutory footing;
- We also believe that **disclosure issues** should be managed through **pre-trial hearings** as far as possible, and that ¹³⁴**disclosure rights and obligations** should themselves be regulated by statutory provisions;
- In England & Wales, there are already formal and depending on the circumstances, sometimes mandatory Ground Rules Hearings to which detailed rules of court apply which vary depending on the precise special measure(s) under consideration¹³⁵. In our view, the right approach by the trial

¹³³ Available online through this web-link:

<http://www.justice.ie/en/JELR/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf/Files/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf> (see Head 2)

¹³⁴ This has already been recommended by the Law Reform Commission in 2014 (see footnote 107 above)

¹³⁵ In England and Wales, the Criminal Practice Directions state that "discussion of ground rules is required in all intermediary trials" and moreover, such a discussion "is good practice, even if no intermediary is used, in all young witness cases and in other cases where a witness or defendant has communication needs". See Criminal Practice Directions 2015 (as amended) (n.141)

judge on this issue is one which is tailored to the individual witness's needs, and is proactive and imaginative: he or she should have the tools necessary to find practical solutions, though they may be novel, for instance, allowing a very anxious young person with ADHD to take frequent breaks from giving evidence¹³⁶. We know that exactly this approach has been adopted in cases in the Central Criminal Court, using the court's inherent jurisdiction, but promulgating court rules in this regard encourages best practice rather than relying on individual judges to use their ingenuity and expecting them to approach such a case without practical guidelines¹³⁷;

- The use of "Court House Dogs" as in Virginia, USA, should be explored further as a means of reassuring and calming vulnerable witnesses;¹³⁸
- Our judges should be supported by rules of court which encourage this flexible approach.

5. Gaps in available menu of Special Measures for certain groups of witnesses:

- **Adult vulnerable witnesses with communication difficulties** should be facilitated as much as possible to give their best evidence in court as well as during the investigative stage. We suggest that intermediaries, not necessarily professionally qualified, may sometimes be best placed to do this, particularly where there is a serious communication difficulty. Often the person best able to act as intermediary in court is someone without professional qualifications, but who is extremely familiar with the witness's style of communication;
- **Vulnerable Witnesses who do not have a "mental disorder" as defined by the CJVoCA 2017, but nevertheless, find it difficult to cope with the criminal justice process for reasons related to their condition (e.g. someone with autism), should be helped to give their best evidence by the court.** This is an example of a situation where a specific protection need identified by An Garda Síochána at an early stage demands an imaginative response which may vary for every individual, depending on the particular form the condition takes. It should be possible for such a person to benefit from an intermediary, where s/he cannot communicate effectively without one, or from other measures such as very short bursts of questioning followed by a break in which nothing happens for a few minutes (for example). This is a good example of where the simple presence of a family member or friend is invaluable as he or she is in the best position to know what method will best put the witness at ease and enable a statement to be taken with the minimum trauma to the witness.

6. Use of Intermediaries Generally:

para. 3E.2-3E.3. Similarly, in *R v Lubemba* [2014] EWCA Crim 2064, para. 49, Lady Justice Hallett remarked, "We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances".

¹³⁶ An even more novel approach has been used with success elsewhere, e.g. in US viz allowing a young witness to be accompanied by a favourite toy or even, pet. See further at pages 43 and 44 above.

¹³⁷ Some of the material produced by The Advocates' Gateway in England and Wales may be a useful resource in formulating such Rules in this jurisdiction: www.theadvocatesgateway.org

