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Personal Cross-Examination of the Complainant by the Defendant in Rape Trials: A Critical and Comparative Analysis

Sarah Bryan O'Sullivan

TRINITY COLLEGE DUBLIN
28 SEP 2016
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Introduction

I. Central Aim of Thesis and General Themes

This thesis seeks to address an issue which, until relatively recently, has been neglected in this jurisdiction. The central aim of this research is to consider the issue of personal cross-examination of the complainant by the defendant in rape and sexual offence trials and the potential for prohibiting such cross-examination in this jurisdiction. In Ireland, a defendant in a rape or sexual offence trial may waive his right to legal representation in favour of self-representation and in doing so, may personally cross-examine a complainant. While other aspects of the rape trial have received significant attention and consequently have been the subject of extensive discussion, debate and reform, this issue is one which remains in need of further consideration in this jurisdiction. This is surprising, particularly due to the fact that the practice of personal cross-examination in rape cases has already been prohibited in many other common law jurisdictions, including England and Wales, New South Wales, New Zealand and Canada.

In Ireland a number of commentators and organisations, such as the Rape Crisis Network Ireland, have carried out some research on the topic; in particular, the issue of personal cross-examination of child complainants has been considered by two Oireachtas Joint Committees.[1] Moreover, the recently published Criminal Law (Sexual Offences) Bill 2015, if enacted in its current form, will provide for a limited prohibition on such cross-examination. However, a comprehensive study of personal cross-examination of the complainant by the defendant in sexual offence trials has yet to be undertaken. Hence, this thesis aims to fill an obvious gap in existing research.

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[1] The reports and commentary provided by the Rape Crisis Network Ireland (Rape Crisis Network Ireland, *Position Paper on Legal Recommendations from "Rape and Justice in Ireland"* (Galway May 2012)) and the two Joint Oireachtas Committees (Joint Committee on Child Protection, *Report on Child Protection* (November 2006) and Joint Committee on the Constitutional Amendment on Children, *Twenty-eighth Amendment of the Constitution Bill 2007: Second Interim Report* (May 2009)) in relation to this issue will be outlined and considered in Chapter 3 of this thesis. Relevant academic commentary will also be considered in Chapter 3 and at other stages throughout this thesis. (For examples of such commentary, see Peter Charleton, Paul Anthony McDermott and Marguerite Bolger, *Criminal Law* (Butterworths 1999) 643, Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009) 82 - 84, Thomas O'Malley, *Sexual Offences* (2nd edn Round Hall 2013) 413 – 415).

It is submitted that the current absence of any prohibition on this practice in Ireland is problematic for a number of reasons. It can place a sexual offence complainant in a traumatic and humiliating situation. It may act as a deterrent to sexual offence victims contemplating reporting a sexual offence and may potentially contribute to the already high attrition rate in such cases. Furthermore, such cross-examination, where carried out, can have an adverse effect on the quality of a complainant's evidence.

The thesis will examine this issue within the framework of the rape trial and in the context of representation and due process rights in criminal trials. A comparative analysis will be undertaken in order to consider the various reforms which have been implemented across a number of common law jurisdictions in an attempt to tackle this issue. From an Irish perspective, this thesis is particularly timely, because as it was being researched a new provision was introduced under the Criminal Law (Sexual Offences) Bill 2015, as mentioned above.[2] The relevant provisions of this ground-breaking Bill will be considered in detail in Chapter 3. It is envisioned that this research will provide an enhanced understanding of the topic, with the methods of reform discussed potentially providing guidance for the development and possible enactment of statutory reform in this jurisdiction in the future. Furthermore, it is anticipated that this research will provide a broader societal benefit by focusing attention on a problematic and relatively neglected aspect of the criminal justice system.

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[2] See s. 35 (14C), Criminal Law (Sexual Offences) Bill 2015. In November 2014 the General Scheme of the Criminal Law (Sexual Offences) Bill 2014 was published. Following this, the Criminal Law (Sexual Offences) Bill 2015 was then published in September 2015. The Bill became available on the Department of Justice and Equality website on 6 October 2015, the date on which it was introduced at Second Stage in the Seanad. Committee Stage debate on the Bill began on 11 December 2015, and concluded in the Seanad on 14 January, 2016. The Bill concluded Report Stage in the Seanad on 21 January 2016 and was then scheduled to be introduced in the Dáil. The version of the Bill used throughout this thesis is that as passed through the Seanad on 21 January 2016. No amendment was made to the relevant provision concerning personal cross-examination during the progress of the Bill through the Seanad. Thus, at the date of submission of this thesis, the Bill was still to proceed through the Dáil. However, the analysis of the Bill, as presented in this thesis, is up to date as of 21 January 2016.

II. Structure

As the title of this thesis suggests, the central aims of the research project, from which the central research questions naturally flow, are to examine the legal position which allows the defendant to represent himself in sexual offence trials, comparatively analyse the possible approaches to reforming this issue with reference to other jurisdictions, and consider potential methods of reform within this jurisdiction. The thesis will be divided into five main chapters.

It will begin by presenting a critical overview of the distinct issues and challenges surrounding the trial of the offence of rape. In doing so, Chapter 1 will establish the unique nature of the offence. It will also produce a framework within which to consider the issue of personal cross-examination and the possibility of prohibiting it in sexual offence trials. The first section will present an overview of the current law before moving on to Part II of Chapter 1, which addresses the various myths and stereotypes which shape perceptions and attitudes towards sexual violence. The prevalence of these myths and stereotypes among the public will be examined and their potential impact on juror deliberation will be considered. The third section of Chapter 1 will examine the issue of consent in rape and will address the current legal situation in this jurisdiction. Consent has proven a particularly contentious issue in this area. Part IV of Chapter 1 will examine in detail a number of legal rules which are unique to rape and sexual offence trials and which have been the subject of reform as a result of their problematic nature. Hence, issues such as the doctrine of recent complaint, sexual experience evidence and the corroboration warning will be considered in the course of this section.

Chapter 2 will consist of an analysis of a number of constitutional and human rights considerations relevant to this thesis from a fair trial perspective, including the presumption of innocence, the right to cross-examination and the right to self-representation. Each right will be considered separately, however the relationship between them will also be examined. The origins and subsequent development of the rights will be addressed briefly before moving on to examine the scope and nature of each right. The protection afforded to the rights will be considered from an Irish constitutional law perspective and within an International and European human rights context. This will include an examination of the parameters of each

right, with particular attention being dedicated to any limitations or prohibitions which may legitimately be imposed upon them.

Chapter 3 explores the central theme of this thesis through examining the specific issue of personal-cross-examination by the defendant in rape trials and the many problems that emerge as a result. It will consider the problematic nature of allowing such a practice to continue, giving due consideration to the consequences of such a cross-examination for a complainant and the potentially deterrent effects of such a practice. The current situation in Ireland will be outlined, along with any relevant case law, commentary, research and recent legislative developments.

Chapter 4 will constitute a significant portion of the thesis. In this Chapter a comparative study of a number of relevant common law jurisdictions will be conducted. The jurisdictions subject to analysis are England and Wales, Scotland[3], New South Wales, Victoria, New Zealand and Canada. All of the jurisdictions under consideration have introduced legislation prohibiting personal cross-examination in sexual offence cases. However, there are certain variations in the respective models of reform which are worthy of note. Engaging in such comparative research will provide deeper understanding and insight into the issues which emerge in relation to personal cross-examination in rape cases. Moreover, by examining the different methods adopted in these jurisdictions, a comprehensive evaluation of the advantages and disadvantages of each approach can be conducted. Such an evaluation will be of assistance when considering a model of reform in Ireland.

The conclusions reached as a consequence of the research and analysis carried out throughout this thesis will be presented in the fifth and final chapter. Chapter 5 will involve a comprehensive examination of appropriate methods of reform for this jurisdiction. It will consider what prohibitions should apply and in what form these prohibitions should be imposed. It is envisioned that by drawing on the strengths of the various legislative provisions

[3] Although Scotland is a hybrid system, containing elements of both civil and common law systems, it remains a jurisdiction worthy of comparison for a number of reasons, as will be outlined in Chapter 4, Part II.

examined during Chapter 4, and avoiding the weaknesses, it will be possible to discuss appropriate models for reform in Ireland. It is hoped that the proposals advanced in this Chapter may act as a source of guidance for the development and enactment of reform, and ultimately, provide a broader benefit by focusing attention on a problematic and relatively neglected aspect of the criminal justice system.

III. Methodology

Overall, there are three theoretical frameworks in this thesis: historical, socio-legal and comparative legal methodologies.

A historical legal methodology was employed in Chapter 2 which examines the development of the adversarial trial and the origins of certain rights, including the presumption of innocence, the right to cross-examination and the right to self-representation. By engaging with this methodology, it is possible to root aspects of the research topic in their historical context, allowing for a more comprehensive and thorough investigation of the origins of the various rights which are examined in the course of this thesis.

A socio-legal methodology was also employed, the purpose of which was to locate the research topic in its social domain.[4] In this respect, the use of socio-legal research can assist in the analysis of the social, political and historical factors which have influenced the development of the law in this area. This methodology has also contributed to the investigation of the various extra-legal elements which influence law reform. Furthermore, as will be demonstrated in Chapter 1 in particular, such a methodology also complements the employment of certain feminist legal methodologies which assists in the application of a gendered analysis of certain legal issues in rape and sexual offence trials.[5]

Finally, this thesis also incorporates a comparative legal methodology, which represents a significant element of this research project.[6] The decision to conduct comparative research was primarily based on the central aim of this thesis; to identify possible ways of reforming a problematic aspect of the law. Engaging in comparative legal research is a valuable legal analysis tool, particularly when attempting to identify possible ways to reform the law.

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[4] For a consideration of socio-legal approaches to research see Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Hart Publishers 2005).

[5] For an examination of a number of feminist legal methods see Katherine Bartlett, "Feminist Legal Methods" (1990) 103(4) *Harvard Law Review*, 829.

[6] For a consideration of comparative legal methodologies see Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge UP 1946) and William Elliot Butler, Oleksii Kresin and Iurii Shemshuchenko, *Foundations of Comparative Law: Methods and Typologies* (Wildy, Simmonds & Hill 2011).

Consequently, conducting comparative research into this specific area of law in other jurisdictions is the most appropriate and beneficial method of satisfactorily addressing the central research aims of this thesis. Comparative research assists in exposing how the law of one jurisdiction can replicate the strengths of another while avoiding the weaknesses, thus allowing the identification of the most appropriate method of reform. Hence, in relation to this research project in particular, carrying out comparative legal research into the prohibitions on personal cross-examination by the defendant in rape trials in place in other jurisdictions will assist in the development of a coherent argument for a balanced reform of the law in this jurisdiction.

IV. Terminology

Finally, a number of issues relating to terminology need to be addressed.

First, it should be noted that the term "rape" is contained in the title of this thesis and is employed throughout the research project. Rape refers to a very specific form of sexual offence. Within the context of the law on sexual offences, it has attracted the most attention from stakeholders within the criminal justice system. Consequently, the majority of research and studies conducted relate to the offence of rape. Therefore, for the most part rape, as opposed to other sexual offences, is referred to in this thesis. Nonetheless, it is important to note that many of the issues which arise in this context are also directly applicable to sexual offences generally. Thus, the conclusions reached in relation to the offence of rape or the trying of the offence may also be applicable and relevant to other forms of sexual offences.

Second, the author is conscious of the fact that sexual violence can be inflicted upon male and female victims by male or female offenders. Consequently, throughout the thesis an attempt has been made to keep the terminology as gender neutral as possible. Nonetheless, where necessary victims and complainants of rape and sexual offences are referred to in the feminine gender while perpetrators and defendants are referred to in the masculine gender. This has been done for linguistic convenience. It is not intended to suggest that victims are always women and that perpetrators are always men. Nonetheless, as Hanly et al note, "All the available evidence...indicates that men and women do not face an equal threat of sexual violence, and that rape is a crime that is overwhelmingly committed against women".[7] This point is also highlighted by Bacik who refers to the archetypal gendered nature of the crime, where the victims are predominantly female and perpetrators are overwhelmingly male.[8] Moreover, as will be illustrated throughout this thesis, the gendered nature of the crime has clearly influenced the development of the law on rape and the interpretation of the offence

[7] Hanly et al (n 1) 13.

[8] Ivana Bacik, "Women and the Criminal Justice System" in Paul O'Mahony (ed), *Criminal Justice in Ireland* (Institute of Public Administration 2002) 148.

on a societal level. Thus, using such gendered terminology, where necessary, is reflective of the reality of sexual offences.[9]

Thirdly, the word 'prohibition' is used throughout this thesis to cover any statutory restriction or prohibition on the practice of personal cross-examination. It is recognised that statutory restrictions on this practice may take several forms; mandatory, presumptive, discretionary or hybrid, not all of which are, strictly speaking, prohibitions. However, it was considered that the term 'prohibition' could appropriately be used to cover all forms of statutory restriction, when these are referred to in general terms. Specific aspects of particular restrictions or prohibitions in place in different jurisdictions will be discussed in detail in Chapter 4.

Finally, the phrase 'personal cross-examination' is used to describe the practice of cross-examination where it is conducted by the defendant in person, rather than through a legal representative or other intermediary. This was considered a less cumbersome phrase than that of 'cross-examination in person'.

[9] Using gendered terminology in this manner is also reflective of the approach adopted by researchers in this area: e.g. Hanly et al (n 1) 13, Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre 1998) xix, Scottish Executive (Justice Department), *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials – A Pre-Legislative Consultation Document* (2000) 8, and generally in Jennifer Temkin, *Rape and the* Legal *System* (2nd edn, Oxford University Press 2002).

1. Rape and the Trial Process in Ireland: Particular Issues and Challenges

Introduction

Rape and the complainants of rape occupy a distinct position in the criminal trial process. It is now widely acknowledged that the prosecution of rape and sexual offences poses a particularly challenging task, creating distinctive difficulties which often do not arise in trials for other criminal offences. Such difficulties are arguably reflected in the high attrition and low conviction rates in these cases.[1]

In particular, the plight faced by complainants during the trial process and the often traumatic effect of the court experience on these witnesses has attracted increased attention in recent decades. The experience is said to be so upsetting for some complainants that it has been described as "secondary victimisation", a process by which the complainant is violated a second time by the criminal justice system.[2] While attempts have been made to temper some of the harsher aspects of the trial process, the courtroom remains a hostile territory for complainants.[3]

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[1] A number of Irish studies have revealed the high attrition rates in relation to rape and sexual offences in Ireland. It appears non-reporting accounts for the largest source of attrition, with an estimate of only one in ten cases of sexual abuse reported to the Gardaí according to a 2002 study. (Hannah McGee, Rebecca Garavan, Mairéad de Barra, Joanna Byrne and Ronán Conroy, *The SAVI Report: The Sexual Abuse and Victimization in Ireland* (The Liffey Press 2002). Also see Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009) 139 - 148). Moreover, a 2009 study revealed that the conviction rate for rape in this jurisdiction was 10 percent in 2007. (See Mary-Louise Corr, Paul O'Mahony, Jo Lovett and Liz Kelly, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases in Eleven Countries, Country Briefing: Ireland* (London Child Woman Abuse Studies Unit 2009), information available in Jo Lovett and Liz Kelly, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe* (London Child and Woman Abuse Studies Unit 2009) 78. This Irish research was conducted as part of a wider research project. For additional information on convictions rates in other jurisdictions, see Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009) 8 – 10.

[2] See Julie Allison and Lawrence Wrightsman, *Rape: The Misunderstood Crime* (Sage Publications 1993) 172 and Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 441. Also, Hanly notes that due to the exposed position in which the complainant is placed during the trial, "it is not uncommon for rape complainants to describe the trial as being almost as bad as the rape itself". (Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill & MacMillan 2015) 345).

[3] Susan Leahy, "In a Woman's Voice – A Feminist Analysis of Irish Rape Law" (2008) 26 *Irish law Times* 203.

There are numerous explanations for the problems associated with the trial of rape and sexual offences. However, consideration of the full range of problems is beyond the scope of this Chapter and ultimately, this thesis. Instead, this Chapter addresses the more prominent issues relating to the offence of rape and its trial. Particular attention will be dedicated to issues which emerge during the trial process. The decision to do so was motivated by the primary focus of this thesis. Ultimately, the purpose of this Chapter is to establish a broad framework in which to consider the central issue of this thesis: personal cross-examination of the complainant by the defendant in rape and sexual offence trials. Given that this issue is primarily associated with an aspect of the trial process, it seems apt to narrow the focus of this Chapter where possible to issues which emerge, or are connected to, the trying of rape and sexual offences. For the most part, the research will consider the various issues within an Irish context. Nonetheless, many of the topics and issues examined also arise beyond this jurisdiction, and therefore, material from other jurisdictions, including academic literature, case law and legislation, will also be referred to where necessary.

Thus, this Chapter will set the topic of personal cross-examination in its appropriate context and will facilitate an examination of the various issues which may arise in the course of this research project. Furthermore, by considering particularly relevant elements of the trial process in sexual offence cases, it is hoped that the distinctive nature of such trials will be highlighted, while also establishing the legal landscape in which to consider the central issue of this thesis.

The Chapter is divided into five parts. Part I will briefly outline the offence of rape in Ireland and will highlight a number of significant pieces of legislation governing this area of the law. Once the law has been outlined, Parts II, III and IV will identify and discuss three problematic issues relating to the offence of rape and the trial of such offences. Part II will address the various myths and stereotypes surrounding sexual offences (and their potential impact on juror deliberation). Part III will consider the issue of consent and the definition of rape and Part IV will examine the application of certain problematic evidential rules in rape and sexual offence trials. By considering these issues a comprehensive overview of many of the challenges surrounding the trial process in rape cases can be established. Before concluding, Part V will outline the existing testimonial aids and support measures available for witnesses

in Irish courts. As noted, attempts have been made to alleviate some of the harsher elements of the rape trial. Outlining these attempts will facilitate a greater understanding of the trial process for rape and sexual offences. Through a collective examination of these topics a context-appropriate consideration of the central research questions of this thesis may be undertaken in the succeeding Chapters.

I. The Offence of Rape in Ireland

The law governing the offence of rape in Ireland has undergone significant change and development, particularly in the latter part of the twentieth century. This section will outline the development of the current legal framework of the law in relation to the offence of rape. However, first, a brief consideration of the origins of the offence will be undertaken.

i. The Origins of the Offence of Rape

The offence of rape originated as a crime against property. In early English law rape was a crime against the man who 'owned' the victim. As Toner explains:

> The wrong was the unlawful use of the man's property. The wronged party was the husband or father of the victim and it was to him that any compensation was paid, understandably since it was the husband's or father's bloody retaliation that had to be bought off.[4]

The position was that the rape of a woman deprived a father of a valuable property right in the form of a successful marriage for his daughter and it deprived a husband of his exclusive 'right' to sexual intercourse with his wife.[5] The importance attributed by the law to protecting wives and daughters within a property-interest context was emphasised by the early Statutes of Westminster.[6] Specifically, the second Statute (1285) provided:

> [I]f henceforth a man ravishes a wife, maiden or other woman, without her consent beforehand or afterwards, he shall have judgement of life and member; likewise if a man forcibly ravish a wife, maiden or other woman, even if she consents afterwards, he shall have judgement at the king's suit, and the king shall have suit.

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[4] Barbara Toner, *The Facts of Rape* (Arrow 1975) 89.