¹³⁸ See further pages 43 and 44 above for more information

- We advise consideration of the need for a cadre of professional intermediaries who are qualified to assist the court as to the best way to communicate with and understand, witnesses with communication difficulties, where these are needed; however
- Care must be taken to ensure that intermediaries are only used where their expertise is really necessary to ensure that these witnesses can communicate effectively with the court;
- Section 14 of the Criminal Evidence Act 1992 should be amended to allow for responses as well as questions, to be put through the intermediary – just as responses as well as questions may be interpreted or translated for any witness;
- Full use should be made by investigators and by advocates of the provisions in Section 22 of the Criminal Justice (Victims of Crime) Act 2017 relating to interpretation and translation during the investigation¹³⁹.
- The use of intermediaries should be allowed wherever there are communication difficulties which are so great that the witness's ability to participate fully in the trial is impaired significantly, whatever the cause of these difficulties ("mental disorder", autism, a physical speech impediment or hearing impediment), and this will require changes to the relevant statute (Section 14 Criminal Evidence Act 1992, as amended to date).
- In line with the recent recommendations of the Victims' Commissioner in England and Wales,¹⁴⁰ it is suggested that if a need for such a service is identified, the provision of intermediaries to vulnerable victims and witnesses in Ireland should be undertaken by a centralised national service, situated in one agency. This national service should be responsible for recruiting, training and supervising intermediaries within the Irish court system.

7. Cross-examination in Person:

- The new provisions in CLSOA 2017, CJVoCA 2017 and DV Bill 2017 (up to this point at least) which restrict **personal cross-examination** should be amended to extend the presumption in favour of restrictions for victims under 18, to those over 18. The distinction between the two age groups is hard to justify in our view, as both groups are likely to be distressed unduly and unnecessarily by personal cross-examination.

8. There should be a Co-Ordinated Approach to Vulnerable Witnesses:

We propose that a Vulnerable Witnesses in Legal Proceedings initiative is put in place following the outline below, by an Inter-Agency Steering Group whose membership includes representation from the relevant State agencies, with independent expertise on victim issues (both service-based and

¹³⁹ it seems to us that this Section provides for witnesses with communication difficulties to be facilitated with interpretative services at this stage.

¹⁴⁰ Victims' Commissioner, *A Voice for the Voiceless: The Victims' Commissioner's Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses* (January 2018), 81.

academic), and relevant legal expertise, and which is chaired by a representative from the responsible Government office, to -

- **Increase knowledge** by circulating relevant materials to all those concerned with victim issues in the criminal justice system, including victim support organisations;
- **Meet and consult** with justice professionals and specialist support organisations (for instance Rape Crisis Centres, SATU Guidelines Committee, Cari, St Clare's Unit in Children's University Hospital, Inclusion Ireland, National Advocacy Service, the Irish Council for Civil Liberties), on what they see as necessary elements of best practice for vulnerable witnesses;
- **Draft and circulate Guiding Principles on Vulnerable Witnesses**, to assert the central importance of reducing the risk of any further harm to victims and to enable all vulnerable witnesses to give their best evidence.;
- **Make and help implement proposals** for positive changes to assist vulnerable witnesses, including proposals for legislative change, as the need arises;
- **Evaluate** effectiveness of any existing and new measures to assist vulnerable witnesses, including through feedback from vulnerable witnesses themselves, insofar as this is practicable; and
- **Make proposals for amendments to existing special measures**, as and when necessary to the appropriate representative, official or agency.

APPENDIX 1: UNOFFICIAL CONSOLIDATED VERSION of CRIMINAL EVIDENCE ACT 1992 PART III (Special Measures)

This is the text of the **Criminal Evidence Act Part III** as it will be amended by both Criminal Law (Sexual Offences) Act 2017 Part 6 (not yet in force as at 16th March 2018), and Criminal Justice (Victims of Crime) Act 2017 (not yet in force as at 16th March 2018).

NB: This version is based on, and adapted from, the Law Reform Commission Revised Acts version of the Criminal Evidence Act 1992 as amended up to and including 27 March 2017, for which a web-link may be found below. Where the changes to CEA 1992 made by CLSOA 2017 will be superseded by the changes to CEA 1992 made by Criminal Justice (Victims of Crime) Act 2017, the latter version is the one to be found in the text below¹⁴¹.

Criminal Evidence Act 1992**Interpretation and application - Part III**

12. (1) In this Part—

‘family member’, in relation to a victim, means—

- (a) a spouse, civil partner or cohabitant of the victim,
- (b) a child or step-child of the victim,
- (c) a parent or grandparent of the victim,
- (d) a brother, sister, half brother or half sister of the victim,
- (e) a grandchild of the victim,
- (f) an aunt, uncle, nephew or niece of the victim, and
- (g) any other person—

- (i) who is or, where the victim is deceased, was dependent on the victim, or
- (ii) who a court considers has or, where the victim is deceased, had a sufficiently close connection with the victim as to warrant his or her being treated as a family member;

‘relevant offence’ means—

- (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;
- (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);

‘victim’ means—

¹⁴¹ <http://revisedacts.lawreform.ie/eli/1992/act/12/revised/en/html#SEC13>

- (a) a natural person, other than an accused, who has suffered harm, including physical, mental or emotional harm, or economic loss, which was directly caused by an offence, and
- (b) where the death of a person referred to in paragraph (a) is caused directly by the offence, a family member, provided that the family member concerned has not been charged with, or is not under investigation for, an offence in connection with the death of the person.

(2) The application of this Part is not dependent on the commission of an offence having to be established (nor is it dependent on establishing whether the person concerned suffered any harm caused by an offence).

Evidence through television link.

13.— (1) In any proceedings (including proceedings under section 4E or 4F of the **Criminal Procedure Act, 1967**) for a relevant offence 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.

(1A) In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act 1967) relating to an offence, other than a relevant offence, a court may, subject to section 14AA, grant leave for a victim of the offence to give evidence, whether from within or outside the State, through a live television link, and

(2) Evidence given under subsection (1) or (1A) 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.

Evidence through intermediary.

14.— (1) Where—

(a) a person is accused of a relevant offence, 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.

“(1A) Subject to section 14AA, where—

(a) a person is accused of an offence, other than a relevant offence, and

(b) a victim of the offence who is 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 the

interests of justice require that any questions to be put to the victim be put through an intermediary, direct that any such questions be so put.
and

(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) or subsection (1A) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

Placement of screen etc. for giving of evidence

14A. (1) Where a person who is under 18 years of age is to give evidence other than through a live television link in respect of a relevant offence, the court may, on the application of the prosecution or the accused, direct that a screen or other similar device be positioned in an appropriate place, so as to prevent the witness from seeing the accused when giving evidence, unless the court is satisfied that in all the circumstances of the case such a direction would be contrary to the interests of justice.

(2) Subject to section 14AA, where—

(a) a person who is a victim of an offence, other than a relevant offence, is under 18 years of age and the person is to give evidence, other than through a live television link, in respect of the offence,
or

(b) a person who is a victim of any offence has attained the age of 18 years and the person is to give evidence, other than through a live television link, in respect of such an offence, the court may, on the application of the prosecution or the accused, if satisfied that the interests of justice so require, direct that a screen or other similar device be positioned, in an appropriate place, so as to prevent the victim from seeing the accused when giving evidence.

(3) A witness giving evidence under subsection (1) or (2) shall be capable of seeing and hearing and being seen and heard by—

- (a) the judge and jury (if any),
- (b) legal representatives acting in the proceedings,
- (c) any interpreter, intermediary appointed under section 14 or any other person appointed to assist the witness, and shall be capable of being seen by the accused.

Matters to be taken into account under Sections 13, 14 and 14A regarding victims

14AA. The court, in deciding—

- (a) whether to grant leave under section 13(1A) for a victim to give evidence through a live television link,
- (b) whether, under section 14(1A), the interests of justice require that it direct that questions be put to the victim through an intermediary,

or

(c) whether, under section 14A(2), the interests of justice require that it direct that a screen or other similar device be positioned, in an appropriate place, so as to prevent the victim from seeing the accused when giving evidence, shall have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation, taking into account—

- (i) the nature and circumstances of the case, and
- (ii) the personal characteristics of the victim.

Wigs and gowns

14B. Where a person who is under 18 years of age—

- (a) is giving evidence in respect of a relevant offence, or
- (b) is giving evidence in respect of any other offence of which he or she is a victim, neither the judge nor the barrister or solicitor concerned in the examination of the witness shall wear a wig or gown.

Protection against cross-examination by accused

14C(1) Where —

(a) a person is accused of a relevant offence, and

(b) a person under the age of 18 years is to give evidence,

the court shall direct that the accused may not personally cross-examine the witness unless the court is of the opinion that the interests of justice require the accused to conduct the cross-examination personally.