[5] Thomas O'Malley, *Sexual Offences: Law, Policy and Punishment* (Round Hall 1996) 3. O'Malley's 1996 edition of *Sexual Offences* is referenced in this section. This edition contains an overview of the historical development of the offence of rape, which is not contained in the more recent 2013 edition. (See Ibid. 3 – 9) Moreover, it should also be noted that the 1996 edition is also referenced in other sections of this thesis. As O'Malley explains, the 2013 publication is "an entirely new book, with very little salvaged from the first edition". (O'Malley, *Sexual Offences* (n 2) v) Therefore, it is useful and at times necessary to refer to the older edition.

[6] Ibid.

As toner explains, the Statute classified rape as an offence, regardless of whether the woman consented.[7] Hence, the law was primarily concerned with the theft of another man's property:

> It was the seizing of a husband's or father's property which was the offence, notwithstanding the will of the woman...the essence of the crime was theft.

This was the legal position for a number of centuries, and it was not until the late fifteenth century that the offence began to separate itself from this property-interest element.[8]

By the late seventeenth century rape was being defined as the carnal knowledge of a woman 'against her will' or without her consent by force, fear or fraud. It appears this definition was derived from the jurist Matthew Hale and the oftquoted phrase that "rape...is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent".[9] This notion was later endorsed by Blackstone in his consideration of rape in *Commentaries of the Law of England*[10], a consideration which is "marked by a scepticism of women's motivations which is highly reminiscent of Hale".[11] As a consequence of this definition, the onus was placed on the victim to demonstrate that the intercourse was forced upon her, which generally necessitated the need for evidence of physical resistance to be presented. It is possible that framing the definition of rape in such a manner has fuelled the culturally engendered implication that has (arguably) only been dispelled in recent decades, that a complainant had to be shown to have physically resisted intercourse in order to prove a lack of consent. However, as O'Malley notes, with the abolition of capital punishment for rape in 1841[12] there emerged a clear willingness on the part of the judiciary to widen the definition of rape, allowing for the offence to have occurred when intercourse

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[7] Toner (n 4) 90.

[8] Ibid. 94. As explained, in 1486, a Statute of Henry VII (Cap. 2, Statute of the Realm) created the offence of forcibly taking away a "maid, widow or wife...against her will to marry or defile her" which appears to indicate the initial separation of offences from the 'property' interest articulated in the 1285 Statute of Westminster. (Ibid 90).

[9] Matthew Hale, *History of the Pleas of the Crown* (Vol 2, London 1736) 628 – 636.

[10] William Blackstone, *Commentaries of the Law of England* (1765 – 1769)

[11] Merril Smith (ed.), *Encyclopedia of Rape* (Greenwood Press 2004) 27

[12] See Substitution of Punishment for Death Act 1841, s. 3. Under the Act the punishment of death was replaced by transportation for life.

was with a woman who did not consent, as opposed to intercourse with a woman 'against her will'.[13]

ii. The Current Law on the Offence of Rape in Ireland

Under current Irish law the offence of rape is provided for under s. 2 of the Criminal Law (Rape) Act 1981.[14] The provision states that:

> 2. (1) A man commits rape if—
>
> (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
>
> (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it,
>
> and references to rape in this Act and any other enactment shall be construed accordingly.

Section 2(1) is gender specific. Rape can only be committed by a man against a woman. Moreover, the offence is confined to heterosexual vaginal intercourse. Section 4 of the Criminal Law (Rape) (Amendment) Act 1990, which contains gender neutral provisions, deals with other forms of penetrative sexual assaults.[15]

Actus Reus

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[13] O'Malley, *Sexual Offences: Law, Policy and Punishment* (n 5) 36. Also see O'Malley, *Sexual Offences* (n 2) 36.

[14] As amended by the Criminal Law (Rape) (Amendment) Act 1990.

[15] Section 4 of the Criminal Law (Rape) (Amendment) Act 1990 provides: (1) In this Act "rape under section 4" means a sexual assault that includes—(a) penetration (however slight) of the anus or mouth by the penis, or (b) penetration (however slight) of the vagina by any object held or manipulated by another person. (2) A person guilty of rape under section 4 shall be liable on conviction on indictment to imprisonment for life. (3) Rape under section 4 shall be a felony. Originally described by O'Malley as "an Irish solution to an international problem", 'rape under section 4' was introduced to address the inadequacies of the traditional definition of rape. (O'Malley, *Sexual Offences: Law, Policy and Punishment* (n 5) 71) However, the provision has attracted significant debate and criticism. (See ibid. 71 and O'Malley, *Sexual Offences* (n 2) 68 – 69).

Section 2(1)(a) contains the *actus reus* element of the offence of rape. There are two main features of this element. Firstly, sexual intercourse must have occurred, and secondly, at the time of said intercourse the woman must not have consented. As Hanly explains, the crucial element of the *actus reus* of the offence of rape is a lack of consent.[16] Therefore, it is necessary for the prosecution to prove that the woman did not consent to sexual relations. In this jurisdiction the concept of consent in relation to the offence of rape has proven a topic of particular contention, primarily due to the lack of a statutory definition. Given the debate surrounding this issue and its centrality in relation to the offence of rape, rape and the issue of consent will be the subject of a detailed analysis in Part III of this Chapter. However, for the purpose of this section, it suffices to present a brief outline of the law on consent so as to enable an understanding of the elements associated with the offence of rape.

As a consequence of the lack of a legislative definition for 'consent' in this jurisdiction, case law has guided developments in this respect. As discussed above, traditional definitions of rape involved sexual intercourse with a woman against her will.[17] However, from the 1840s onwards, following the abolition of capital punishment for those convicted of rape, the definition of rape was gradually widened, allowing for the offence to have occurred when intercourse took place with a woman who did not consent as opposed to intercourse with a woman 'against her will'.[18] Due to increased pressure, campaigning and consciousness-raising by various victim advocacy groups and feminist critics, particularly in the second half of the twenty century, non-consent as opposed to resistance is now the crucial issue, both from a case law and legislative perspective. In the seminal case of *DPP v. Morgan*[19] (which provides the basis for s. 2 of the Irish 1981 Act and which will be discussed in greater detail below), the House of Lords classified the traditional reference to "force, fear or fraud" as misleading, noting:

> [T]he essence of the crime consists in having sexual intercourse with a woman without her consent and it is, therefore, rape to have sexual intercourse with a woman who is asleep or with one who unwillingly submits without a struggle.[20]

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[16] Hanly, *An Introduction to Irish Criminal Law* (n 2) 320.
[17] Blackstone (n 10).
[18] Ibid. Also see O'Malley, *Sexual Offences: Law, Policy and Punishment* (n 5) 36.
[19] *DPP v Morgan* [1976] AC 182.
[20] Ibid. 197.

In this jurisdiction the need to demonstrate resistance has also been statutorily negated. Following a review of the law in this areas by the Law Reform Commission ("LRC") in 1988[21], s. 9 of the Criminal Law (Rape) (Amendment) Act 1990 was enacted. The provision provides as follows:

> It is hereby declared that in relation to an offence that consists or includes the doing of an act to a person without the consent of that person any failure or omission by that person to offer resistance to the act does not of itself constitute consent to that act.

The shift from equating a lack of resistance with the presence of consent, and the subsequent clarification of the law in this regard through the enactment of statutory provisions, represented a marked improvement. However, in terms of seeking a clearer definition of consent, difficulties remain as to the exact meaning of this term in many circumstances, as will be discussed in Part III of this Chapter.

Mens Rea

The *mens rea* of rape is provided for under s. 2 (1)(b). At the time of sexual intercourse, the accused must have known the woman was not consenting or have been reckless as to whether she was or was not consenting. The test for assessing whether the requisite *mens rea* was present or absent is a subjective one. As Hanly explains:

> When a man genuinely believes that a woman is consenting, no rape occurs. This is so even where the belief is mistaken and even unreasonable. The reasoning is that rape requires either knowledge that the woman did not consent or recklessness as to consent. If the defendant genuinely believed that she was consenting, then clearly the defendant could not have had the required mens rea.[22]

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[21]Law Reform Commission, *Report on Rape and Allied Offences* (LRC 24 – 1988).
[22] Hanly, *An Introduction to Irish Criminal Law* (n 2) 325 – 326.

In an attempt to clarify the subjective approach to the mens rea of rape, s. 2(2) of the 1981 Act provides:

> (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

As the Law Reform Commission points out in its recent paper *Sexual Offences and the Capacity to Consent*, s. 2 of the Irish 1981 Act is directly modelled on s. 1 of the English Sexual Offences (Amendment) Act 1976.[23] Section 1 of the 1976 Act placed the House of Lords' decision in *DPP v Morgan* on a statutory footing. In this case a majority of the House of Lords held that a man who has sexual intercourse with a woman without her consent could not be convicted of rape if he honestly believed she was consenting. Nonetheless, while the test under the Irish 1981 Act is subjective in nature (at the time the accused must have honestly believed the complainant was not consenting), the provision also requires the jury to have regard for the presence or absence of reasonable grounds when assessing whether the accused belief is an honest one. Thus, the *Morgan* test (as contained in s. 2(2)), "although primarily subjective, incorporates an objective element by requiring the jury to objectively assess whether the accused could honestly have believed that the victim had consented".[24]

iii. A Brief Overview of Other Significant Sexual Offence Provisions in Ireland

Apart from the legislation governing the offence of rape, a number of other significant pieces of sexual offence legislation are worthy of mention at this point. Some of this legislation introduced particularly relevant statutory reforms which have shaped this area of the law in recent decades. While this legislation will be flagged at this juncture, it will also be considered in greater detail during the course of this thesis.

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[23] Law Reform Commission, *Sexual Offences and the Capacity to Consent* (LRC 109 – 2013) 30.
[24] Ibid.

Particularly relevant from a rape complainant perspective was the introduction of the Criminal Evidence Act 1992 ("1992 Act"). As McGrath states, the introduction of the 1992 Act signalled a recognition that victims of sexual or violent crime may suffer "considerable psychological trauma if required to give evidence in open court in the presence of the persons who have committed those offences".[25] The 1992 Act introduced a number of testimonial aids to cater for and accommodate vulnerable witnesses while giving evidence.[26] These provisions were primarily aimed at minimising trauma and accommodating the witness during the potentially taxing trial process and therefore, a consideration of the 1992 Act is particularly relevant given the subject matter of this thesis. The 1992 Act and its relevant provisions will be addressed in greater detail in Part IV of this Chapter, during the examination of existing testimonial aids and support measures available for witnesses in Irish courts.

Another piece of legislation worthy of mention is the Sexual Offenders Act 2001 ("2001 Act"). As will be discussed in Part IV of this Chapter, s. 34 of the 2001 Act inserted a new provision, s. 4A, into the Criminal Law (Rape) Act 1981.[27] The provision allows sexual offence complainants to avail of separate legal representation if the defence applies for leave to bring in evidence of sexual experience.[28] These proceedings take place in the absence of the jury. However, this right does not extend as far as full legal representation during the trial itself.[29]

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[25] Declan McGrath, *Evidence* (2nd edn, Round Hall 2014) 152.

[26] Many of the testimonial aids provided for in the 1992 Act find their origins in recommendations made by the Law Reform Commission in its report entitled *Report on Child Sexual Abuse*. Consequently, many of the protections offered under the 1992 Act are limited to minors. See Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32 – 1990).

[27] As amended by s.6 of the Criminal Law (Sexual Offences) Act 2006 and s. 3(1) of the Criminal Law (Sexual Offences)(Amendment) Act 2007 This topic will be discussed further in Part IV of this Chapter - "Sexual Experience Evidence".

[28] The cost of this representation in provided for by the State under the Civil Legal Aid Act 1995.

[29] For further information and criticism of the law in this regard see Rape Crisis Network Ireland, *Previous Sexual History Evidence: Position Paper* (May 2012). Initially, the concept of even limited separate legal representation for complainants was an issue of contention in Ireland. (See Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre 1998) 258 – 259) A number of commentators and contributors, including the Law Reform Commission, expressed concern about the enactment of such a provision, referring to its potential to unduly impact on the defendants constitutional right to a trial "in due course of the law". (LRC, *Report on Rape and Allied Offences* (n 21) 16 – 17) Nonetheless, drawing on models in a number of Scandinavian jurisdictions, in 1998 the Department of Justice, Equality and Law Reform advanced an argument for allowing such representation under Irish law. (Department of Justice, Equality and Law Reform, *Discussion Paper: The Law on Sexual Offences* (Government Publication 1998) 42) Subsequently, s. 34 of the Sex Offenders Act 2001 was enacted.

Furthermore, of particular interest within the context of this thesis is the recently published Criminal Law (Sexual Offences) Bill 2015 ("2015 Bill"). In November 2014 the General Scheme of the Criminal Law (Sexual Offences) Bill was published by the Department of Justice and Equality. This was followed by the publication of the 2015 Bill in September of that year. The 2015 Bill represents a response to prolonged calls by academics and criminal justice stakeholders alike for reform and modernisation of the law on sexual offences. The lengthy bill attempts to tackle a wide range of issues including criminalising the purchase of sexual services, strengthening offences to tackle child pornography and creating new offences to protect minors from online grooming. During the second reading of the Bill before the Seanad, the Minister for Justice and Equality, Francis Fitzgerald stated:

> The Bill is the most comprehensive and wide ranging piece of sexual offences legislation to be introduced in almost a decade .... Not only will the provisions in the Bill target those who target children, there is also recognition of the needs of victims of sexual offences and those who assist them ... In addition, amendments to criminal evidence legislation acknowledges the difficult experience which a trial process may be for the victim of a sexual offence.[30]

Section 35 (14C) of the 2015 Bill is of particular importance within the context of this thesis. This section proposes the introduction of a limited prohibition on personal cross-examination of the complainant by the defendant in certain circumstances. Given the significance of this provision to this research, it will be the focus of marked attention throughout this thesis, and in particular, will form a substantial part of the analysis undertaken in Chapter 3 and Chapter 5.

[30] Seanad Éireann Deb (Minister Frances Fitzgerald), 6 October 2015, vol 242 col 6.

II. Rape Myths and Stereotypes

The offence of rape has been described as occupying a unique status due to the "profusion of myths and incorrect stereotypes about rape, rapists and rape victims in society".[31] The archetypal gendered nature of the crime[32] has attracted extensive feminist research and literature on the topic, dating back several decades. This research attempts to identify the myths and stereotypes associated with the offence and to examine their prevalence in society.[33] It is now widely acknowledged that stereotypical beliefs and attitudes about rape complainants, rape defendants and the circumstances of sexual violence cases impact and impinge on judgments and perceptions about such offences.[34] Such beliefs make dealing with rape particularly challenging.[35] These myths, stereotypes and prejudices permeate many significant aspects of the trial process (and indeed, the criminal justice system). They have been implicated in the low reporting, high attrition and low conviction rates in such cases.[36] Identifying and understanding these prejudicial myths and stereotypes is important in order to appreciate their impact on the trial process, including their effect on substantive and evidential rules, their influence on juries and their overall impact on prosecution and conviction rates.

Three of the more prominent myths will be discussed in this Chapter. The construction of these myths, their prevalence in society and by association, their potential impact on juror deliberations and decision-making will be considered. The effect of such myths on other aspects of the trial process, namely on substantive and evidential rules relating to sexual offences, will be incorporated into the consideration of such issues which will take place in the following sections of this Chapter.

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[31] Allison and Wrightsman (n 2) 98.

[32] As described by Bacik in Ivana Bacik, "Women and the Criminal justice System" in Paul O'Mahony (ed), *Criminal Justice in Ireland* (Institute of Public Administration 2002) 148.

[33] For an overview of some of the early research on this topic see Allison and Wrightsman (n 2) Chapter 6 and Chapter 7. Also see Jo Bridgeman and Susan Millns, *Feminist Perspectives on Law: Law's Engagement with the Female Body* (Sweet & Maxwell 1998) 392 – 393.

[34] Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 31.

[35] See Sokratis Dinos, Nina Burrowes, Karen Hammond and Christine Cunliffe, "A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?" (2015) 43 (1) *International Journal of Law, Crime and Justice* 36, 37 and Hanly et al, *Rape and Justice* (n 1) 29.

[36] For example, see Susan Leahy, "Bad Law or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rape for Rape in Ireland" (2014) 14(1) *Irish Journal of Applied Social Studies* 18

Leahy helpfully identifies three primary stereotypes or myths associated with the offence of rape: the 'real' rape stereotype, the 'real' victim stereotype and the false allegations myth.[37] All three have been particularly influential in creating and shaping many of the difficulties that arise in the trial of rape and sexual offences.

i. The 'Real' Rape and 'Real' Victim Stereotype

The 'real' rape and 'real' victim stereotype are two of the most persistent stereotypes associated with the trial of rape and sexual offences. As a result, there is extensive national and international literature exploring and examining these stereotypes and their associated consequences.[38] As Temkin and Krahé explain, these stereotypes are described as such because they represent generalisations that stands at odds with available factual evidence.[39] They follow a very specific and ultimately unrealistic narrative, outlining the elements which must be present in order for the attack to constitute what many decision-makers perceive as a genuine or 'real' rape. Despite the fact that the 'real' or 'ideal' rape/victim scenario is not representative of reality, it has been established that the relationship of the alleged rape to the ideal rape has a profound effect on the chances of conviction.[40]

Corbett and Larcombe wrote:

> [T]he determining issue in the majority of rape cases is based on socially prevalent myths about sexual assault and stereotypes of female and male sexuality. These myths in effect classify some women as 'real' or 'deserving' rape victims and others

[37] Leahy, "Bad Law or Bad Attitudes?" (n 37) These three myths are also identified as particularly problematic by Hannah McGee, Madeleine O'Higgins, Rebecca Garavan and Ronán Conroy, "Rape and Child Sexual Abuse: What Beliefs Persist About Motives, Perpetrators, and Survivors?" (2011) 26 (17) *Journal of Interpersonal Violence* 3580.

[38] For example, see Hanly et al, *Rape and Justice* (n 1) 19, Temkin and Krahé (n 34) 31, Mont Du, Janice Du and Karen-Lee Miller, "The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women" (2003) 9(4) *Violence Against Women* 466 – 486 and Ilaria Sarmiento, "Rape Stereotypes and Labelling: Awareness of Victimisation and Trauma" (2011) 108 (1) *Psychological Reports* 141 – 148.

[39] Temkin and Krahé (n 34) 31.

[40] For example, see MR Burt and RS Albin, "Rape Myths, Rape Definitions and the Probability of Conviction" (1981) 11 *Journal of Applied Social Psychology* 212 – 230.

as 'unrapable'; some rapes as 'real' and others as 'half-won arguments' with no harm done.[41]

According to the stereotype, a 'real' rape is committed by a stranger, a person who is unknown to the victim. The attack will take place in a public, yet isolated place, generally at night. The rapist will use force and inflict violence upon the victim, causing significant injury and harm.[42]

Closely connected to the 'real rape' perception is the 'real' or 'ideal' victim stereotype.[43] A 'real' victim of rape will be young and generally sexually inexperienced. She will be modestly dressed and will not have engaged in any 'inappropriate' or 'risky' behaviour.[44] Overall, she will have lead a 'respectable' lifestyle.[45] Consequently, she will have done nothing to invite or provoke the attack. She will scream and struggle during the rape, resulting in serious injury to her person. Once the attack is over she will be in a visibly emotional and traumatised state and will promptly report the assault, preferably to the police or the first person she encounters.

The criteria necessary in order to adhere to the 'real' rape and 'real' victim' stereotype are not only onerous but more significantly, unrealistic. Research in this jurisdiction and beyond has repeatedly shown that the majority of rapes and the majority of rape complainants do not fulfil the criteria advanced by the 'real' rape/'real' victim stereotype.[46] In Ireland a number

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[41] Lea Corbett and Wendy Larcombe, "Lunar Landscapes: The Dark Side of Sexual Assault and the Law", *Real Rape Law Coalition* (Victoria 1993) 131, 133.