(2) Where —

(a) a person is accused of a sexual offence, and

(b) a person who has attained the age of 18 years is to give evidence,

the court may direct that the accused may not personally cross-examine the witness unless the court is of the opinion that the interests of justice require the accused to conduct the cross-examination personally.

(3) Where an accused person is prevented from cross-examining a witness by virtue of subsection (1) or (2), the court shall —

(a) invite the accused person to arrange for a legal representative to act for him or her for the purpose of cross-examining the witness, and

(b) require the accused person to notify the court, by the end of such period as it may specify, as to whether a legal representative is to act for the accused for that purpose.

(4) If by the end of the period referred to in subsection (3)(b), the accused has notified the court that no legal representative is to act for him or her for the purpose of cross-examining the witness or no notification has been received by the court and it appears to the court that no legal representative is to so

act, the court shall consider whether it is necessary, in the interests of justice, for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused person.

(5) If the court decides it is necessary, in the interests of justice, for the witness to be so cross-examined, the court shall appoint a legal representative (chosen by the court) to cross-examine the witness on behalf of the accused.

(6) Where, in a jury trial, an accused person is prevented from cross-examining a witness in person by virtue of this section, the court shall give the jury such warning (if any) as it considers necessary to ensure that the accused person is not prejudiced —

(a) by any inferences that might be drawn from the fact that the accused has been prevented from cross-examining the witness in person, or

(b) where the witness has been cross-examined by a legal representative appointed under subsection (5), by the fact that the cross-examination was carried out by such a legal representative and not by a person acting as the legal representative of the accused.

(7) In addition to the meaning assigned to that expression by section 27 of the Civil Legal Aid Act 1995 ‘ legal aid ’ in that Act means representation by a solicitor or barrister, engaged by the Legal Aid Board under section 11 of that Act on behalf of the accused in relation to the cross-examination of a witness under subsection (3).

Procedure in relation to certain offences.

15. — (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 video-recording under section 16(1)(b) 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 video-recording 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,

(d) it is proposed, pursuant to section 16 (1) (b) , that a video-recording of a statement made by that person during an interview as mentioned in that provision shall be given in evidence at the trial,

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 video-recording 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.

Video-recording as evidence at trial.

16.— (1) Subject to *subsection (2)*—

(a) a video-recording of any evidence given, in relation to a relevant offence, 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 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 —

(i) by a person who is under 18 years of age in relation to an offence of which he or she is a victim, 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,

(III) an offence under 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 video-recording 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 video-recording concerned or that part ought not to be so admitted.

(b) In considering whether in the interests of justice such video-recording 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.

Transfer of proceedings.

17.— In any proceedings for an offence 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, by means of a video-recording through a live television link or by means of a video-recording or that a screen or other similar device be used in the giving of evidence 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.

Identification evidence

18. Where a person (in this section referred to as “the witness”)—

(a) gives evidence in respect of a relevant offence, or

(b) gives evidence in respect of any other offence of which he or she is a victim, through a live television link pursuant to section 13(1) or (1A) or using a screen or other similar device pursuant to section 14A, 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.

Application of Part III to persons with mental disorder, within the meaning of Section 5 of the Criminal Justice Act 1993.

19.— The references in sections 14, 14B, 15 and 16 to a person under 18 years of age shall include references to a person with a mental disorder, within the meaning of section 5 of the Criminal Justice Act 1993 who has reached the age concerned.

Disclosure of third party records in certain trials

19A. (1) In this section —

‘ Act of 1995 ’ means the Civil Legal Aid Act 1995 ;

‘ competent person ’ means a person who has undertaken training or study or has experience relevant to the process of counselling;

‘ counselling ’ means listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration);

‘ counselling record ’ means any record, or part of a record, made by any means, by a competent person in connection with the provision of counselling to a person in respect of whom a sexual offence is alleged to have been committed (‘ the complainant ’), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy;

‘ court ’ means the Circuit Criminal Court or the Central Criminal Court;

‘ sexual offence ’ means an offence referred to in the Schedule to the Sex Offenders Act 2001 .