[42] For further discussion of the 'real' rape/'real' victim stereotype see Temkin and Krahé (n 34) 31 – 33. Also see Susan Estrich, *Real Rape: How the Legal System Victimizes Women who say No* (Harvard University Press 1988)

[43] See Ibid. Also see Bennett Capers, "Real Women, Real Rape" (2013) 60 (4) *UCLA Law Review* 827 – 882.

[44] For an early consideration of appropriate versus inappropriate behaviour in relation to the rape complainant in an Irish context see Caroline Fennell, "Criminal Law and the Criminal Justice System: Women as Victims" in Alpha Connelly (ed), *Gender and the Law in Ireland* (Oak Tree Press 1993) 163 - 165. Here, Fennell refers to the "good girl"/"bad girl" distinction.

[45] See Aileen McColgan, "Common Law and the Relevance of Sexual History Evidence" (1996) 16 *Oxford Journal of Legal Studies* 275, 276. One of the most influential aspects of the 'ideal' rape scenario concerns the perceived 'sexual respectability' or otherwise of the complainant. This issue will be discussed in more detail in Part IV of this Chapter.

[46] For research uncovering the falsehood of these myths in other jurisdictions see Allison and Wrightsman (n 2) Chapter 6 and Temkin and Krahé (n 34) 31-33.

of studies have revealed the fictitious nature of these stereotypes, namely, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases in Eleven Countries (Country Briefing: Ireland)*[47] (*"Different Systems"*), *Rape and Justice in Ireland ("RAJII")* [48]and *The SAVI Report: Sexual Abuse and Victimisation in Ireland* (*"SAVI Report"*). [49] The *Different Systems* study was part of a wider European project which involved the tracking of 100 rape case files in eleven different countries, including Ireland, while the *RAJII* was a four year, national, multi-strand, study of the process of prosecuting rape in Ireland. *The SAVI Report* was commissioned by the Dublin Rape Crisis Centre in 2002 and was a national study involving anonymous telephone interviews with over 3,000 adults who were randomly selected from the general population in Ireland.

In relation to the stereotypes under discussion, these studies revealed that, contrary to the 'real' rape scenario, statistics indicate that the majority of rapes are committed in private, indoor settings[50] by an attacker who is known to the victim. In fact, in the *RAJII* study, of 173 case files received by the Central Criminal Court between 2000 and 2005, attacks by strangers made up less than 18 per cent of cases.[51] In the *SAVI Report,* 23.6 per cent of women surveyed had been sexually assaulted by intimate or ex-partners.[52] Moreover, statistics also suggest that while physical force was present in the majority of cases, the physical injuries received were mostly minor (bruising, scratches, etc), as opposed to severe (broken bones, knife wounds, etc).[53]

Similarly, many of the assumptions surrounding the 'real' rape victim were also proven false by the two studies. For example, the notion that a 'real' victim will promptly report their attack has at this stage been debunked. Since the 1970s, Rape Trauma Syndrome ("RTS") has received greater attention, with extensive research and studies being carried out in this

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[47] Corr et al (n 1).
[48] Hanly, *Rape and Justice* (n 1).
[49] McGee et al (n 1). The study involved anonymous telephone interviews with over 3,000 adults who were randomly selected from the general population in Ireland. (Ibid. xxxi).
[50] Corr et al (n 1) 76 and Hanly et al, *Rape and Justice* (n 1) xxvii.
[51] Hanly et al, *Rape and Justice* (n 1) xxix. Similarly, in another Irish study, the *SAVI Report,* 23.6 per cent of women surveyed were sexually assaulted by intimate or ex-partners. (McGee et al (n 1) xxxv).
[52] McGee et al (n 1) xxxv.
[53] Hanly et al, *Rape and Justice* (n 1) 274.

area.[54] Much of this research has demonstrated that victims of sexual offences often do not share the same reactions as victims of other types of crime. Therefore, while it may be typical of a victim of a theft, for example, to complain of the offence as soon as possible, "many perfectly genuine rape victims fail to report rape to a third party, either immediately or at all".[55] In Ireland the results of the *RAJII* study found that of 100 victims of rape who participated in a questionnaire, 34 per cent had never reported their attack to the Gardaí. Similarly, in 2002, the *SAVI Report* indicated that one in five women experience sexual violence as adults, yet in 2004, for example, the Central Statistics Office showed that only 1,752 sexual offences were recorded as having been reported.[56] Indeed, the low reporting rates and the "dark figure" of crime in relation to sexual offences had long been recognised, both domestically and internationally.[57]

Furthermore, as Leahy notes, alcohol consumption represents an "additional element to sexual offending which does not feature in stereotypical assumptions about sexual offences".[58] Consequently, its consumption (and particularly its 'excessive' consumption) is capable of being construed as engaging in the 'inappropriate' or 'risky' behaviour which a 'real' victim is expected to avoid. As Lees notes, "For women ... alcohol carries the taint of immorality and promiscuity".[59] Therefore, it is not an element which is present in relation to the 'real' victim stereotype. However, in reality it is an extremely common feature of sexual offences. In the *Different Systems* study, 70 per cent of complainants had consumed alcohol

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[54] For further information see Ann Wolbert Burgess and Lynda Lytle Holmstrom, "Rape Trauma Syndrome" (1974) 131 *American Journal of Psychiatry* 918 in Jennifer Temkin (ed) *Rape and the Criminal Justice System* (Dartmouth Publishing Company Ltd 1995) 3. Also see Allison and Wrightsman (n 2) 152 – 161.

[55] Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford University Press 2002) 190. Also, refer to Heffernan and Ní Raifeartaigh, where it is noted that developments in psychological research of RTS has dispelled the notion that the timely reporting of such an offence is likely, or in some situations, even possible. (Liz Heffernan and Úna Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) 127).

[56] See www.cso.ie. This figure dropped to 1,480 in 2009 and reached 2,006 in 2014 <http://www.cso.ie/multiquicktables/quickTables.aspx?id=cja01> accessed 16 June 2015. Also see Mary Crilly, *Sexual Violence in Ireland: The Criminal Justice System, A Guide for Victims* (Department of Justice, Equality and Law Reform 2007) 8.

[57] Temkin and Krahé give an overview of various international statistics in relation to rape and sexual offences (including the low reporting rates) from a number of jurisdictions. Temkin and Krahé (n 34) 10 – 14.

[58] Leahy, "Bad Law or Bad Attitudes?" (n 36) 22.

[59] Sue Lees, *Carnal Knowledge: Rape on Trial* (The Women's Press Ltd 2002) 144.

prior to the attack[60], while statistics from the *RAJII* questionnaire showed an almost identical result.[61]

Thus, the 'real' rape/'real' victim stereotype has been found not to reflect the reality of the majority of sexual offences.

ii. The False Allegations Myth[62]

As outlined above, another rape myth which has an insidious effect is the false allegation myth. In relation to sexual offences, there exists a belief that "false accusations of sex crimes in general, and rape in particular, are much more common than untrue charges of other crimes".[63] The starting point of this argument begins with the assertion that false allegations are easy to make.[64] As Hale infamously cautioned, "[rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent".[65] This assertion would seem to stem from the fact that such crimes generally take place in private with no other witness and often leave no physical evidence. Under such circumstances it has been argued that a sexual offence complainant can construct a detailed and plausible, yet ultimately false, allegation.[66] The next step in this argument is the proposition that false allegations are therefore frequently made. Such an assertion is based to a large degree on perception rather than on any statistical or empirical evidence and hence, appears to point to sexual prejudice rather than any genuine phenomenon.[67] As Temkin comments, due to the "alleged proclivities and weakness of women", they have traditionally

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[60] Corr et al (n 1) 76.

[61] Hanly et al, *Rape and Justice* (n 1) xxv.

[62] Describing false allegations of rape as a myth may be misleading. Like any other offence, there are of course incidents of false allegations of rape. However, as will be discussed, the myth element relates to the notion that false allegations of this offence occur significantly more often than false allegations of other crimes. (For an interesting discussion on the mythical history of such allegations see Donna Zuckerberg, "He Said, She Said: The Mythical History of the False Rape Allegation" (*Jezebel* 30 July 2015) <http://jezebel.com/he-said-she-said-the-mythical-history-of-the-false-ra-1720945752> accessed 7 August 2015. Also, see Allison and Wrightsman (n 2) 205 – 206.

[63] Note, "The Rape Corroboration Requirement: Repeal Not Reform" (1972) 81 *Yale Law Journal* 1365 in Jennifer Temkin (ed) *Rape and the Criminal Justice System* (Dartmouth Publishing Company Ltd 1995) 221.

[64] Declan McGrath, "Two Steps Forward, One Step Back: The Corroboration Warning in Sexual Cases" (1999) 9(1) *Irish Criminal Law Journal* 22, 37.

[65] Hale (n 9) 628 – 636.

[66] McGrath, "Two Steps Forward, One Step Back" (n 64) 37.

[67] Ibid. 38.

been deemed less trustworthy than complainants of other offences.[68] Indeed, brief reference to the myriad of reasons put forward by various sources as possible explanations for the making of false allegations would appear in itself to confirm the prejudice towards such complainants. For example, Glanville Williams commented that "sexual cases are peculiarly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed".[69] Similarly, in *Archbold* it was stated that "experience has shown that female complainants have told false stories for various reasons and sometimes for no reason at all".[70]

However, the inherent flaws of the above arguments have been exposed by researchers. Referring first to the assertion that false allegations are easy to make, Fennell notes that this factor "is not peculiar to sexual offences".[71] On the contrary, many other non-sexual offences can arise in a criminal trial where the "accused's word is pitted against the accusers".[72] Therefore, the mere fact that sexual crimes often take place in private and may leave no physical evidence, does not in itself justify the allegation that such offences are easily fabricated. In this regard, it has been noted that, contrary to the thesis advanced by Hale, rape is in fact "one of the hardest charges to bring".[73] It has repeatedly been demonstrated that there are several factors to discourage complainants from making an accusation of rape ranging from "the stigma that attach to victims of an incident culturally defined as sordid" to the "fear of retaliation from the accused rapist or his friends".[74] Thus, as Lees comments, "The problem is not that women falsely report being raped but that most women do not report rape at all...".[75]

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[68] Temkin, *Rape and the Legal Process* (n 55) 256.
[69] Glanville Williams, "Corroboration – Sexual Cases" (1962) *Criminal Law Review* 662.
[70] S G, Mitchell (ed), *Archbold: Criminal Pleading Evidence and Practice* (39th edn, Sweet & Maxwell 1976) para 1430. Furthermore, for a more detailed list of reasons advanced for the making of a false allegation see Law Reform Commission (Vic), *Rape Prosecution (Court Procedures and Rules of Evidence)* (Melbourne 1976) 43 – 44.
[71] Caroline Fennell, "Differential Treatment of Sexual Complainants by the Law of Evidence: A Case for Reform?" (1987) 22(2) *The Irish Jurist* 228, 233.
[72] Ibid. 233.
[73] Temkin, *Rape and the Legal Process* (n 55) 256.
[74] Note (n 63).
[75] Lees (n 59) 125.

As for the claim that false allegations are commonly made by complainants of sexual crimes, such an assertion would also appear to be founded on sexual prejudice, suspicion and myth as opposed to factual or statistical evidence. There appears to be little evidence that false accusations are made more frequently in rape than in other crimes. In this jurisdiction, the *Different Systems* study found that nine per cent of the cases in their study sample were classified as false by the Gardaí.[76] An even lower percentage of false allegation was found in the *RAJII* study. Here the data indicated that of the 595 DPP files subject to the survey, approximately six per cent of the complaints were deemed false by either the Gardai or the DPP.[77] Such results suggest that false allegations of rape are rare. Furthermore, identifying whether an allegation is in fact false and classifying it as such can present difficulties. As Hanly et al note, issues can arise from a definitional perspective, such as false allegations made in good faith (for example, where the complainant was intoxicated and honestly believed that she had been assaulted).[78] Identifying false reports can also prove problematic. For example, complainants may "maintain false reports or they may make genuine reports which they later claim were false in order to be certain that the case will not be prosecuted". [79] Consequently legitimate allegations may be identified by the Gardaí but remain un-falsified, while "false reports may be suspected but remain unproven".[80]

Therefore, while identifying the true rate of false allegations is challenging, from the data available in this jurisdiction such allegations would appear to be low. This reflects the results of similar studies in other countries.[81] Thus, it would appear that in Ireland the rate of false allegations of rape is low and no higher than the rate in relation to other offences.[82] Consequently, the heightened level of suspicion directed at complainants of rape and sexual offences would appear unjustified.[83]

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[76] Corr et al (n 1) 78.
[77] Hanly et al, *Rape and Justice* (n 1) xxix.
[78] Ibid. 19.
[79] Ibid. 249.
[80] Ibid. 249.
[81] For example, see Allison and Wrightsman (n 2) 10 – 11 and Philip Rumney, "False Allegations of Rape" (2006) 65 *Cambridge Law Journal* 128-58. Also see Sue Lees and Jeanne Gregory, *Rape and Sexual Assault: A Study of Attrition* (Islington Council 1993) 6. In the course of their research Lees and Gregory found no "clear cut case of false allegations" and they also reported that the Branch Crown Prosecutor could recall no clear cut example of a false allegation case in five years of CPS work. (Ibid.).
[82] Hanly et al, *Rape and Justice* (n 1) 19 and for a broader perspective see Temkin and Krahé (n 34) 138.
[83] Leahy, "Bad Law or Bad Attitudes?" (n 36) 23.

iii. The Prevalence of Rape Myths and Stereotypes

Despite the fallaciousness of these stereotypes and myths, they have yet to be dispelled on a broader, societal level. Research continues to demonstrate that these prejudicial myths and stereotypes remain influential among the general public, both nationally and internationally. In an attempt to explain and understand their continued prevalence, researchers have advanced a number of different rationales. Allison and Wright attribute their ongoing pervasiveness to a variety of theories including the belief in a just world, defensive attribution and cognitive attributional explanations.[84] Other feminist theorists have argued that it is the innately patriarchal nature of society which continues to generate these myths and stereotypes.[85] Hanly et al also note that the representations and reports of rape in the media could also fuel the continued validity of these myths and offences. They explain:

> Reports that correspond to the real rape stereotype are more likely to be prosecuted, such incidents are also more likely to be reported in the media, thereby creating a self-perpetuating process. Further, the real rape stereotype is also quite dramatic and lends itself to media reporting.[86]

Whether these theories fully or partially account for the ongoing prevalence of rape myths and stereotypes in society is open for further discussion. However, what seems apparent is the influence which these myths and stereotypes continue to hold. In an Irish context, a number of studies have assessed the prevalence of rape myths among the general public. Leahy compares the results of two studies in particular, and concludes that there is a significant level of rape myth prevalence in Irish society.[87]

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[84] Allison and Wrightsman (n 2) Chapter 7.

[85] For example see Susan Brownmiller, *Against our Will: Men Women and Rape* (Penguin Books 1976) and Carol Smart, *Feminism and the Power of Law* (Routledge 1989). Also see more generally, Germaine Greer, *The Female Eunuch* (HarperCollins Publishers 1970).

[86] Hanly et al, *Rape and Justice* (n 1) 33.

[87] Leahy, "Bad Law or Bad Attitudes?" (n 36) 24.

The *SAVI Report*[88] found that 37.9 per cent of women and 42.3 per cent of men believed that false allegations of rape were common.[89] The 'real' rape/'real' victim stereotype also appears to hold credence in Irish society. For example, an *Irish Times* report found that 37 per cent of participants believed that victims who flirt extensively with their attacker are at least complicit, if not completely to blame for the assault.[90] The report also found that 41 per cent of respondents believed that a victim is partially responsible for the attack if she consumed alcohol or took drugs.[91] The *SAVI Report* found that 30.2 per cent of men and 27.4 per cent of women believed that victims who wear tight tops or short skirts are inviting the rape, while approximately 16 per cent of participants believed that a woman who was not visibly upset by the experience probably was not the victim of a rape.[92] These results are unsettling but are perhaps unsurprising, given the lasting resilience of rape myths and stereotypes.

It should be noted that both these studies are quite dated, particularly the *SAVI Report* which was conducted in 2002. However, despite repeated calls for additional and up-to-date research in this area, a follow up report has yet to be commissioned.[93] Therefore, until such a report is sanctioned and undertaken, the current data is the only guidance available in this respect.

Drawing on the above research indicating the prevalence of rape myths and stereotypes in Irish society, Leahy seeks to assess the potential effect of such attitudes on juror deliberation in rape and sexual offence trials. She opines that given the prevalence of such myths among the general public, there is significant potential for juries in rape and sexual offence trials to include individuals who are influenced by such myths.[94] Unfortunately, assessing this is problematic. In this jurisdiction, research on real juries appears not to be permitted,[95] and as

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[88] McGee et al (n 1). The study involved anonymous telephone interviews with over 3,000 adults who were randomly selected from the general population in Ireland. (See Ibid. xxxi).
[89] Ibid. 158.
[90] Conor Ryan, "Rape: Our Blame Culture", *Irish Examiner*, (Dublin, 26 March 2008). This survey was conducted by the *Irish Times* and RED C with over 1,000 adults being questioned.
[91] Ibid.
[92] McGee et al (n 1) 158.
[93] For example, see report in the *Irish Times* in which Ellen O'Malley- Dunlop of the Rape Crisis Centre Dublin calls for a "second Savi" report to be commissioned, See Kitty Holland, "'Disturbing' Increase in Sexual Abuse", *Irish Times* (Dublin, 3 September 2014).
[94] Leahy, "Bad Law or Bad Attitudes?" (n 36) 24.
[95] See *O'Callaghan v Attorney General* [1993] 2 IR 17.

of yet, there have been no mock jury studies related to rape or sexual offence trials conducted in Ireland.[96] However, a number of such studies have been undertaken in other jurisdictions including England and Wales, where similar attitudes towards rape myths have been established among the general public. Clear evidence has emerged from these studies indicating that jurors' attitudes influence the way they approach evidence and reach a verdict.[97]

McColgan highlights the effect of the admission of evidence relating to a complainant's sexual experiences on juries by reference to the "extra legal notions" of 'real' rape and the "still-prevalent myth" that women who are sexually experienced are more likely to fabricate allegations of rape.[98] Experimental studies have found that the introduction of such evidence can still have a far-reaching and overtly-prejudicial effect upon mock juries. A 2002 study carried out by Schuller and Hastings found that upon being informed that the complainant had previously engaged in consensual sexual intercourse with the defendant, mock jurors were less likely to find the complainant credible and more likely to attribute blame to her for the incident, than were those who did not receive this information.[99] Interestingly, directions given to these mock jurors instructing them to use this evidence only to establish whether the defendant had reason to believe that the complainant was consenting and not to evaluate the complainant's credibility were not effective.[100] Moreover, many of the findings produced by this research echo those established in an earlier mock jury study conducted by Johnson et al in 1995.[101] In another study conducted by Temkin and Krahé, in which they assessed

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[96] For a comprehensive examination of juries from an Irish perspective see Mark Coen, "Presumed Competent?: An Analysis of the Irish Criminal Jury" (PhD Thesis, Trinity College Dublin 2012).