(2) In criminal proceedings for a sexual offence the prosecutor shall notify the accused of the existence of any counselling record but shall not disclose the content of the record without the leave of the court given in accordance with this section.

(3) An accused who seeks disclosure of the content of a counselling record may make an application (‘ disclosure application ’), in writing, to the court —

(a) providing particulars identifying the record sought, and

(b) stating the reasons grounding the application, including grounds relied on to establish that the record is likely to be relevant to an issue at trial.

(4) An accused who intends to make a disclosure application shall, not later than the beginning of such period as may be prescribed in rules of court, notify the person who has possession or control of the counselling record, the complainant, the prosecutor and any other person to whom the accused believes the counselling record relates of his or her intention to make the application.

(5) Where no disclosure application has been made by the accused in respect of a counselling record under subsection (3) and the prosecutor believes that it is in the interests of justice that the record should be disclosed, the prosecutor may make a disclosure application in writing to the court.

(6) Where the prosecutor intends to make a disclosure application under subsection (5) , he or she shall, not later than the beginning of such period as may be prescribed in rules of court, notify the person who has possession or control of the relevant record, the complainant, the accused and any other person to whom the prosecutor believes the counselling record relates of his or her intention to make the application.

(7) The court may, at any time, order that a disclosure application be notified to any person to whom it believes the counselling record may relate.

(8) The court shall hold a hearing to determine whether the content of the counselling record should be disclosed to the accused and the person who has possession or control of the counselling record shall produce the counselling record at the hearing for examination by the court.

(9) The person who has possession or control of the counselling record, the complainant and any other person to whom the counselling records relates shall be entitled to appear and be heard at the hearing referred to in *subsection (8)* .

(10) In determining, at the hearing referred to in *subsection (8)* , whether the content of the counselling record should be disclosed to the accused under *subsection (11)* , the court shall take the following factors, in particular, into account:

- (a) the extent to which the record is necessary for the accused to defend the charges against him;
- (b) the probative value of the record;
- (c) the reasonable expectation of privacy with respect to the record;
- (d) the potential prejudice to the right to privacy of any person to whom the record relates;
- (e) the public interest in encouraging the reporting of sexual offences;
- (f) the public interest in encouraging complainants of sexual offences to seek counselling;
- (g) the effect of the determination on the integrity of the trial process;
- (h) the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm.

(11) (a) Subject to *paragraph (b)* and *subsection (12)* , after the hearing referred to in *subsection (8)* , the court may order disclosure of the content of the counselling record to the accused and the prosecutor where it is in the interests of justice to do so.

(b) The court shall order disclosure of the content of the counselling record to the accused where there would be a real risk of an unfair trial in the absence of such disclosure.

(12) (a) Where an order is made pursuant to *subsection (11)* , in the interests of justice and to protect the right to privacy of any person to whom the counselling record relates, the court may impose any condition it considers necessary on the disclosure of the record.

(b) Without prejudice to the generality of *paragraph (a)* , one or more of the following conditions may be included in an order made pursuant to *subsection (11)* —

- (i) that a part of the content of the counselling record be redacted,
- (ii) that a copy of the counselling record and not the original be disclosed,
- (iii) that the accused and any legal representative for the accused not disclose the content of the counselling record to any person without leave of the court,
- (iv) that the counselling record be viewed only at the offices of the court,
- (v) that no copies, or only a limited number of copies, of the counselling record, be made,

(vi) that information concerning the address, telephone number or place of employment of any person named in the counselling record be redacted from the record,

(vii) that the counselling record be returned to the person who owns or controls the said record,

(viii) that the counselling record is used solely for the purposes of the criminal proceedings for which the record has been disclosed.

(13) The court shall provide reasons for ordering, or refusing to order, disclosure of the content of a counselling record pursuant to *subsection (11)* .

(14) (a) Subject to *paragraph (b)*, a disclosure application shall be made before the commencement of the trial of the accused.

(b) Where, upon application by the accused, the court considers that the interests of justice require the making of a disclosure application after the commencement of the trial, the court may direct that such an application may be made.