[97] For a recent analysis of this issue see Dinos et al (n 35) 36 – 49. Here the authors conducted a systematic review of nine studies which assessed the impact of rape myths on juror decision-making. The meta-analysis "supported the hypothesis that rape myths impact on juror decision-making regardless of study quality". (Ibid. 36). However, in general, a note of caution should be added in relation to existing mock jury studies on rape, as some of the methodologies employed are not as rigorous or impressive as others. (See Temkin and Krahé (n 34) 53 – 54 and Pamela McMahon and Lawrence Fehr, "Methodological Problems in Mock Jury Research" (1984) 123(2) *The Journal of Social Psychology* 277)

[98] McColgan (n 45) 276.

[99] Regina Schuller and Patrice Hastings, "Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions" (2002) 26 *Psychology of Women Quarterly* 252, as discussed in Temkin and Krahé (n 34) 55.

[100] Ibid. For further discussions of this and other studies, see Temkin and Krahé (n 34) 55.

[101] JD, Johnson, LA, Jackson, L, Gatto and A, Nowak, "Differential Male and Female Responses to Inadmissible Sexual History Information Regarding a Rape Victim" (1995) 16 *Basic and Applied Social Psychology* 503 as cited in Temkin and Krahé (n 34) 55.

responses to different rape scenarios, they found that participants were "more convinced that the defendant should be held liable and blamed the complainant less in stranger rapes than in rapes by acquaintances and, in particular, rapes by ex-partners".[102] Moreover, the study revealed that participants' belief that women precipitate rape through their appearance and behaviour was "a strong predictor of assessments of defendant liability and complainant blame...".[103]

Similar studies reveal further evidence of rape myths and stereotypes influencing the decision-making processes of mock jurors. In a study conducted by Finch and Munro, the results suggested that jurors were critical of complainants who were intoxicated at the time of the alleged attack.[104] Another study undertaken by Ellison and Munro indicated that participants were less likely to classify non-consensual intercourse as rape when it was not accompanied by physical force or evidence of subsequent resistance.[105]

The results of such research give credence to the proposition that jurors drawn from societies in which a significant portion of the population adhere to rape myths and stereotypes are likely to include individuals who hold such attitudes. Consequently, such myths and stereotypes have the potential to impact upon juror deliberations. As Leahy concludes, it is not possible or advisable to reach solid conclusions in respect to juror deliberations in rape cases in Ireland by reference to mock jury studies conducted in England.[106] Nonetheless, within an Irish context the value of such research lies in its ability to demonstrate "how the types of attitudes which have been shown to exist in Irish society may influence juror deliberations".[107]

iv. Conclusion

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[102] Temkin and Krahé (n 34) 120.
[103] Ibid.
[104] Emily Finch and Vanessa E Munro, "The Demon Drink and the Demonized Woman: Socio-sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16(4) *Social and Legal Studies* 591, 599.
[105] Louise Ellison and Vanessa E Munro, "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49(2) *British Journal of Criminology* 202, 206.
[106] Leahy, "Bad Law or Bad Attitudes?" (n 36) 25.
[107] Ibid.

The dangers created by rape myths and stereotypes were outlined in the preceding section. They shape and influence the manner in which sexual offences, complainants of sexual offences and defendants in these cases are perceived. They give credence to prejudices and misconceptions which distort the reality of sexual violence. Within the context of the criminal trial process, perceptions which are influenced by rape myths and stereotypes make dealing with such offences particularly difficult and challenging.

As highlighted, it is difficult to comprehensively identify and demonstrate the impact of rape myths and stereotypes on juror deliberations. Nonetheless, the prevalence of such myths among members of the general public in this jurisdiction has been assessed and it seems apparent that they still exert significant influence in society. Consequently, it is rational to assume that such attitudes will be held by certain jurors and therefore, will come into play during juror deliberations in rape and sexual offence trials. Moreover, the manner in which such attitudes have influenced other aspects of the trial process is also concerning and will be considered in the subsequent sections of this Chapter.

III. Consent and the Offence of Rape

Within the criminal law in general the concept of consent has proven problematic, however, this is particularly so in relation to the offence of rape. A number of specific aggravating factors may be identified. Due to the broad and multifaceted nature of the term "consent", a satisfactory definition of the concept has proven troublesome from both a legislative and judicial perspective. This difficulty is reflected by the failure of the legislature in a number of common law jurisdictions, including Ireland, to provide a statutory definition of the term. The issue is further complicated by the fact that the legitimacy of sexual intercourse hinges on both the *actus reus* and the *mens rea* of rape – namely "whether the complainant in a rape trial actually consented to the sexual intercourse and... whether the defendant understood the complainant to be consenting".[108]

This section will present an overview of the various issues surrounding the concept of consent in the offence of rape. First, consent and its development in relation to the offence of rape will be addressed. The unique difficulties presented by the concept in relation to the offence of rape will then be outlined. Before concluding, the current position in this jurisdiction will be assessed and the potential for reform will be briefly evaluated.

i. The Law of Consent in the Offence of Rape

As highlighted in Part I of this Chapter, in this jurisdiction the offence of rape is provided for in s. 2 of the Criminal Law (Rape) Act 1981, as amended by the Criminal Law (Rape) (Amendment) Act 1990.[109] As outlined previously, under this provision[110] consent is an element of the *actus reus* of the offence of rape, contained in s. 2(1)(a), while belief in consent is an aspect of the *mens rea* of the offence, as outlined in s. 2(1)(b).

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[108] Sharon Cowan, "Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape" in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007) 54.

[109] "2 (1) A man commits rape if: He has sexual intercourse with a woman who at the time of the intercourse does not consent to it; and At the time he knows that she does not consent or he is reckless as to whether she does or does not consent to it, and reference to rape in this Act and other enactments shall be construed accordingly. (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

[110] This provision was modelled on its corresponding provision in England and Wales, s. 1, Sexual Offences (Amendment) Act 1976.

In relation to the *mens rea* element, the test to be applied when assessing culpability is a subjective one. Consequently, the defendant's belief in the complainant's consent does not have to be an objectively reasonable belief, it merely has to be honestly held. As discussed in Part I of this Chapter[111], the leading precedent for the subjective test for the *mens rea* of rape is the House of Lords' decision in *DPP v Morgan*.[112] As per Lord Hailsham, the court held that;

> [T]he prohibited act is and always has been intercourse without the consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or not. A failure to prove this involves an acquittal because the intent, an essential ingredient is lacking. It matters not why it is lacking if only it is not there, and in particular it matters not that the intention is lacking only because of a belief not based on reasonable grounds.[113]

The House of Lords' endorsement of the subjective construction of the *mens rea* of rape caused significant controversy, both among the legal community and the greater public in general. While supporters of the subjective approach defended the judgment for its general effects on the criminal law[114], dissenters dubbed it as a "Rapist Charter".[115] In response to the controversy, the government established the Heilbron Committee to examine the matter and produce a report.[116] The committee concluded that the majority of the House of Lords had decided the *Morgan* case correctly and recommended that the judgment be reflected in statute. Thus, the Sexual Offences (Amendment) Act 1976 was enacted in England and Wales, giving legislative effect to the decision in *Morgan*. In 1981 the relevant provision of the 1976

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[111] See p. 17 – 18 of this thesis.
[112] *DDP v Morgan* (n 19).
[113] Ibid. 215.
[114] Ashworth and Temkin note that such an approach emphasises the principle that people should be judged on the facts as they believe them to be. (Andrew Ashworth and Jennifer Temkin, "The Sexual Offences Act 2003: Rape, Sexual Assault and the Problems of Consent" (2004) *Criminal Law Review* 328, 340).
[115] See O'Malley, *Sexual Offences* (n 2) 56. Also see Jennifer Temkin, "Sexual History Evidence—Beware the Backlash" (2003) *Criminal Law Review* 217, 217.
[116] The Heilbron Committee, *Report of the Advisory Group on the Law of Rape* (London 1975).

Act was replicated in this jurisdiction by s. 2 of the Criminal Law (Rape) Act 1981, with much of the rest of the common law world also following suit.[117]

ii. The Role of Consent in the Offence of Rape

Thus, as highlighted above, the rape trial "hinges on two crucial issues", both of which are directly concerned with consent: "on the fact of non-consent on the part of the victim and on the defendant's state of mind about whether the victim was consenting".[118] Referring to consent and the manner in which it is interpreted in rape trials, the criminologist, Carol Smart has stated, "In practice it would seem that consent is assumed and the raped woman must prove non-consent".[119]

From a legal perspective, the necessity to prove non-consent is not unique to the offence of rape.[120] Within the criminal law there are a number of offences which require non-consent to be proven by the prosecution in order for a defendant to be convicted. For example, the offence of theft as set out under s. 4 of the Criminal Justice (Theft and Fraud Offence) Act 2001, provides:

> [A] person is guilty of theft if he or she dishonestly appropriates property *without the consent* of its owner and with the intention of depriving its owner of it.(Emphasis added)

Similarly, s. 2 of the Non-Fatal Offences Against the Person Act 1997[121] provides that a person will be guilty of assault if he applies force on the body of another "*without the consent* of the other".[122] (Emphasis added)

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[117] See O'Malley, *Sexual Offences: Law, Policy and Punishment* (n 5) 57. The *Morgan* decision was given legislative effect in a number of other common law jurisdictions outside of Ireland, including Scotland and a number of Australian jurisdictions. However, in recent decades, many jurisdictions have moved away from this approach, including England and Wales. The approach adopted in the English Sexual Offences Act 2003 will be considered in later paragraphs.

[118] Celia Wells and Oliver Quick, *Lacy, Quick and Wells: Reconstructing Criminal Law: Texts and Materials* (4th edn, Cambridge University Press 2010) 506.

[119] Smart (n 85) 33.

[120] Finbarr McAuley and J Paul McCutcheon, *Criminal Liability* (Round Hall 2000) 505.

[121] As amended by s. 6 of the Fines Act 2010.

[122] Section 2 states: 2. (1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly— (a) directly or indirectly applies force to or causes an impact on

Due to the presumption of innocence afforded to the accused in criminal trials and the burden of proof which is placed upon the prosecution, non-consent must be proven beyond a reasonable doubt by the prosecution in order to secure a conviction for these offences. However, there are a number of aspects of consent within the context of the offence of rape which differentiate it from other criminal offences.

First, consent is an element which is integral to both the *actus reus* and *mens rea* of the offence of rape in a manner which is distinctive from the above offences. Thus, in order for a conviction for rape to be secured, not only must the prosecution prove that the complainant did not consent but they must also prove that the defendant believed the act to be non-consensual. Second, in comparison to the victim of a theft or assault, the complainant in a rape trial is effectively forced to play a significant and extremely burdensome role in proving non-consent, often resulting in a close scrutiny of her present and past behaviour.[123] As Temkin and Krahé comment, "there is probably no other criminal offence that is as intimately related to...evaluations of the victim's conduct as sexual assault".[124] This is particularly evident in relation to the scrutiny directed at the victim's sexual history. The burdensome role placed on the victim and the degree of probing to which she is subjected is linked to the pivotal role of consent in rape trials and it is this which significantly differentiates it from other criminal offences. Hence, it is on the basis that Smart stated that consent is assumed, leaving non-consent to be proven by the rape victim. [125]

iii. Ireland – The Potential for Reform

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the body of another, or(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,
without the consent of the other. (Emphasis added)

[123] Refer to Part II and Part IV of this Chapter.

[124] Temkin and Krahé (n 34) 33. Also, Hanly outlines the difficult position in which the complainant is placed. (Hanly, *An Introduction to Irish Criminal Law* (n 2) 345 – 347). However, also see Doreen McBarnet, "Victim in the Witness Box: Confronting Victimology's Stereotype" (1987) 7 *Contemporary Crises* 293 where the author attempts to examine the shared experiences of victims of a variety of different crime.

[125] Smart (n 85) 33. Also see Susan Duncan, "Law as Literature: Deconstructing the Legal Text" (1994) 5 *Law and Critique* 3 and Nina Philadelphoff-Puren, "Contextualising Consent: The Problem of Rape and Romance" (2005) 20(46) *Australian Feminist Studies* 31.

As outlined above, there is no statutory definition of consent in this jurisdiction, and the subjective approach to the *mens rea* element of the offence has been firmly established in Ireland since the enactment of the Criminal Law (Rape) Act 1981.[126] This has proven extremely contentious, particularly among victim advocacy and support groups.[127] Following the enactment of the 1981 Act, an opportunity arose for the Law Reform Commission to address the issue of consent in rape offences in the late 1980's. Initially, the 1987 consultation paper issued by the Commission stated that they "were not aware of any problems having arisen as a result of the non-definition of consent" and therefore recommended that the law be left as it was.[128] However, a year later in their 1988 report, the Commission seemed to have had a change of heart. They stated that certain victim support groups were "strongly of the opinion that the absence of a definition had influenced verdicts" and accordingly they felt it would be "advantageous if the legislature were to clarify the law".[129] Hence, they recommended that consent be defined as "a consent freely and voluntarily given"[130] and they called for the enactment of legislation which would place this definition on a statutory footing.

However, in relation to the *mens rea* element of the offence, the Law Reform Commission were not to be swayed from their original position, as established in the consultation paper. The Commission rejected the proposition of substituting an objective test for the one laid down in s.2 (2) of the 1981 Act. The commission stated;

> We have not been persuaded by any argument that has been advanced to us that we were wrong in our original conclusion that the provisions of section 2 (2) represent a fair and workable test in a difficult area. We accordingly adhere to our original recommendation that no change be made.[131]

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[126] For further information on the lack of a statutory definition of consent in Ireland see O'Malley, *Sexual Offences* (n 2) 38 – 40.

[127] See Rape Crisis Network Ireland, *Consent on Sexual Contact: Discussion Document* (Galway 2008). Interestingly, on a separate, yet broadly related note, the subjective test in relation to the defence of provocation in Ireland has also attracted criticism in recent years. (see Hanly, *An Introduction to Irish Criminal Law* (n 2) 252 – 253) Such criticism is perhaps indicative of a growing willingness to reconsider the merits of subjective approaches to *mens rea* elements.

[128] Law Reform Commission, *Consultation Paper: Rape* (LRC October 1987) para. 64.

[129] LRC, *Report on Rape and Allied Offences* (n 21) para 16.

[130] Ibid. para 17.

[131] Ibid. para 21.

Following this report by the Commission, the Criminal Law (Rape) (Amendment) Act 1990 was enacted. While the 1990 Act followed many of the recommendations advanced by the Commission, its suggested definition of consent was omitted.[132] Thus, reform of the *mens rea* element and the absence of a definition of consent were not addressed by the 1990 Act.

Since the 1990 Act there have been repeated calls for reform that would provide a definition of consent and would help to clarify and modernise the law. Victim advocates and academics alike have strongly highlighted the need for change. The Rape Crisis Network Ireland has issued a number of publications illustrating this gap in the law and seeking legislative action to rectify the situation[133], while Leahy has highlighted the necessity for a "clear statement of what constitutes a legally acceptable consent to sexual activity".[134] The long-awaited review of Irish sexual offences law, which culminated in the publication of the Criminal Law (Sexual Offences) Bill 2015, had the potential to rectify the omissions of the 1990 Act in relation to the issue of consent. However, the 2015 Bill makes no changes regarding the issue of consent, and has been judged to fall short by advocates calling for clarification and modernisation of the law on consent.[135] The Law Reform Commission's report which preceded the publication of the 2015 Bill, was predominantly concerned with the capacity to give consent as opposed to defining consent itself, and consequently no recommendation was made in this respect.[136] Thus, despite sustained calls for reform, to date there appears to be no clear intentions to revise this issue at legislative level.

Leahy ultimately advocates the introduction of a positive statutory definition of consent in Irish law and a reformulated model of the *mens rea* element of the offence of rape which provides for an objectively constructed honest belief in consent.[137] Despite a number of

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[132] However, refer to s. 9 of the 1990 Act.

[133] Rape Crisis Network Ireland, *Agenda for Justice: Towards Ending Injustice for Survivors of Sexual Violence* (Galway 2005) 4 and Rape Crisis Network Ireland, *Consent on Sexual Contact: Discussion Document* (Galway 2008) 15.

[134] Susan Leahy (2013) "Reform of Irish Sexual Offences Legislation" (*Human Rights in Ireland*, 11 June 2013) <http://humanrights.ie/criminal-justice/reform-of-irish-sexual-offences-legislation/> accessed 20 May 2015.

[135] For example, see ibid.

[136] LRC, *Sexual Offences and Capacity to Consent* (n 23).

[137] Susan Leahy, "Reform of Irish Rape Law: The Need for a Legislative Definition of Consent" (2014) 43(3) *Common Law World Review* 231, 244 - 247.

shortcomings and limitations[138], the English Sexual Offences Act 2003 ("2003 Act") can provide significant guidance in this context. The 2003 Act provides a legislative definition of the term "consent"[139] and introduces a reasonableness element to belief in consent.[140] The Act also provides for a set of circumstances which give rise to either a conclusive[141] or evidential[142] presumption that consent was absent. Therefore, consideration of the relevant aspects of the 2003 Act has the potential to offer insight from an Irish perspective.

The Sexual Offences Act 2003 was introduced in response to sustained calls for reform of the offence of rape. In particular it was hoped that the new Act would introduce "a more structured approach to consent".[143] The Act significantly altered the offence as contained in s. 1 of the Sexual Offences Act (Amendment) 1976. Section 1 of the 2003 Act provides:

> (1) A person (A) commits an offence if—
>
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
>
> (b) B does not consent to the penetration, and
>
> (c) A does not reasonably believe that B consents.
>
> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

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[138] For example, in relation to the legislative definition of consent provided for under the 2003 Act, concern has been voiced over whether the concepts of freedom, capacity and choice are too broad to use when defining such a critical element of such a serious offence. (See David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) 820 - 821) For a comprehensive analysis of the various concerns surrounding the definition of consent as per s. 74 of the 2003 Act, see Cowan (n 108) 54-59.

[139] Sexual Offences Act 2003, s. 74 – "For the purpose of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice".

[140] Sexual Offences Act 2003, s. 1.

[141] This section outlines two circumstances which give rise to a conclusive presumption that the complainant did not consent to the relevant act, namely, where the defendant deceives the complainant as to the nature/purpose of the act or where the defendant impersonates a person known to the complainant for the purpose of inducing the complainant to consent. (see s. 76(2))

[142] Section 75 provides for an exhaustive list of circumstances which creates an evidential presumption of the absence of consent where such circumstances arise. These include situations where the complainant is subjected to violence, unlawful detention, or where the complainant is asleep. (For the complete list of circumstances see s. 75(2)).

[143] Wells and Quick (n 118) 513.

Further guidance in relation to the concept of consent is provided by s. 74, in which a statutory definition of the term provides:

> For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

Described as "groundbreaking in its definition of consent", s. 74 represents a response to the prolonged calls for a statutory definition of the term in England and Wales.[144] The concepts of freedom, capacity and choice upon which the definition is based, are intended to reemphasise the pre-existing legal position that the absence of resistance, protest or injury does not necessarily indicate the presence of consent.[145] Indeed, the provision is to be applauded for attempting to "give flesh to the bones of the concept of consent by referring to the surrounding circumstances of a choice" and for "acknowledging that consent is not a simple matter".[146] However, while the definition emphasises important concepts such as autonomy and individualism, given the loose meaning of such terms, it is questionable whether it offers any practical assistance when putting such a definition to the jury. Concern has been voiced over whether the concepts of freedom, capacity and choice are too broad to use when defining such a critical element of such a serious offence.[147] Therefore, while s. 74 offers an improvement on the previous situation,[148] due to the provision's lack of clarity, judges and juries are still without significant guidance, and consequently are left with considerable discretion as to the meaning of consent.

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[144] Wells and Quick (n 118) 515.

[145] Ormerod and Laird (n 138) 821.

[146] Cowan (n 108) 55.

[147] Ormerod and Laird (n 138) 820 - 821. These concerns are aptly illustrated by *R v Gardner* (2005) EWCA Crim 1399. Here the defendant plead guilty to sexual activity with a child. At the sentencing stage, the trial judge accepted that what had occurred was "consensual," even where the complainant was intoxicated and regardless of the fact that she had been "taken advantage of." (Ibid.) Cowan notes that "this judgment demonstrates the very real concerns of having a vague definition of consent which is left open to case-by-case interpretation by individual judges and juries". Thus, for a comprehensive analysis of the various concerns surrounding the definition of consent as per s. 74 of the 2003 Act see Cowan (n 108) 54-59.

[148] Previously, under *R v Olugboja* [1982] QB 320, the definition of consent was determined by the jury by applying the ordinary meaning to the phrase. This approach was described by Glanville Williams as "one more manifestation of the deplorable tendency of the criminal courts to leave important questions of legal policy to the jury" (as quoted in Ormerod and Laird (n 138) 820).

Section 74 is accompanied by two further provisions which offer additional assistance in determining consent. Section 76 reaffirms the pre-existing law and outlines two circumstances which give rise to a conclusive presumption that the complainant did not consent to the relevant act. The two circumstances are as follows;

> (2)The circumstances are that—
>
> (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
>
> (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

A further exhaustive list of circumstances is provided for by s. 75 which creates an evidential presumption of the absence of consent where such circumstances arise. These include situations where the complainant is subjected to violence, unlawful detention, or where the complainant is asleep.[149]As Wells and Quick note, this partial reversal of evidential burdens, though not altogether uncommon, is rare in relation to serious offences.[150] In terms of attempting to reconstruct consent in rape cases, creating these presumptions has an important symbolic value as well as a practical worth, drawing attention to unacceptable forms of sexual behaviour. Consequently, they represent significant gestures towards greater clarity and certainty of the law.[151]

Section 1 (1)(c) of the 2003 Act addresses the *mens rea* element of the offence and introduces the necessity for the belief in consent to be a reasonable one. Section 1(2) holds that in determining whether such belief is reasonable, regard should be had for "all the circumstances, including any steps A has taken to ascertain whether B consents". This

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[149] For the complete list of circumstances see s. 75(2).

[150] Wells and Quick (n 118) 517.

[151] See David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 726. Nonetheless, the presumptions have also attracted criticisms due to their complex nature and practical inefficiencies. (see Ibid. 727) Also see Wells and Quick (n 118) 523 and *R v Jheeta* [2008] 1 WLR 2582. For criticisms of the 2003 Act in general, see Ormerod and Laird (n 138) 885 – 888.

reformulated definition represents a significant improvement on the purely subjective test of the 1956 Act. Cowan describes s. 1(2) as embodying "a positive communicative standard of consent rather than allowing the defendant to rely on his own assessment without trying to communicatively establish whether his assessment is correct".[152] That said, it is important to note that communication is not necessary in order for a reasonable belief in consent to be established.[153] Thus, while the provision encourages positive action on the part of the defendant, it does not classify such action as necessary.

A crucial element in determining whether a belief in consent is reasonably held lies in the interpretation of the term "all the circumstances". The Crown Prosecution Service Guidelines on the 2003 Act have noted that "all the circumstances" is likely to include a defendant's attributes and characteristics, such as disability or extreme youth.[154] This reference to the defendant's characteristics injects an element of subjectivity into an otherwise objective test. Instead, the test is more aptly described as an objective one, consisting of components of subjectivity, or a hybrid test.[155] The subjective element of the test avoids the potential for injustice which a purely objective test could inflict upon a defendant who is incapable of acting reasonably as a result of some disability.[156]

Of course, like the other provision discussed, s. 1 (2) has not avoided criticism. In particular it has been opined that the loose nature of the term "in all the circumstances" could potentially allow jurors to interpret it so broadly that the test loses is objectivity.[157] Nonetheless, while

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[152] Cowan (n 108) 62.

[153] Susan Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) *Irish Criminal Law Journal* 1, 4.

[154] Crown Prosecution Service, *Legal Guidance: Rape and Sexual Offences* (Crown Prosecution Service) Chapter 3 < http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/consent/#a02> accessed 20 November 2015. See also Ormerod and Laird (n 138) 855.

[155] Leahy refers to the test as a "mixed test". (Leahy, "When Honest is not Good Enough" (n 153) 5).

[156] Leahy, "When Honest is not Good Enough" (n 153) 5.

[157] As Cowan comments, leaving the jury to decide what is reasonable in the circumstances is a dangerous and unnecessary exercise. (Cowan (n 108) 65) Furthermore, refer to the mock jury study conducted by Finch and Munro. Their research indicates that reference to "all the circumstances" allows questionable and inappropriate stereotypes to seep into the jurors' determination of whether a defendant's belief in consent is reasonable or not. (Emily Finch and Vanessa Munro, "Breaking Boundaries?: Sexual Consent in the Jury Room" (2006) 26(3) *Legal Studies* 318).

such criticisms are not without merit, they do not negate the contribution these reforms make towards attempting to reconstruct the concept of consent.

Therefore, though not without its flaws, it is submitted that the English legislation offers a persuasive "template for reform" in Ireland which is worthy of consideration when assessing options aimed at modernising the law in this jurisdiction.[158]

iv. Conclusion

The concept of consent in relation to the offence of rape presents distinct issues and challenges. The problematic nature of the concept is reflected in the difficulties encountered when attempting to effectively legislate in this area. Attempts to reform and reconstruct this aspect of the law have been widely debated, with various reformulations and alternatives being advanced. As highlighted, commentators have suggested that the root of these failings lie in the fact that the concept of consent is too broad and abstract, and therefore, is not equipped to appropriately address the relevant issues in such cases.[159] Consequently, reform of the law in this area has proven a slow and arduous task, with much remaining to be achieved.

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[158] Leahy, "Reform of Irish Rape Law" (n 137) 232. In this article, Leahy offers an in-depth analysis of the English legislation and a comprehensive consideration of how the relevant aspects of the 2003 Act could be adapted to offer a suitable model of reform from an Irish law perspective. Also see Leahy "When Honest is Not Good Enough" (n 153).

[159] See Ormerod and Laird (n 138) 820 – 821 and Cowan (n 108) 54-59. Also, for a broader feminist consideration of this topic see Catherine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989).

IV. Problematic Evidential Rules in Rape Trials

Apart from the issue of consent, there are a number of evidential rules which present distinct problems during rape and sexual offence trials.[160] Writing in 2002, Temkin noted that "The evidential rules as they apply in sexual assault cases have been and remain a cause for some concern".[161] Alas, over a decade later little has changed in Ireland.

Described by Hanly et al as "special evidential practices", certain evidential rules exist which are specific to rape and sexual offence trials.[162] Many of these rules are premised on antiquated and inaccurate assumptions about rape complainants,[163] and are often illustrative of the differential and prejudicial treatment of such complainants by the criminal justice system. A number of negative elements of the rape trial have been connected to or associated with these rules. They have been implicated in the low conviction rate in such trials, and a significant degree of blame for the trauma experienced by complainants during such trials has been attributed to the implementation of these rules.[164]

In this section, three evidential rules in particular will be considered; the doctrine of recent complaint, the introduction of sexual experience evidence and the corroboration warning.[165] It is submitted that the existence of these rules demonstrates the distinctive nature of rape and sexual offence trials.

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[160] My LLM (Criminal Justice) dissertation was entitled "Special Legal Evidential Rules in Sexual Offence Trials – Discriminatory Barriers Against Complainants". The dissertation dealt with a number of evidential rules in sexual offence trials which will be discussed in the following section.

[161] Temkin, *Rape and the Legal Process* (n 55) 187.

[162] Hanly et al, *Rape and Justice in Ireland* (n 1) 76.

[163] Refer to the discussion concerning rape myths and stereotypes in Part II of this Chapter.

[164] See Temkin, *Rape and the Legal Process* (n 55) 187 and more generally, Chapter 4, "Evidence". (Ibid.).

[165] As will be outlined, corroboration warnings are not specific to rape and sexual offence trials. Nonetheless, sexual offence complainants fall within the category of witness where corroboration warnings are deemed necessary in certain circumstances.

i. The Doctrine of Recent Complaint

In general, in criminal cases, the rule in relation to hearsay evidence provides that "the statements of a testifying witness previously made out of court, are inadmissible as evidence of the facts stated".[166] The rationale for this common law rule is two-fold; it serves to exclude testimony that is considered to be self-serving, and it avoids the introduction of superfluous evidence which is regarded as time-wasting since the assertions of a witness at trial are generally assumed to be true.[167] However, as Temkin notes, this assumption does not appear to exist in relation to rape complainants whose testimony at trials has always been treated with great suspicion.[168] Originally described by O'Malley as "something of an anomaly in the law of evidence",[169] the doctrine of recent complaint (or the doctrine of fresh complaint) is an evidential rule which is unique to rape and sexual offence cases.

The doctrine of recent complaint allows for the introduction of evidence of a complaint made by the victim of a sexual assault in the aftermath of the incident.[170] Under this rule, the complainant is permitted to give evidence that at the first reasonable opportunity after the offence she voluntarily and without prompting reported the rape to a third party.[171] Ostensibly this rule may appear to give sexual offence complainants an advantage over other witnesses,[172] but in reality this is debatable. As explained by McColgan, "the previous statement is not admissible, in the case of sexual offences, as evidence of its truth".[173] Instead it is used to rebut the adverse inference that might be drawn from the complainant's failure to complain of the attack which was carried out against her. Thus, the doctrine is illustrative of the fact that "the rape complainant does not benefit from the presumption of truthfulness which exists in respect of witnesses to other crimes".[174]

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[166] Temkin, *Rape and the Legal Process* (n 55) 187. Also see *Cullen v Clarke* [1963] IR 368 and *Director of Corporate Enforcement v Bailey* [2008] 2 ILRM 13

[167] Ibid.

[168] Ibid.

[169] O'Malley, *Sexual Offences: Law, Policy and Punishment* (n 5) 236.

[170] See Caroline Fennell, *The Law of Evidence in Ireland* (3rd edn, Lexis Nexis Butterworths 2009) 212.

[171] McGrath, *Evidence* (n 25) 140 and Temkin, *Rape and the Legal Process* (n 55) 188.

[172] See Peter Charleton and Stephen Byrne, "Sexual Violence: Witness and Suspects, A Debating Document" (2010) 1 *Irish Journal of Legal Studies* 1, 12, where the authors described the doctrine as the "only discreet rule of evidence on the prosecution's side".

[173] McColgan (n 45) 277.

[174] Ibid.

Origins of the Doctrine

It appears that the rules governing this principle originate from the "medieval defence of 'hue and cry' requiring a vocal invitation to the community to observe the 'torn garments of the ravished woman'".[175] As Post comments, in medieval times "the action was initiated by the wronged woman; she was expected to raise the hue, exhibit her torn garments and her bleeding to the local law officers, and prosecute the offender before the royal justices in eyre at the earliest opportunity".[176] Therefore, a victim was expected to deliver a complaint in this dramatic fashion in order to substantiate her claim and to assist in the capture of the accused.

However, by the eighteenth century the function of the rule had altered and a strong presumption had developed against a victim if no complaint was made within a reasonable time. The doctrine became a tool to be employed by the complainant in order to dispel any presumption of falsity on her part by indicating a "consistency between her conduct and her statement at trial".[177] In the absence of such a speedy complaint, the presumption was that the victim was an untrustworthy witness. The reliance on the doctrine as a means of verifying the credibility of a rape complainant was blatantly highlighted by the Canadian Supreme Court in *Kribs v R,* a case worthy of mention for illustrative purposes.[178] The Court, noting that the doctrine had become a principle of "necessity", held that the rule is founded on the presumption that the victim of an attack is expected to complain "upon the first reasonable opportunity".[179] Consequently, if she fails to do this, "her silence may naturally be taken as virtual self-contradiction of her story".[180]

As highlighted in Part II of this Chapter, such reasoning reveals a misunderstanding about rape victims and demonstrates a lack of knowledge about Rape Trauma Syndrome. As outlined previously, the available studies and the resulting statistics indicate that delayed complaints

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[175] Pollack and Maitland, *History of English Law* (2nd ed, 1968), vol 2 606 as cited in Brian Foley, "The Doctrine of Recent Complaint Revisited" (2001) 11(3) *Irish Criminal Law Journal* 20.
[176] J. B. Post, "Sir Thomas West and the Statute of Rapes, 1382"(1980) 53 *Bulletin of the Institute of Historical Research* 24 in Jennifer Temkin (ed) *Rape and the Criminal Justice System* (Dartmouth Publishing Company Ltd 1995) 177.
[177] Temkin, *Rape and the Legal Process* (n 55) 188.
[178] *Kribs v R* [1960] SCR 400.
[179] Ibid.
[180] Ibid.

in relation to sexual offence cases are in fact quite common. As Foley comments, it is even arguable that delay may be intrinsic to a sexual offence.[181] It has been found that there are a myriad of reasons, unrelated to the issue of trustworthiness, as to why a complainant may delay in making a complaint. For example, "they may be too traumatised, too embarrassed, too scared of encountering a judgemental attitude, or too full of quite unjustified guilt feelings about what has occurred".[182] The assumption, therefore, that promptness is invariably linked with credibility is not valid.[183]

The Doctrine in Ireland

Despite the questionable rationale underpinning this rule, for decades the Irish courts have continued to accept the validity of the doctrine of recent complaint and it appears this trend seems set to continue.[184] However, in recent decades the courts have also demonstrated more of a willingness to allow a degree of latitude when applying the doctrine by expanding the recent complaint exception to cover sexual offences in general[185], and permitting a slightly wider scope in relation to the construction of promptness[186] and the interpretation of voluntariness in making the complaint.[187] While such developments are encouraging, it is

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[181] Brian Foley, "The Doctrine of Recent Complaint Revisited" (2001) 11(3) *Irish Criminal Law Journal* 20, 21.

[182] Temkin, *Rape and the Legal Process* (n 55) 190.

[183] Foley (n 181) 21.

[184] Charleton and Byrne (n 172) 78.

[185] As O'Malley notes, the rule applies not only to rape but also to other sexual offences involving sexual violence and exploitation. (O'Malley, *Sexual Offences* (n 2) 508).

[186] In *People (DPP) v Kiernan* (unreported, CCA, March 11, 1994), despite ruling that the evidence was inadmissible due to delay, the Court of Criminal Appeal did accept that fear constituted a valid ground for failure to complain. This reasoning was later implemented in *People (DPP) v R (D)* [1998] 2 IR 106. The defendant was the partner of the complainant's sister-in-law, with whom both the complainant and her husband were staying at the time of the assault. The Court found that from the victim's perspective it was an impossible situation. Unable to complain to her sister-in-law, she feared a confrontation if she told her husband, who was stated to have a temper which was violent and difficult to control. Instead she told her husband the following day after the drive home. The trial judge, who had evidence before him of the profound psychological effect the situation had upon the complainant, found that it was not reasonably possible for her to complain any earlier. This finding was upheld on appeal.

[187] *People (DPP) v R (D)* [1998] 2 IR 106 is also a leading authority in relation to the voluntariness requirement of the doctrine. On appeal the court rejected the contention that a question put to the victim by her husband rendered the complaint involuntary and inadmissible. The complainant had taken a seat in the garden and her husband had followed her out. The complainant began the conversation by stating that her sister-in-law's partner was "no gentleman". (Ibid. 109) In response to this remark, her husband asked a question and the complainant then recounted the story. In these circumstances the court held that the husband's question had simply assisted the complainant in saying something that she herself had wished to say. Hence, the court recognised the victim's desire

submitted that they do not go far enough and that further reform is needed. The negative connotations associated with the doctrine, and the proposition that the rule supports a continued bias against sexual offence complainants, brings into question whether the doctrine should be retained.[188] O'Malley argues that while traditionally the doctrine may have perpetuated the myth that 'real' victims of rape will report their attack immediately, this is no longer the case. Instead he notes, "evidence of recent complaint may certainly bolster, often quite significantly, a complainant's evidence. To this extent, it operates in ease of complainants rather than working against them".[189] It is respectfully submitted that this proposition is debatable. After all, if evidence of early complaint can significantly bolster a complainant's evidence, then surely its absence could significantly undermine it. Nonetheless, that is not to say that removal of the doctrine is the correct response. Brief reference to a number of common law jurisdictions where this approach was adopted would caution against abolition.

In South Australia the doctrine was abolished in 1976. However, it was reinstated eight years later after the recognition that its abolition had led to a series of issues, including "depriving the complainant of an opportunity to adduce evidence in support of her credibility, substantially disadvantaging the prosecution and seriously prejudicing the complainant's credibility in the eyes of the jury".[190] Similarly, in Canada empirical research revealed that the abrogation of the rule benefited the defence, with the prosecution finding it even more challenging to support the complainant's credibility.[191] Therefore, while the prejudicial nature of the doctrine seems apparent, Temkin rightly notes that the abolition of the rule will "not create an assumption that a woman who says she has been raped is telling the truth in the

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to speak and acknowledged that some victims are in need of such assistance given the nature of such offences and the difficulties victims face as a result.

[188] See O'Malley, *Sexual Offences* (n 2) 513. Also note, Heffernan and Ní Raifeartaigh criticise the doctrine for failing "to keep pace with developments" and comment that "it is arguable that the doctrine is ripe for re-examination with a view to reform". (Heffernan and Ní Raifeartaigh (n 55) 127).

[189] Ibid. 514.

[190] Temkin, *Rape and the Legal Process* (n 55) 193.

[191] See Lorenne Clark, *Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law: Still Searching for Epistemic Equality* (Ottawa: Canadian Advisory Council on the Status of Women, 1993), as referred to in Temkin, *Rape and the Legal Process* (n 55) 193. Also see Elaine Craig, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence" (2011) 36(2) *Queen's Law Journal*, 551. Craig notes that "Although section 275 of the Criminal Code abrogates the rules regarding recent complaint, courts have been inconsistent in their interpretation and application of the provision since its enactment in 1983". As a consequence the law remains "problematic and confusing". (Ibid. 551).

face of an abundance of prejudicial myths concerning women who allege rape...".[192] Therefore, given the experience in South Australia and Canada it is possible that abolition of the doctrine would "serve only to place a further impediment in the way of prosecutions in rape cases".[193]

Described as an "entirely different approach" to reforming the doctrine,[194] in England and Wales s. 120 of the Criminal Justice Act 2003 brought about substantial changes to the doctrine of recent complaint.[195] Under this provision the admissibility of complaints is no longer limited to sexual offences, but applies to a complaint of any offence. In addition to this, subject to the conditions provided for under s. 120,[196] when complaints are admissible they are admissible as both evidence of any facts stated in the complaint and as evidence of the complainant's consistency. The voluntariness requirement has also been relaxed whereby now only threats and promises, as opposed to prompting and assistance, render the complaint inadmissible. Furthermore, in 2009 the requirement for the complaint to be made as soon as can reasonably be expected was eliminated.[197] Hence, as Dennis comments, its removal was reflective of "the culmination of a greater appreciation of the psychology of victims of offences, particularly sexual offences".[198]

From an Irish law reform perspective, it is contended that the approach adopted in England represents a viable option for reform in this jurisdiction. It has much to recommend it, particularly in relation to the elimination of the requirement that the complaint be made as

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[192]Temkin, *Rape and the Legal Process* (n 55) 191. Thus, Temkin notes that if a timely complaint is made by a complainant but, due to the abolition of the doctrine, it is not brought to the juries' attention, then it can reasonably be presumed that "many of those serving on juries would wonder why, if she (the complainant) is telling the truth, she did not report the rape to someone right away". (Ibid.)