(15) For the purposes of a hearing pursuant to *subsection (8)* , all persons, other than officers of the court, persons directly concerned in the hearing and such other persons (if any) as the court may determine, shall be excluded from the court during the hearing.

(16) In addition to the meaning assigned to that expression by section 27 of the Act of 1995, ‘ legal aid ’ in that Act means representation by a solicitor or barrister, engaged by the Legal Aid Board under section 11 of that Act, on behalf of a complainant or witness in relation to a disclosure application that concerns the complainant or witness.

(17) This section does not apply where a complainant or witness has expressly waived his or her right to non-disclosure of a counselling record without leave of the court.

APPENDIX 2: Extract on the Norwegian “Barnehus” (Child House) System from the Scottish Evidence and Procedure Review Report (2015):

Case Study 3: a different approach - Norway

2.48 Norway has a population of 5.1m, in a country with a total area of 385,252 km² (Scotland's is 78,770 km²). Courts in Norway are organized into three levels: sixty-five city/district courts (tingrettene, typically the court of first instance), six Courts of Appeal (lagmannsrettene, typically the court of second instance), and the Supreme Court (Høyesterett). All courts, and all the judges, handle civil, criminal, and administrative cases. In criminal cases, decisions are made by judges together with lay members of the court. Lay members are drawn from a list drawn up by the local authority of those willing and suitable to perform the role.

2.49 Criminal investigations are undertaken by the Police (or other authorised investigating agency). The Prosecution Service is a department of the Norwegian Police.

³⁵ For a detailed description of the effectiveness of an intermediary (in a non section 28 case), see D. Wurtzel, *The youngest witness in a murder trial: making it possible for very young children to give evidence* Crim. L.R. 893 (2014)

Under the relevant legislation³⁶, criminal trials are based on oral proceedings, and evidence must be heard in court. The indictment is the only document that the court receives prior to the main hearing of the case; judges are not permitted to see police records before the trial opens. Typically, the court comprises one professional judge and two lay judges. In addition to the prosecution and defence counsel, the complainant also has the right to legal representation in Court.

Judicial hearing of evidence

2.50 Criminal Procedure Regulations³⁷ provide for the taking of evidence in a judicial hearing prior to trial for certain witnesses and certain cases. Judicial hearings are available for witnesses who are either under 16 years old or who have a mental disability, in cases where either the witness is the alleged victim of a sexual offence or of an offence of violence, or has been the witness to violence (usually in a domestic setting). The regulations provide that such a hearing should happen as soon as possible after an incident is reported, and no more than two weeks later, unless there are special circumstances preventing this. In practice, however such hearings often take place more than two weeks later, because of the difficulties in assembling all the parties who need to be present – only around 40% of cases in Oslo take place within the 2-week deadline. These hearings were also described as “judicial forensic interviews”. The number of these hearings in Norway has risen dramatically – due to a number of factors, including broadening the eligibility of cases – over the past 20 years from around 200 in 1994 to over 2500 in 2013. The interviews are videorecorded and played as evidence in the trial.

2.51 Prior to the introduction of the network of Barnehus (State Children’s Houses) in 2008 hearings were conducted at interview suites at the police station. There are now 11 Barnehus across Norway, which provide custom designed facilities for the hearings and other services to support child witnesses (see below). These include dedicated interview rooms, featuring high quality audio and video links to a conference/viewing room for all those entitled to observe the proceedings.

Participants

2.52 The hearing is under the control of the judge. Also present at the hearing will be a

large number of participants, as follows: Interviewer; Counsel for the complainant; Substitute guardian for the child; Defence lawyer; Police/prosecuting lawyer; Police Investigator; Advisor from the Children’s House; Representatives from Child welfare services (if necessary). There will also be a Technician to operate the audio/video viewing and recording. There may also be a need for an interpreter. This is an increasing and challenging requirement as Norway becomes more multi-cultural. The accused is not usually present, although it is the norm that he/she is informed that the session will be taking place.