[193] Ibid.

[194] Ibid. 196.

[195] This reform took place following a comprehensive review of the area by the Law Commission. See Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, (Law Com No. 245, 1997).

[196] For the conditions which must be satisfied see s. 120(5), (6) and (7).

[197] The Coroners and Justice Act 2009 removed this requirement which was provided for under s. 120 (7) (d) of the 2003 Act.

[198] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 571. As Dennis explains: "A period of delay between the alleged offence and the making of a complaint about it may affect the weight to be attached to the complaint, and the testimony with which it is consistent, but it no longer goes to the admissibility of the complaint". (Ibid.)

soon as can reasonably be expected. Similarly, the widening of the doctrine to encompass complaints made in relation to offences other that sexual ones is welcomed. Such a reform is necessary in order to assist with the dismantling of the antiquated assumption of inherent untrustworthiness in respect to sexual assault complainants. In this respect, given the ability of such reforms to assist sexual offence complainants while also counter-balancing the often prejudicial effects of the doctrine, they have been praised and welcomed.[199] However, the long term effects of this reform remains to be seen, as does the degree to which change will be effected.[200] Until such research is available it is difficult to assess the significance of these changes in practice and whether a similar approach would be suitable within an Irish context. Despite this, reforms such as these, and the acknowledgement that such reforms are needed, are to be welcomed as progressive steps as far as the doctrine in Ireland is concerned.

ii. Sexual Experience Evidence

The admissibility of a complainant's sexual experience evidence[201] during a sexual offence trial has long generated controversy and debate.[202] As explained by Heffernan and Ní Raifeartaigh, traditionally the common law placed no restriction on defence counsel's ability to introduce evidence relating to the complainant's previous sexual experience or to cross-examine her on such evidence.[203] Criticism has routinely been directed at the rule as a result of its biased and gendered nature. Its use, and arguably its continued misuse, in such trials is thought to have a deterrent effect on victims who may be contemplating reporting an attack, and it has been implicated in the low conviction rate in such trials.[204] Given the potentially negative and prejudicial impact of this evidential rule on rape complainants and the trial of such offences, the importance of regulating the use and admissibility of such evidence has

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[199] See Dennis (n 198) 570 and Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: A Consultation Paper* (London, HMSO, 2006) 22 – 30.

[200] For example, Temkin and Krahé noted in 2008 that despite the enactment of s. 120 of the 2003 Act (which allows a complaint, if admitted, to act as evidence of the facts stated in the complaint) views have been expressed that a complaint that is admissible is still unlikely to be regarded as supporting evidence. (Temkin and Krahé (n 34)236).

[201] There are various synonyms used for this evidence, including "sexual history evidence" (see O'Malley, *Sexual Offences* (n 2) 433) and "prior sexual experience evidence" (see Hanly et al, *Rape and Justice* (n 1) 76 and Charleton and Byrne (n 172) 63). However, the term employed when referring to such evidence in the Criminal Law (Rape) Act 1981 (s. 3) is "sexual experience" and consequently, this term will also be used during the course of this discussion.

[202] Heffernan and Ní Raifeartaigh (n 55) 131.

[203] Ibid. 131 – 132. Also, for a comprehensive overview of this topic see O'Malley, *Sexual Offences* (n 2) Chapter 18.

[204] See Hanly et al, *Rape and Justice* (n 1) 76 - 80 and Temkin, *Rape and the Legal System* (n 55) 197.

long been recognised across the common law world. In Ireland, s. 3 of the Criminal Law (Rape) Act 1981 restricts the introduction of such evidence, except in cases where leave was granted by the trial judge. As per s.3 (2)(b), such leave will be granted:

> [I]f, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.[205]

Furthermore, as mentioned previously, s. 34 of the Sex Offenders Act 2001 inserted a new provision, s. 4A, in the Criminal Law (Rape) Act 1981. The section entitles the complainant to avail of separate legal representation when an application is made to admit evidence of her sexual experience. However, despite these reforms taking place, the law on sexual experience evidence remains problematic and lacking in clarity.

Origins of the Rule

Sexual experience evidence has "long been criticised as perpetuating the 'twin myths' that by reason of her sexual behaviour a complainant is (a) more likely to have consented to the sexual activity in question and (b) less credible as a witness".[206] As McColgan explains, the traditional position of the common law was that evidence of a complainant's prior sexual experience could be relevant both to the issue of her credibility and to the issue of consent.[207] The practice of introducing such evidence appears to have derived from the perception that immoral women are likely to be untruthful women, and therefore are more likely to consent to sexual intercourse.[208]

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[205] See s. 3 of the Criminal Law (Rape) Act 1981. This section was later amended by s. 13 of the Criminal Law (Rape) (Amendment) Act 1990 which extended the application of the restriction to sexual assault offences and also widened its scope to include evidence of sexual experience with the defendant, which had previously been outside the parameters of the restriction. (See O'Malley, *Sexual Offences* (n 2) 438).

[206] Gerard Murphy, "The Admissibility of Sexual Experience Evidence in Ireland" (2006) 16(4) *Irish Criminal Law Journal* 15.

[207] McColgan (n 45) 280.

[208] Ibid.

Today these assumptions appear strikingly antiquated, and from a legal perspective, inherently unsustainable. The inference of a link between chastity and credibility is groundless. No evidence has ever been proffered in support of this notion, and past sexual activity is rarely accepted as having any bearing upon the trustworthiness of a witness in non-sexual offence trials.[209] Similarly, the assumption of a link between chastity and consent is also untenable. However, while it is now widely recognised that "generalised, stereotyped and unfounded prejudices ought to have no place in our legal system",[210] as was highlighted earlier in this Chapter, rape myths and stereotypes continue to exert significant influence upon society generally and consequently, upon such trials.

Given the troubling origins and inaccurate rationales underpinning this rule, the question of if and when sexual experience evidence is relevant is an issue of contention. Unsurprisingly, a myriad of problems can emerge from the introduction of such evidence.

A predictable consequence is deterrence. Referring to research conducted in England and Wales, Hanly et al comment on the possibility of the introduction of such evidence having a dissuasive effect on victims contemplating reporting an attack.[211] The consequences of this dissuasive element impacts negatively upon the legal system specifically and by extension upon society. In England, this negative societal impact was addressed by Lord Slynn in *R v A*. Commenting on the inappropriate admission of sexual experience evidence he noted that "to allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape".[212] Given the extent to which sexual offences go unreported,[213] coupled with the already high

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[209] See McColgan (n 45) 280 – 281.

[210] *R v A* [2002] 1 AC 45, 59. Here, in a landmark case, the House of Lords criticised the rule for promoting such stereotypes and prejudices, as outlined above.

[211] Hanly et al, *Rape and Justice* (n 1) 79. Hanly et al refer to a study conducted by Kelly et al where, out of 19 victims interviewed, two chose not to report and five others seriously considered not reporting primarily due to the possibility of such evidence being introduced. (See Liz Kelly, Jennifer Temkin and Sue Griffith, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office, 20 June 2006) 62).

[212] *R v A* (n 210) 54.

[213] Refer to Corr et al (n 1). Also see Hanly et al, *Rape and Justice* (n 1) xxv. The researchers found that 34 per cent of participants (of which there was a 100 in total) who identified as victims of rape had not made a report to Gardaí. (Ibid.).

attrition rate in relation to such cases,[214] it is clear that the criminal justice system has difficulties tackling the many problems surrounding the reporting, investigating and prosecuting of sexual offences. Considering the deterrent effect which the use of sexual experience evidence seems to have, the inappropriate admission of such evidence can only act to further aggravate this situation.

A second consequence relates to the potential impact of such evidence on the jury.[215] The prevalence of myths and stereotypes surrounding rape and sexual offences among the general public in Ireland was discussed earlier in this Chapter. Nonetheless, it would not be unreasonable to view sexual experience evidence and the negative consequences which have been proven to stem from it as products of their time. As a result, it might be assumed that today such evidence would not have the same prejudicial effect upon jurors, given changes in social attitudes towards sexuality.[216] However, as highlighted previously, the prevailing influence of rape myths in society should not be underestimated. Despite the fact that attitudes towards sexuality have changed significantly, it would appear that perceptions surrounding the previous sexual experiences of rape complainants have not evolved at the same rate as those relating to sexuality in a social context.[217]

The Rule in Ireland

While the provisions governing the admissibility of such evidence in this jurisdiction were initially described as having the capacity to fulfil the goals which they were enacted to

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[214] For example, see Paul O'Mahony, "The Attrition Rate in Rape" (Rape Law – Victims on Trial, Dublin Rape Crisis Centre and the Law School Trinity College Conference, Dublin, January 2010).

[215] Refer to Hanly et al, where research on mock jurors in other jurisdictions is outlined. (e.g. JD, Johnson, LA, Jackson, L, Gatto and A, Nowak, "Differential Male and Female Responses to Inadmissible Sexual History Information Regarding a Rape Victim" (1995) 16 *Basic and Applied Social Psychology* 503 and Regina Schuller and Patrice Hastings, "Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions" (2002) 26 *Psychology of Women Quarterly* 252) These studies have found that where evidence of a complainant's previous sexual experience was introduced, it had a negative effect on mock juries. (Hanly et al, *Rape and Justice* (n 1)) 79).

[216] O'Malley provides a number of recent statistics highlighting the radical changes in Irish attitudes towards sexuality in Ireland since the 1960s. (O'Malley, *Sexual Offences* (n 2) 435). Also, Hanly et al comment that in 2006 the Irish Crisis Pregnancy Agency found that "over 80 per cent of Irish women aged between 18 and 24 had engaged in vaginal intercourse; for women aged between 30 and 40, the applicable figure was almost 98 per cent". (Hanly et al, *Rape and Justice* (n 1) 79).

[217] See McColgan (n 45) 280 – 281. Also refer to Part II of this Chapter on the continued prevalence of rape myths among society, and presumably, among jurors.

achieve,[218] developments in case law and the limited research available on the impact of these provisions in practice have cast doubts over the effectiveness of this legislation and have led to calls for greater clarity.

The intended purpose of s. 3 of the 1981 Act is to exclude irrelevant material, yet the wording of s. 3 (2)(b) lends itself to the possibility of interpreting irrelevant evidence as relevant. The test provides that sexual experience evidence should be admitted if the trial judge is satisfied that:

> [O]n the assumption that the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.[219]

Such a test has the ability to allow irrelevant evidence to appear relevant. For example, as Murphy notes, it is reasonable to assume that many jurors, who as ordinary people are not immune to personal prejudices, would take a dim view of a complainant if evidence of a socially perceived 'unrespectable' sexual history was admitted, and as a result would not be satisfied of the defendant's guilt.[220] Indeed, that evidence could be admitted on the basis that it could lead to the jury taking a different view is, as Temkin notes, "the whole nub of the problem".[221] Given that the primary argument for restricting such evidence relates to its potentially overly prejudicial impact on the jury, the fact that the test in this jurisdiction could allow for such evidence to be admitted is worrying.[222]

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[218] O'Malley, *Sexual Offences: Law, Policy and Punishment* (n 5) 244.
[219] Criminal Law (Rape) Act 1981, s. 3 (2)(b).
[220] Murphy (n 206) 23. Again, support can be found for this argument by reference to the continued prevalence of myths and stereotypes in relation to rape and sexual offences, as discussed in Part II of this Chapter.
[221] Jennifer Temkin, "Sexual History Evidence – the Ravishment of Section 2" (1993) *Criminal Law Review* 3, 4. Temkin's comments are relevant from an Irish law context as s. 3 (2)(b) was modelled on s. 2 of the English Sexual Offences (Amendment) Act 1976. Also see Charleton and Byrne (n 172) 69
[222] Interestingly, O'Malley notes that there is "remarkably little Irish case law" on the topic of the admissibility of sexual experience evidence. (O'Malley, *Sexual Offences* (n 2) 439).Nonetheless, as examination of the limited case law in this area add to these concerns. (For example, see *People (DPP) v K (G)* [2007] 2 IR 92 and *People (DPP) v C(T)* [2009] IECCA 63 were a loose interpretation of the rules of relevance in relation to the admissibility of sexual experience evidence was applied.).

In a relatively recent Irish study conducted by Bacik et al of rape cases brought before the Central Criminal Court between 2003 and 2009, the emerging results lead the authors to express particular concerns over the increasing frequency with which s. 3 applications were being applied for and granted, even in cases where consent was not an issue.[223] It was discovered that out of 40 trials where s. 3 applications were made, leave was granted in 70 per cent of these cases. Consequently, such research results appear indicative of the court's application of a loose interpretation of the rules of relevance in relation to the admissibility of sexual experience evidence. Bacik et al concluded their study by calling for a review of the wording of s. 3 in order to achieve greater clarity.[224] In particular, they recommended rewording the criteria by which the judge must make the decision to adduce such evidence.[225] However, commenting on the findings of this research, the then Director of Public Prosecutions, James Hamilton, considered that it would be premature to assume that the current legislation required reform. Referring to the increase in the number of granted applications to cross-examine in relation to sexual experience in recent years, Mr Hamilton noted that it is difficult to ascertain whether this increase was as a result of a change in judicial thinking or whether it was reflective of the courts applying a loose interpretation of the rules of relevance in relation to the admissibility of sexual experience evidence. Thus, the then DPP stressed the need for further research to be carried out. However, Mr Hamilton also acknowledged that "it may be that an examination of the current practice will indicate that some legislative change is required".[226]

If this is the case and legislative change is required, identifying an appropriate method of reform may prove problematic. In England and Wales, s. 41 of the Youth Justice and Criminal Evidence Act 1999 ("1999 Act") was introduced to rectify the failings of s. 2 of the Sexual Offences (Amendment) Act 1976 upon which the current law in Ireland was closely

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[223] Ivana Bacik, Ciara Hanley, Jane Murphy and Aoife O'Driscoll, "Separate Legal Representation in Rape Trials" (Rape Law – Victims on Trial, Dublin Rape Crisis Centre and the Law School Trinity College Conference, Dublin Castle, January 2010). As the title suggests, separate legal representation (as per s. 34 of the 2001 Act) was the primary concern of this study. Also see Hanly et al, *Rape and Justice* (n 1) xxxi. In their study sexual experience evidence was admitted in thirteen cases out of 35 for which transcripts were available.

[224] Ibid.

[225] Ibid.

[226] James Hamilton, "Rape Law – Victims on Trial - Address" (Rape Law – Victims on Trial, Dublin Rape Crisis Centre and the Law School Trinity College Conference, Dublin Castle, January 2010).

modelled.[227] Section 41 of the 1999 Act places a blanket ban on the introduction of evidence or the asking of any questions relating to the complainant's sexual experience, subject to four specific exceptions.[228] As Hanly et al comment, on the surface these restrictions appear to "remove a great deal of judicial discretion".[229] Indeed, it was this particular aspect of the new statutory regime which many praised as necessary in order to efficiently restrict such evidence. However, the enthusiasm for s. 41 by those campaigning for tighter restrictions on the admissibility of sexual experience evidence was short lived.

In *R v A*[230] the House of Lords considered the position of s. 41 of the 1999 Act in the context of the defendant's right to a fair trial under Article 6 of the *European Convention on Human Rights* and concluded that it amounted to a violation of this Article. In doing so, the Court expanded the third exception by permitting the introduction by the defence of evidence of a prior relationship that the defendant claimed to have had with the complainant. In making such an expansion, the House of Lords, exercising its interpretive power under the Human Rights Act 1998 and thus avoiding a declaration of incompatibility, decided that such evidence should be admitted where it was "so relevant to the issue of consent that to exclude it would endanger the fairness of the trial" under Article 6.[231]

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[227] The s. 2 restriction came in the form of a discretionary provision, placing a general restriction on such evidence but allowing its introduction where the trial judge came to the conclusion that to exclude it would be unfair to the defendant. However, as Temkin explains, despite the restrictive attempts of s. 2, it was given a broad interpretation, resulting in the failure of the provision to fulfil its intended purpose of preventing the inappropriate introduction of sexual experience evidence. For a detailed account of the failings of s. 2 of the 1976 Act, see Temkin, *Rape and the Legal Process* (n 55) 198 – 201.

[228] See s. 41 of the 1999 Act. Hanly et al summarises the various exceptions created by s. 41 as follows "1. The evidence related to a relevant issue in the case that is not an issue of consent, which is defined to exclude the defendant's belief in consent; 2. The evidence related to a relevant issue in the case which is an issue of consent and the complainant's sexual behaviour is alleged to have occurred at or about the time of the incident in question...; 3. The evidence relates to a relevant issue in the case which is an issue of consent and the complainant's sexual behaviour was so similar to any sexual behaviour by the complainant which the defence evidence shows either was a part of the incident in question or occurred at or about the same time, such that the similarity cannot be explained as coincidence; or 4. The defence wishes to rebut any evidence of the complainant's sexual behaviour introduced by the prosecution and goes no further than required to accomplish this rebuttal". (Hanly et al, *Rape and Justice* (n 1) 78).

[229] Ibid.

[230] *R v A* (n 210).

[231] Ibid. 69.

It was suggested subsequently that this judgment was potentially broad enough to allow the admission of sexual history evidence in any case "where the judge takes the view that an Article 6 breach could otherwise result".[232] Subsequent research would seem to suggest this is in fact the case.[233] Thus, it would appears that since *R v A*, judges have interpreted the decision as giving them the "very discretion that Parliament had attempted ...to restrict". [234]

Hence, the experience in England and Wales in relation to s. 41 illustrates the pitfalls of such a model of reform. Moreover, in the context of this jurisdiction, it poses a particularly cautionary tale. As Charleton and Byrne note, an attempt to introduce a similarly broad prohibition in Ireland could be construed as a violation of the right to a trial in due course of the law, as guaranteed under Art. 38. 1 of the Constitution.[235]

Therefore, even if reform is deemed necessary, it appears that achieving a regime which satisfactorily regulates the admissibility of sexual experience evidence while upholding the defendant's right to a fair trial will prove challenging. The difficulty in this regard is perhaps

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[232] Jennifer Temkin, "Sexual History Evidence – Beware the Backlash" (2003) *Criminal Law Review* 217, 240.

[233] See Kelly et al (n 211). This study involved 160 cases in which s. 41 applications were made in around a quarter of rape cases. Of the applications made, it was revealed that they were successful in just over two-thirds of the cases. The study concluded that "the limited data on the specific paragraphs of s. 41 which are being used in applications suggest that many continue to be phrased in general terms, thus evading the purpose of the legislation, which was only to allow sexual history evidence in the circumstances specified in the Act". (Ibid. 18) Moreover, a study conducted by Temkin and Krahé in 2008 found that six out of 17 judges interviewed actively circumvented or neutralised the prohibition in s. 41 if they thought such evidence was necessary for a fair trial. (Temkin and Krahé (n 34) 148).

[234]Hanly et al, *Rape and Justice* (n 1) 79. That said, Dennis states that the case law on s. 41 suggests that the senior judiciary have been well aware of the policy objectives of the legislation and that they have conscientiously tried to give effect to the aims of protecting complainants while continuing to ensure fair trials for defendants. However, he goes on to comment that it remains uncertain how fair a balance is being achieved by trial judges in all cases, with the empirical research to date coming up with mixed messages. (Dennis (n 198) 629). Moreover, in a recent analysis of the case of *R v Gjoni* (Kujtim) [2014] EWCA Crim 691, the author contended that despite concern regarding s. 41 and its potential "loopholes", the judgment of *Gjoni* supported the contention that "although the demands of the defendant's fair trial rights under Article 6 of the European Convention on Human Rights might occasionally call for a relaxed interpretation of s. 41, judges remain committed to upholding a basic principle that evidence concerning the complainant's sexual behaviour... will be allowed only in exceptional cases". Brian Brewis, "Sexual History Evidence and Impact on Belief in Consent" (2014) 78(4) *Journal of Criminal Law* 290, 293.

[235] Charleton and Byrne (n 172) 78. Drawing on this point, the potential constitutional conflicts in relation to a broad prohibition within the context of personal cross-examination will be examined further in Chapter 2 and Chapter 5.

indicative of the continued prevalence of prejudicial myths and stereotypes and is illustrative of the challenge faced when attempting to address these myths and stereotypes through law reform. A common recommendation that seems to have emerged as a possible method of tackling this problem relates to the educating and training of judges and barristers. For example, in relation to the operation of s. 41 in England and Wales, Kelly et al recommended that "renewed efforts should be made to ensure that the statute, and especially the Explanatory Notes and Crown Court Rules, are understood by judges and lawyers, in order to prevent circumvention by ignorance."[236] Whether such recommendations offer a possible solution remains to be explored. However, given the continued difficulties faced by legislative reforms in this area, such recommendations are indeed worthy of closer consideration within an Irish law reform context.

iii. The Corroboration Warning

As highlighted previously, the doctrine of recent complaint and sexual experience evidence are evidential rules which reflect the distinctive suspicion with which the law has traditionally regarded sexual offence victims. However, as Hanly et al note, nowhere is this differential treatment more apparent than in relation to the development of the corroboration rule in such cases.[237] For rape and sexual offences, the common law developed a rule whereby the jury had to be warned specifically of the dangers of convicting the defendant on the uncorroborated evidence of the complainant. This rule, once described as one which "arbitrarily discriminates against women",[238] has undergone a significant amount of reform across the common law world (including Ireland) in an attempt to lessen its impact. However, it is debatable whether reforms have gone far enough. In this regard it has been noted that the continuity of stereotypical myths about rape complainants, demonstrated in one way through the continued unnecessary use of the corroboration warning, is "hardly conducive to obtaining convictions".[239] In an area with an already strikingly low conviction rate, this is a cause for concern.

Corroboration was described in the classic case of *R v Baskerville* as:

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[236] Kelly et al (n 211) 77.
[237] Hanly et al, *Rape and Justice* (n 1) 80.
[238] *People v Rincon – Pineda* (1975) 14 Cal 3d 864.
[239] Temkin and Krahé (n 34) 145.

> [I]ndependent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.[240]

Generally, the evidence of a witness, if believed, is sufficient to prove the case against a defendant in a criminal trial.[241] Therefore, in most situations corroborative evidence is not required but its presence can increase the security of a conviction. There are a number of exceptions to this general rule. As Heffernan and Ni Raifeartaigh explain, "the courts insisted that the testimony of particular categories of witnesses, whose evidence was considered to be inherently unreliable, could be admitted only if supported or corroborated by other independent evidence".[242] These exceptional situations where corroboration is needed fall into three categories.

Visual identification evidence constitutes one category.[243] Where the case depends substantially on the correctness of such evidence it is "deemed desirable for the attention of the jury to be drawn to the necessity for caution".[244] Another requires corroboration as a *matter of law*. In such a case if no corroborative evidence is produced at the end of the prosecution's case, then the defendant cannot be convicted. Examples of cases which fall within this category include charges of perjury, treason and certain road traffic offences.[245] Finally, the last category requires corroboration as a *matter of practice* (or at least a warning to the jury is required).[246]Traditionally, this category included accomplice evidence, the evidence of children given on oath, claims against estates of deceased persons and the evidence of complainants in sexual offence cases. In relation to the latter category of evidence, it is important to note that in some jurisdictions, corroboration was required as a matter of law.[247] Therefore, in the absence of such corroboration, conviction was not possible.

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[240] *R v Baskerville* [1916] 2KB 658, 667.
[241] See Temkin, *Rape and the Legal Process* (n 55) 255.
[242] Heffernan and Ní Raifeartaigh (n 55) 23.
[243]Fennell, *The Law of Evidence* (n 170) 241 – 249.
[244] Fennell, "Differential Treatment of Sexual Complainants" (n 71) 230.
[245] For further information see Fennell, *The Law of Evidence* (n 170) 215.
[246] Ibid. 215 – 241.
[247] Note (n 63) 221.

However, in other jurisdictions, such as England and Wales and Ireland, a conviction was allowed without corroboration, "but only after the jury had been warned of the dangers inherent in convicting a defendant on the word of one person".[248] In recent decades this category has been the subject of much change with certain categories of evidence removed. The evidence of sexual offence complainants is one such category. In Ireland, although the warning was not abolished, it was downgraded from mandatory to discretionary.

Origins of the Rule

Like the rules previously discussed, the rationale underpinning the corroboration rule in rape and sexual offence cases appears to stems from a deep suspicion of the evidence of sexual complainants. As Temkin notes, until relatively recently corroboration requirements and warnings in sexual cases were well established throughout the common law world.[249] In this jurisdiction, prior to 1990 the issuing of a corroboration warning in a sexual offence trial was mandatory. Therefore, while a jury could still convict on the uncorroborated evidence of a complainant, they first had to be warned by the trial judge of the dangers of convicting a defendant on the basis of such unsupported testimony.

Many link the origins of this rule back to the well-worn statement made by Hale that an accusation of rape is easily made yet hard to defend.[250] Thus, as Hanly notes, implicit in the corroboration rule is the belief that complainants in sexual offence cases are "more willing to lie than in other kinds of cases".[251]

The rationale advanced in favour of the rule appears to have been threefold in nature.[252] First, as mentioned previously, there still exists an unfounded belief that false allegations of rape are easily made and consequently are a common occurrence.[253] The prevalence and acceptance of this notion in society was discussed in Part II of this Chapter. Thus, given the

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[248] Conor Hanly, "Corroborating Rape Charges" (2001) 11(4) *Irish Criminal Law Journal* 2.
[249] Temkin, *Rape and the Legal Process* (n 55) 256.
[250] See Hale (n 9).
[251] Hanly, *An Introduction to Irish Criminal Law* (n 2) 348.
[252] See Note (n 63) 229.
[253] Ibid.

belief, no matter how unfounded, that false allegations of rape and sexual assault are commonly made, it was "to protect men from the alleged fabrication of women" that the corroboration requirement owed much of its justification.[254] The ultimate fallaciousness of the assumption that false allegations of rape are easily and regularly made was demonstrated during the examination of the myth.[255] Consequently, it seems bizarre that today such an assumption continues to wield influence, and is repeatedly used as a justification for the differential treatment of sexual offence complainants.

A second justification advanced in favour of the corroboration rule relates to the emotion generated by a charge of rape or sexual assault. It is argued that "the nature of the allegations in sexual cases may arouse excessive sympathy on the part of the jury"[256] and consequently, they may get "swept away in a fit of passion and hastily convict men on the likely-sounding testimony of women who allege sexual assault".[257] Given the now wide acceptance of the difficulties faced when prosecuting such crimes, this argument appears odd. Indeed, there are a number of factors which undermine this justification, the most persuasive of which is the low conviction rate in such cases.[258] Evidence suggests that excessive sympathy for victims only exists in relation to rapes which adhere to the 'real' rape stereotype, as previously discussed. The more a specific incident differs from the perceived 'real' rape scenario, the less likely it is to be considered rape.[259] In addition to this, as McGrath explains, the complainant's evidence will not always arouse sympathy in every sexual offence case, and even when sympathies are aroused "there are many non-sexual cases in which this factor is present but no warning is required".[260] Thus, the fear that the jury may be swayed by excessive sympathy for a rape complainant is not an argument which withstands scrutiny.

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[254] Temkin, *Rape and the Legal Process* (n 55) 255.
[255] Refer to Part II of this Chapter.
[256] McGrath, "Two Steps Forward, One Step Back" (n 64) 40.
[257] Note (n 53) 235.
[258] As previously cited, in this jurisdiction a 2009 study revealed that the conviction rate for rape was 10 per cent. (See Corr et al (n 1)).
[259] Temkin and Krahé (n 34) 32. For more information see Martha R Burt and Rochelle S Albin, "Rape Myths, Rape Definitions and the Probability of Conviction" (1981) 11 *Journal of Applied Social Psychology* 212. Also see Tara M, Emmers-Sommer and Mike Allen, "Variables Related to Sexual Coercion: A Path Model" (1999) 16 *Journal of Social and Personal Relationships* 659.
[260] McGrath, "Two Steps Forward, One Step Back" (n 64) 41.

A final justification often put forward when defending the corroboration rule in sexual offence cases relates to what has been described as the "imagined difficulty encountered by an innocent man in defending himself from an accusation of rape".[261] It is still argued that sexual offence charges are difficult to defend given that they generally occur in private and often leave little physical evidence. Consequently, a defendant is deprived "of the opportunity to present evidence beyond his own testimony to establish his innocence".[262] However, as highlighted earlier, it is not particularly unusual to have one person's testimony pitted against another's in a criminal trial and moreover, this will not necessarily be the situation in every sexual offence case.[263] Furthermore, given that the conviction rate for sexual offences is particularly low, it seems clear that such cases are in fact difficult to prosecute as opposed to difficult to defend.[264] Therefore, it seems that this argument, like the others advanced, does not provide sufficient justification for a corroborative warning.

The Warning in Ireland

As stated, prior to 1990, a mandatory corroboration warning existed in this jurisdiction. However, in response to sustained calls for reform fuelled by the mounting criticisms surrounding the corroboration rule, in 1988 the Law Reform Commission issued a report recommending that a discretionary warning replace the mandatory one.[265] The Commission noted that the present law was "unduly restrictive" and "superfluous" in some cases.[266] Consequently they recommended that the decision to issue a warning or not, and its terms, should be left to the discretion of the trial judge. This recommendation was implemented two years later under s. 7 of the Criminal Law (Rape) (Amendment) Act 1990.[267]

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[261] Note (n 63) 238.
[262] McGrath, "Two Steps Forward, One Step Back" (n 64) 39.
[263] Ibid.
[264] For further information, see discussion by Heffernan and Ní Raifeartaigh where allegations of rape and sexual assault are described by the authors as "notoriously difficult to prosecute". (Heffernan and Ní Raifeartaigh (n 55) 122).
[265] LRC, *Report on Rape and Allied Offences* (n 21) 13.
[266] Ibid.
[267] Criminal Law (Rape) (Amendment) Act 1990, s. 7 —"(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning; and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.

From the outset Fennell argued against such a reform, stating that it would merely give effect to a *de jure* change "without a *de facto* improvement to the position of sexual complainants".[268] Fennell noted that "given that the original requirement was fashioned by judicial practice, it does not seem implausible that the same factors considered to justify the original rule, would also be deemed to justify a continual exercise of this discretion by the judiciary".[269] While the jurisprudence of the Irish courts in relation to the discretionary warning has been varied, there is substantial evidence giving credence to the fears expressed by Fennell.[270]

Consequently, if further reform is necessary, an alternative approach may be to introduce a prohibition on such warnings in sexual offence cases, while allowing the judge, as usual, to comment as to the weight to be given to unsupported evidence and to give a warning, if

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(2) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so."

[268] Fennell, "Differential Treatment of Sexual Complainants" (n 71) 241.

[269] Ibid.

[270] For example, see *People (DPP) v Molloy* (unreported, CCA, 28 July 1995) where the Court of Criminal Appeal held that while it was "fully aware and alive" to the fact that there was no longer a statutory obligation to give a warning, it was of the view that "where the charge is essentially supported by the evidence of the complainant alone without collateral forensic evidence or any other form of corroboration, it is prudent practice for the trial judge to warn the jury...".(ibid. 6). Also see *People (DPP) v PJ* [2003] 3 IR 550, where the Court of Criminal Appeal held that while the corroboration warning was no longer mandatory it "may still...be desirable in particular cases" (ibid. 556) and *PL v Buttimer* [2004] 4 IR 494, where Geoghegan J noted obiter dictum that "[t]he mandatory requirement is now gone but there is still a discretion left in a trial judge and in my opinion, such a warning should always be given in a one on one case". (ibid. 516). However, also refer to the case of *People (DPP) v JEM* [2001] 4 IR 385 where "a more liberal trend is discernible" in relation to corroboration warning. (Heffernan and Ní Raifeartaigh (n 55) 123) In *JEM* Denham J referred with approval to the English decision of *R v Makanjoula* [1995] 2 ALL ER 730. Here, the English Court of Appeal held that while the trial judge retained a discretion to issue a warning if deemed necessary, "there will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable" and that "an evidential basis does not include mere suggestion by cross-examination". (ibid. 472 – 473) While Denham J acknowledged that the wording of s. 7 of the Irish 1990 Act was not an exact replication of the corresponding English provision (Criminal Justice and Public Order Act 1994, s. 32), she held that the legal principle underpinning both provisions was the same and quoted with approval the principles enumerated in *Makanjoula.*

appropriate, on the facts. This approach was adopted in England and Wales[271] (although to limited success).[272] However, even prior to reform in England, the Irish Law Reform Commission rejected the notion of abolishing the warning in this jurisdiction. In its *Report on Rape and Allied Offences,* the Commission referred to any possibility of prohibiting the warning as an "unjustifiable interference with the judicial function".[273] They also rejected the suggestion that where the trial judge considers that a warning is necessary, he/she should be expressly precluded from couching it in language suggesting that the evidence of complainants in cases of sexual assault should be treated with reserve, noting that they did not consider that such a prohibition was either necessary or desirable.[274] Indeed, while it is possible that such a prohibition could present a constitutional conflict, given that the trial judge would still enjoy a discretion to comment on the credibility of a witness and the weight which should be attached to his or her evidence, any claims of unconstitutionality could be legitimately circumscribed.

Nonetheless, as McGrath comments, for the sake of clarity and in the interests of minimising interpretive difficulties, it would perhaps be more prudent to approach the issue of reform by advocating a two-part prohibition:

> The first part would prohibit the trial judge from warning the jury that it was dangerous on the uncorroborated evidence of a sexual complainant or from making any other generalisations about such evidence. The second part would then contain a proviso that this prohibition did not interfere with the discretion of the trial judge

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[271] See s. 32, Criminal Justice and Public Order Act 1994. However, note that in *Makanjuola* the Court of Appeal interpreted s. 32 as permitting a continued judicial discretion to give a warning in appropriate cases. Consequently, the current approach in Ireland is in fact quite similar to that in England and Wales. Nonetheless, it is arguable that moving from a mandatory warning to a discretionary one still allows for the differentiation of sexual offence complainants from other witnesses, whereas abolition eliminates this differentiation, at least in principle. Therefore, from a symbolic perspective, abolition may have more to recommend it.

[272] The results of an empirical study conducted by Temkin and Krahé in 2008 indicated that the ruling in *Makanjuola* was, in some cases, being effectively ignored and that juries were frequently being told to look for "independent support". (Temkin and Krahé (n 34) 144. For further information see Ibid. 144 – 145). Such results would seem to suggest that "old judicial habits die hard" (Temkin, *Rape and the Legal Process* (n 55) 266) and possibly speak to the flaws of such an approach. (For further details on the negative issues surround abolishing the warning, see Susan Leahy, "The Corroboration Warning in Sexual Offence Trials: Final Vestige of the Historic Suspicion of Sexual Offence Complainants or a Necessary Protection for Complainants" (2014) 18 *The International Journal of Evidence and Proof* 41, 58 – 60).

[273] LRC, *Report on Rape and Allied Offences* (n 21) 31.

[274] Ibid.

to make such a comment on the facts as the interests of justice required in the circumstances of the case.[275]

Leahy endorsed this approach as a "viable proposal".[276] However, she also suggested that such a method of reform could be supported by the publication of a bench book with a provision providing guidance on when it would be appropriate for the trial judge to use his/her discretion to comment.[277] It could also provide guidance as to the phrasing of such comments in order to avoid any prejudicial statements which may serve to reinforce rape myths and stereotypes.[278] It is submitted that this dual approach to reform would achieve an accurate balancing of the issues and rights at stake by avoiding any concerns relating to constitutionality, maintaining the interests of justice and eliminating the remnants of any unwarranted and antiquated generalisations.

However, to date the law relating to corroboration remains unchanged. The recently published Criminal Law (Sexual Offences) Bill 2015 is silent on this subject. Consequently, any legislative advancement in this area is unlikely in the near future.

iv. Conclusion

The evidential rules discussed in this section offer a particular insight into the criminal trial process as it relates to rape and sexual offences. As was highlighted, the special evidential rules which apply to such offences appear to be premised on antiquated and inaccurate assumptions about rape complainants and are often illustrative of the differential and prejudicial treatment of such complaints and such complainants by the criminal justice system. Attempts to address these issues have generally sought to challenge these prejudicial assumptions. Nonetheless, as was demonstrated above, reform of the special evidential rules in rape and sexual offence cases is no easy feat. Socially engrained myths and stereotypes,

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[275] McGrath, "Two Steps Forward, One Step Back" (n 64) 37.
[276] Leahy, "The Corroboration Warning" (n 272) 61.
[277] Ibid. 63. Leahy notes that in this jurisdiction no bench book exists as of yet. However she recommends that guidance on corroboration could be included within a bench book which, as part of a wider reform, could be created for general use in sexual offence trials. (Ibid.).
[278] Ibid.

along with long-held prejudicial assumptions all contribute to a social, and by extension, legal landscape which cannot be altered overnight. Consequently, addressing the specific challenges and difficulties which arise as a result of these rules has proven particularly problematic, as has the identification and implementation of appropriate and effective methods of reform.

V. Overview of Testimonial Aids and Support Measures

The final section of this Chapter will present an overview of existing testimonial aids and support measures. The previous sections examined the challenges associated with the rape trial, however, it is also important to consider the measures in place to provide support to witnesses and to temper some of the harsher aspects of the trial process. Consideration of these issues will facilitate a deeper understanding of the context in which a potential reform of personal cross-examination in rape trials could take place.

In recent years Irish law has introduced a number of measures designed to accommodate witnesses, and in particular vulnerable witnesses, while giving testimony in court.[279] The motivation behind these provisions can primarily be attributed to a recognition of the need to protect such witnesses by minimising the degree of trauma to which they could potentially be exposed[280] and an understanding of how such measures can benefit the quality of a witness' evidence, and ultimately the truth-seeking objectives of the criminal trial.[281] For the most part these measures have applied to children and vulnerable adults, such as those with a mental disability.[282] However, increasingly complainants in sexual offence cases have also been included in the category of witnesses who are entitled to avail of certain testimonial aids and support measures.[283] This inclusion is perhaps indicative of a more progressive and contemporary understanding of the potential vulnerability of such witnesses.[284]

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[279] For example, see Shane Kilcommins, Máire Leane, Fiona Donson, Caroline Fennell and Anna Kingston, "The Needs and Concerns of Victims of Crime in Ireland" (*The Commission for the Support of Victims of Crime* 2010) and Shane Kilcommins, Claire Edwards and Tina O'Sullivan, "An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime", *Irish Council for Civil Liberties* (Dublin 2014).

[280] O'Malley, *Sexual Offences* (n 2) 415 – 416 and McGrath, *Evidence* (n 25) 152.

[281] For example, Heffernan and Ní Raifeartaigh state: "Special measures...provide tangible support to such witnesses and enhance their ability to give valuable evidence". (Heffernan and Ní Raifeartaigh (n 55) 60) Also, more generally, see *R v Levogiannis* [1993] 4 SCR 475 at 11 - 12. Referring to the truth-seeking objective of the adversarial trial, Justice L'Heureux-Dubé of the Supreme Court of Canada stated in *R v Levogiannis*: "The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth".