2.53 It is notable that, given that this hearing takes place a short time after the incident is reported, there may not even be an identified defendant who has been charged. In this case, a lawyer is appointed to represent the defence’s interests in anticipation of future

³⁶ Straffeprosessloven (Norwegian Criminal Procedure Act) 1981, as amended

³⁷ Criminal Procedure Regulations of 2 October 1998 no. 925.

proceedings. Under the current jurisprudence of the European Court, this appears to be compliant with the Convention.

2.54 Other than the witness, the critical participant is the police interviewer. All police officers in Norway are required to take a 3-year Bachelor’s degree in Policing. On top of that, those undertaking forensic interviews with child and vulnerable witnesses are subject to intensive training for 6 months before becoming qualified to conduct interviews. They are subject to face-to-face tuition, on-the-job training and coaching and rigorous examination.

Process

2.55 Normal practice is for the child witness to be informed of their visit to the Barnehus the night before the hearing. The interviewer will let the child’s parent or guardian know what to expect from the time the child arrives, and will discuss any needs the child may have, and anything about the child that might help the interviewer establish a rapport with him/her.

2.56 At the Barnehus the participants will meet in advance of the hearing. The interviewer will set out her plan for the interview, and potential lines of questioning are discussed. This is an opportunity for Defence counsel to suggest what questions they would wish to see asked. These meetings usually last 15-20 minutes. It is normal practice for the Police to have interviewed the suspect prior to the judicial hearing, which allows for any alternative narrative to be tested with the child.

Interview

2.57 The interview itself follows a structure based on the internationally established Protocol from the National Institute of Child Health and Human Development (NICHD)³⁸. The interview is comprised of seven phases:

1. Preparations
2. Building trust
3. Formalities
4. Case/theme introduction
5. Narrative interview
6. Probing – theme by theme, and challenge if necessary
7. Finalization

2.58 The nature of the questioning has to be appropriate to the age and development of the child in question. The Oslo police has recently decided to develop a particular specialism in particularly young children (pre-school age), as the type of questioning needs

to be markedly different from that for older children. Age tends also to determine the length of the interviews - younger children will tend to require shorter sessions and longer breaks, which can mean a much longer time spent overall at the Barnehus. It was clear from the discussion that the nature of the evidence provided can vary enormously, depending on the child's own state of mind and emotion. Breaks could also be taken for the interviewer to discuss with the Judge and other participants what further lines of questioning might be appropriate.

2.59 After the interview, the child is, if appropriate, given a medical examination on site by specialist staff from the University hospital. It was suggested that at times information useful to the investigation emerges during the medical examination, as, for example, a child may be more willing to talk to the doctor or nurse about the injuries he or she has received. The child is also assessed for any further welfare or child protection measures and support that may be required.

The Barnehus

2.60 As referred to above, the Barnehus at Oslo is part of a network across Norway, introduced in 2009. The purpose of the facility is to provide a safe environment for the children to be interviewed and assessed. It appears that, unlike some comparable facilities in Scotland, it is a principal purpose of the Barnehus to be a centre for the holding of judicial forensic interviews – in other words, its primary purpose is to support the criminal trial process. Among the many benefits identified by all concerned was that the wrap-around service provided by the Barnehus staff allowed the police to concentrate on their primary responsibility, the appropriate interviewing of the witness; and that additional therapeutic and medical support could be instantly accessed, making the experience of the interview less traumatic.

2.61 The Barnehus in Oslo was an outstanding facility – well designed and extremely well equipped to provide a non-threatening and reassuring atmosphere. It was clear that there needed to be significant investment and maintenance to ensure the quality of the facilities and the support service provided. The police interviewer emphasised the importance of using the best available technology for the video recording process, as this makes the presentation of the evidence far more effective.

Conclusion

2.62 Practitioners in Norway were clear that this approach was producing far better results, both in terms of the quality of evidence and the promotion of the child's wellbeing, than police-station or court-based alternatives. An evaluation of the Barnehus system in 2012³⁹ concluded that the model was working as it was intended, although there were issues that needed to be addressed around the future governance of the network, the likely resource requirements in the face of increasing demand, and the capacity for the network to cope with children with special needs. There was also evidence that the witnesses themselves found this process helpful and positive.



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