[282] See O'Malley, *Sexual Offences* (n 2) 409. However, also refer to *DPP v McManus* [2011] IECCA 32 where the Court recognised an adult as vulnerable for reasons other than mental disability.

[283] See LRC, *Sexual Offences and Capacity to Consent* (n 23) 96.

[284] See Heffernan and Ní Raifeartaigh (n 55) 62.

As stated in Part I of this Chapter, the Criminal Evidence Act 1992 ("1992 Act") was a particularly influential piece of legislation in this context. It introduced a series of provisions aimed at reducing the often stressful and traumatic experience of giving evidence in trials concerning sexual and other violent offences.[285] For example, under s. 13(1)(a) of the 1992 Act, in any proceedings for an offence to which the section applies, a witness under the age of 18 years (or with a mental handicap[286]) may give evidence through a live television link.[287] Section 13(2)(b) makes provision for witnesses who do not meet the age or mental handicap proviso under s. 13(1)(a) to give evidence by video-link with the leave of the court in violent or sexual offence cases. A more general provision relating to evidence via a live television link is provided for under the Criminal Justice Act 1999. Section 39 of the 1999 Act allows a witness to give evidence through a television link where the court is satisfied that the person is otherwise likely to be in fear or to suffer intimidation in giving evidence. This provision is not subject to any age limitation and is applicable to proceedings on indictment for any offence. These provisions allowing for the giving of testimony via video-link have been described by Heffernan and Ní Raifeartaigh as "the most prominent of the special measures" available under Irish law and "the most widely extended", given the spectrum of vulnerable and intimidating witnesses which the provisions encompasses.[288]

A provision allowing for the use of intermediaries is also provided for under the 1992 Act. Where a witness is giving evidence through a live television link, s. 14 of the Act allows for

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[285] Part III of the 1992 Act (s. 13 – 19) applied to proceeding outlined under s. 12 and include:
"(a) a sexual offence,
(b) an offence involving violence or the threat of violence to a person,
(c) an offence under section 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998,
(d) an offence under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008,or
(e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c) or (d)".
Subject to amendment under s. 33 of the 2015 Bill.

[286] Section 19, 1992 Act, as amended by s. 4(c) of the Criminal Law (Human Trafficking) (Amendment) Act 2013: "The references in sections 13 (1)(a), 14 (1)(b), 15 (1)(b) and 16(1)(a) and (b)(ii) to a person under 18 years of age and the reference in section 16 (1)(b)(i) to a person under 14 years of age shall include references to a person with mental handicap who has reached the age concerned". As evident, the term "mental handicap" is used in the 1992 Act and is not the author's own wording. It is submitted that "mental disability" would be a more appropriate term. Nevertheless, when discussing the 1992 Act, the same terminology employed in the Act will be employed by the author for the sake of consistency.

[287] See s. 13 of 1992 Act (as amended by the s. 18 of the Criminal Justice Act 1999 and s. 257 of the Children Act 2001) for further information.

[288] Heffernan and Ní Raifeartaigh (n 55) 64.

questions to be put to the witness through an intermediary.[289] However, this provision applies only to children under 18 or to persons with a mental handicap.[290] Moreover, it is only applicable where evidence is being given through a live television link. Despite the limitations of this provision, where an intermediary is employed, the provision has the potential to restrict an accused from personally cross-examining a witness by inserting a third party between the accused and the complainant. This was not the intention underpinning the enactment of the provision (the primary purpose of employing an intermediary is to assist with communication) and there have been no relevant cases in this regard, nonetheless, it is worthy of note within the context of this thesis.[291] Finally, another provision of importance in respect to the 1992 Act is s. 16, which allows for the admission of video recorded statements by minors or mental handicapped persons subject to certain requirements.[292]

In relation to the introduction of additional testimonial aids, the previously mentioned Criminal Law (Sexual Offences) Bill 2015 represents a significant development in this respect and demonstrates a clear eagerness to better accommodate and cater for the needs of vulnerable witnesses. Part 5 of the 2015 Bill deals exclusively with amendments to the criminal evidence legislation. The Bill proposes a number of reforms and additions to the Criminal Evidence Act 1992, aimed at "minimising the trauma on victims of sexual offences, particularly children".[293] For example, s. 35 (14A) permits the giving of evidence from behind a screen. As per the Memorandum accompanying the Bill, the purpose of such a provision is to protect the witness "from any potential intimidation, or feeling of intimidation, by the sight of the accused while giving evidence in court".[294] In addition to this, s. 35 (14B) provides for the removal of wigs and gowns during the giving of evidence. However, in relation to the vast majority of provisions there is an age (or mental disability) requirement. Therefore, adult sexual offence complainants who do not suffer from a mental disability are not in a position to avail of many of these testimonial supports.

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[289] As amended by s. 257 (3) of the Children Act 1997.
[290] Moreover, it appears the provision has rarely been used in practice.
[291] This issue will be discussed further in Chapter 3.
[292] As amended by s. 20 of the Criminal Justice Act 1999 and s. 4 of the Criminal Law (Human Trafficking) (Amendment) Act 2013. It is also subject to amendment under the Criminal Law (Sexual Offences) Bill 2015, s. 36.
[293] Department of Justice and Equality, "Minister Fitzgerald Publishes Heads of new Criminal Law (Sexual Offences) Bill 2014" (Press Releases 27 November 2014) < http://www.justice.ie/en/JELR/Pages/PR14000349 > accessed 18 May 2015.
[294] Criminal Law (Sexual Offences) Bill 2015, *Explanatory and Financial Memorandum* 9.

While not a testimonial aid, another potential protection which may safeguard against inappropriate or abusive questioning is the trial judge's power to exercise "general supervisory jurisdiction in relation to the cross-examination of witnesses".[295] As was noted by the Law Reform Commission in a recent report: "The issue of controlling cross-examination is particularly acute in the case of complainants and witnesses who require support and accommodation to give evidence".[296] The trial judge has the ability to "disallow questions which he or she considers to be improper" and to "curtail cross-examination which is repetitive or excessive in length".[297] Nonetheless, given the constitutional considerations at play, the court must exercise such discretion in a cautionary manner. As McGrath explains:

> It is open to a trial judge to intervene during the cross-examination of a witness to ensure that a witness is given an adequate opportunity to give an answer to a question or to ask a question. However, if the intervention of a trial judge are so frequent, prolonged, or of such a nature as to be unfairly disruptive or to give the impression of partiality in favour of one side of the case, this may result in a verdict being set aside.[298]

Thus, as O'Malley notes, the trial judge must "walk a tightrope between keeping the cross-examination within proper bounds and not appearing to favour the prosecution".[299] Therefore, while a notable discretionary power, the need to exercise it with caution has been recognised by the judiciary.

There are also a number of support measures specific to sexual offence complainants which are not directly related to the giving of evidence but are worthy of mention nonetheless in order to provide a fuller context. It appears these measures indicate a broader concern on

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[295] McGrath, *Evidence* (n 25) 118.
[296] LRC, *Sexual Offences and Capacity to Consent* (n 23) 120.
[297] McGrath, *Evidence* (n 25) 118.
[298] Ibid. 119.
[299] O'Malley, *Sexual Offences* (n 2) 415. Also, note Lord Denning's comments in *Jones v National Coal Board* [1957] 2 QB 55, where he stated that judicial interventions "should be as infrequent as possible" and that judge's should exercise restraint in intervening as it risks giving witnesses "time to think out the answer to awkward questions". (ibid. 65)

the part of the legislature to support complainants of sexual offences by minimising the potential stress caused by the rigors of a criminal trial. An example of such a measure is the complainant's right to be accompanied to court by virtue of s. 6 of the Criminal Law (Rape) Act 1981, as inserted by s. 11 of the Criminal Law (Rape) (Amendment) Act 1990. As per this provision the trial judge shall exclude from the court during the proceedings for serious sexual offences[300] "all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press, and such other persons (if any) as the judge...may in his...discretion permit to remain". Subsection (3) provides that the provision is "without prejudice to the right of a parent, relative or friend of the complainant...to remain in court". Legal advice is also available for complainants under s. 26 (3A) of the Civil Legal Aid Act 1995.[301] Under this provision a complainant in respect of a serious sexual offence[302] is entitled to free means-tested legal advice from the reporting stage. However, in 1998 Bacik et al reported that in practice this provision was not being used (there is no clear duty imposed on the Gardaí under the provision to inform complainants of this right) and complainants were "generally unaware of its existence".[303] As discussed in Part I and Part IV of this Chapter, s. 34 of the Sex Offenders Act 2001 inserting a new provision, s. 4A, in the Criminal Law (Rape) Act 1981, allowing sexual offence complainants to avail of separate legal representation upon an application by the defence to introduce sexual experience evidence. For its time this was quite an advanced support measure for complainants, and while there have been issues in respect to its application and operation,[304] it remains a support measure which has attracted significant praise.[305]

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[300] The offences include "rape offence or the offence of aggravated sexual assault or attempted aggravated sexual assault or of aiding, abetting, counselling or procuring the offence of aggravated sexual assault or attempted aggravated sexual assault or of incitement to the offence of aggravated sexual assault or conspiracy to commit any of the foregoing offences". (Criminal Law (Rape) Act 1981 Act, s. 6(1)).

[301] As amended by s.78 of the Civil Law (Miscellaneous Provisions) Act 2008.

[302] The offences include "the offence of rape under the common law or under section 2 of the Criminal Law (Rape) Act, 1981 or of aggravated sexual assault under section 3 or of rape under section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 , or of unlawful carnal knowledge under section 1 or 2 of the Criminal Law Amendment Act, 1935 , or of incest under section 1 or 2 of the Punishment of Incest Act, 1908". Civil Legal Aid Act 1995, s. 26(3) (b)).

[303] Bacik et al (n 29) 251. For further criticism relating to the lack of use of this provision see Bacik et al (n 29) 258-260. However, since then s. 34 of the Sex Offenders Act 2001 has been introduced, altering much of the discussion outlined by Bacik et al in 1998.

[304] Refer to the discussion on "Sexual Experience Evidence" in Part IV of this Chapter.

[305] See Temkin, *Rape and the Legal Process* (n 55) 281, 295, 303.

Finally, a recent statutory development worthy of mention in the context of testimonial aids and support measures for vulnerable victims is the EU Victims' Rights Directive[306] and the General Scheme of the Criminal Justice (Victims' Rights) Bill 2015 ("Victims' Rights Bill").

The EU Victims' Rights Directive was adopted in November 2012 with the aim of "establishing minimum standards on the rights, supports and protection of victims of crime".[307] As per the guidelines issued by the Directorate General for Justice, the aim of the Directive is "to deal with victims' needs in an individual manner, based on an individual assessment and a targeted and participatory approach towards the provision of information, support, protection and procedural rights".[308] The guidelines go on to highlight the particular attention dedicated to victims of gender-based violence, stating:

> Special attention is given to special support and protection for victims of certain crimes, including victims of gender-based violence, predominantly women, due in particular to the high risk of secondary and repeat victimisation, of intimidation and of retaliation.[309]

Under Irish law there exists no general domestic legislation bestowing rights upon victims.[310] The 1999 Victims' Charter establishes a series of rights which should be afforded to victims but, as McDonald explains, these are merely aspirational and have no legal effect.[311] However,

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

[307] Ibid.

[308] European Commission, Directorate General for Justice, "The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, replacing Council Framework Decision 2001/220/JHA" (Guidance Document, December 2013) 4.

[309] Ibid.

[310] Note, during the discussion of the EU Directive in this section, the term "victim" is used in place of the term "complainant". This is done in order to adhere to the terminology adopted in the Directive and is not intended to imply either guilt or innocence in relation to the accused. Moreover, it should be noted that the terminology of the Criminal Justice (Victims of Crime) Bill 2015 (e.g use of terms such as "victim", "accused", "repeat victimisation") replicates the wording used in the Directive.

[311] Maria McDonald, "Overview of new Victims' Rights Directive" (Public Interest Law Alliance, July 2013) <http://www.pila.ie/bulletin/2013/july-2013/3-july-2013/guest-article-by-maria-mcdonald-bl-overview-of-new-victims-rights-directive/> accessed 18 May 2015.

this position has been altered since the Victims' Rights Directive came into force on the 16 November 2015.[312]

Nonetheless, while the Directive has taken effect, domestic legislation has yet to be enacted, although the drafting process is underway. On 15 July 2015, the Department of Justice and Equality published the General Scheme of the Criminal Justice (Victims of Crime) Bill 2015.[313] The purpose of the Bill is "to strengthen the rights of victims of crime and their families" and to give effect to the EU Directive.[314] As David Stanton, TD, the Chair of the Justice Committee stated

> The draft Bill contains provisions to help a victim through the court process...It will also formalise and require an assessment of each victims protection needs. This is a crucial piece of draft legislation and our Committee is very much aware of the need to get this Bill right. Victims of crime must be prioritised in the justice system and we are keen to assist the Minister for Justice in crafting this piece of legislation.[315]

Of particular interest within the context of this thesis is head 6 of the Victims' Rights Bill. This draft provision provides for an assessment of a victim upon complaint to establish whether he/she may benefit from certain protections in order to avoid secondary or repeat victimisation. It states:

> (1) The member of the Garda Síochána taking a complaint or another appropriate member shall assess, in consultation with the victim;

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[312] See European Commission, "New Rules on Better Protection for Victims of Crime in the EU enter into force Today", *Press Release* (Brussels, 16 November 2015) last accessed on 4 June 2016 (Available at http://europa.eu/rapid/press-release_IP-15-6095_en.htm)

[313] According to the Government Legislation Programme published in September 2015, the Bill was "expected to be published from the start of the Dáil session to the beginning of the next session". (Department of the Taoiseach, *Government Legislation Programme: Autumn Session 2015* (22 September 2015)).

[314] Ibid.

[315] See Houses of the Oireachtas, "Justice Committee to begin Pre-Legislative Scrutiny of Criminal Justice (Victims of Crime) Bill" (Press Releases 20 October 2015) <http://www.oireachtas.ie/parliament/mediazone/pressreleases/2015/name-29941-en.html> accessed 5 December 2015.

(i) the measures, if any, that may be necessary for protection of the victim from any secondary or repeat victimisation, intimidation or retaliation, and

(ii) if the victim would, in the course of the investigation of the offence alleged, benefit from any measure provided for in section 15, and

(iii) if, in the event of the victim being required to give evidence in the trial of any offender charged with the alleged offence, he or she would benefit from any measure provided for in section 16.

Entitled "Special Measures during Trial", head 16 (1) provides that:

(1) In any proceedings for an offence where a victim is required to give evidence, the Court may, on the application of the prosecutor, where it is satisfied that the victim by reason of any of the following:

(a) his or her personal characteristics

(b) the type and nature of the offence alleged

(c) the degree of harm suffered by him or her as a result of the offence alleged

(d) the relationship, if any, between him or her and the accused

(e) The nature of the evidence he or she is to give

(f) any behaviour towards him or her on the part of – (i) the accused (ii) members of the family of or associates of the accused

should be permitted to give evidence other than viva voce in open court and, if it is further satisfied that no injustice would thereby be caused to the defendant, shall direct that the evidence be given under such provision as it considers appropriate of Part III of the Criminal Evidence Act 1992, as amended.

Subsection (2) of the draft provision also provides the court with the power to exclude people from the court during the victim's testimony if necessary.

While the Bill itself has yet to be published, according to the Minister for Justice and Equality, Frances Fitzgerald, the draft legislation represents a "new departure", making victims' rights,

supports and protections a "legislative requirement".[316] Thus, it is within this framework that the cross-examination of complainants in rape and sexual offence trials is conducted and consequently, it is within this context that any proposed reform would need to be considered and evaluated.

[316] Department of Justice and Equality, "Minister Fitzgerald Publishes Heads of new Criminal Law (Sexual Offences) Bill 2014" (n 293).

Conclusion

The purpose of this Chapter was to establish a context within which to consider the central issue of this thesis. The Chapter began by asserting that the trying of rape and other forms of sexual offences poses distinct and particular challenges. It was submitted that this category of offences, and in particular the complainants of such offences, occupy a particular position in the criminal trial system. In order to demonstrate this, three specific issues were identified as being capable of illustrating distinct aspects associated with rape and sexual offence trials.

First, certain rape myths and stereotypes were discussed. The prevalence of these myths/stereotypes in society and their ability to influence and shape attitudes towards sexual violence were outlined. In particular the troubling effect of such myths/stereotypes on the interpretation and understanding of such offences within the criminal trial context, and specifically from a juror deliberation perspective, was considered. Moving on, certain substantive elements of the law relating to the trying of sexual offences were identified and considered. The concept of consent in relation to the offence of rape, and the issues surrounding it, were discussed. A number of particularly problematic evidential rules which apply in sexual offences cases were also identified. The origins, rationales and impact of these rules were outlined, as was their influence on the law in this jurisdiction. In particular, the manner in which these rules reinforce the differentiation of sexual offences and the complainants of such offences from other criminal offences was considered.

Finally, before concluding, an overview of various testimonial aids and support measure which are available to witnesses was presented. As highlighted, for the most part these measures applied to children and vulnerable adults, such as those with a mental disability. However, in recent decades, complainants in sexual offence cases have increasingly been included in the category of witnesses who are entitled to avail of certain testimonial aids and support measures.

The examination of the first three topics allowed for a discussion of the distinct challenges and difficulties associated with the trying of rapes, while considering the available testimonial

aids and measures facilitated a fuller appreciation of the context in which complainants appear in court and give evidence. Consequently, a framework has been put in place in which to address the central issue of this thesis: personal cross-examination of the complainant by the defendant in rape trials.

2. Constitutional and Human Rights Considerations: Presumption of Innocence, Right to Cross-Examination and the Right to Self-Representation

Introduction

The preceding Chapter established an appropriate framework and context for this thesis by considering the unique nature of rape and sexual offences and examining a number of problematic issues which arise in the course of such trials. Chapter 1 emphasised an important theme which is central to this thesis. This Chapter offers an examination of another primary theme; the due process and fair trial rights of the accused.

Referring to the Irish legal system, Bacik et al comment:

> Our system of criminal justice is grounded in a commitment to procedural due process, i.e., to the proposition that an individual may not be punished for criminal conduct without the benefit of procedures that are fair and respectful of the individual's basic rights. This commitment is enshrined in Article 38.1 of the Constitution...[1]

Article 38.1 of the Irish Constitution states: "No person shall be tried on any criminal charge save in due course of law". This short and rather vague Article of the Constitution has had a profound impact on Irish criminal law. It has been used to "introduce norms of fairness that protect the position of the suspect" during the trial.[2] Due to the brevity of the Article, its meaning and scope is not immediately clear. As Doyle notes, "At its narrowest, it could simply mean that trials of criminal charges must be held in accordance with the law".[3] However, the Irish Courts have tended towards a broader, more substantive definition of Art. 38.1, encompassing a wide range of rights which have been held as basic to the concept of a fair trial. In *Heaney v Ireland*,[4] Costello J. stated

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[1] Ivana Bacik, Liz Heffernan, Patricia Brazil and Marguerite Woods, *Report on Services and Legislation Providing Support for Victims of Crime* (Law School, Trinity College Dublin 2007) 31.
[2] Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press Ltd 2008) 17.
[3] Ibid.
[4] *Heaney v Ireland* [1994] 3 IR 593.

> [Article 38.1]...as the courts have shown, implies a great deal more than a simple assertion that trials are to be held in accordance with laws enacted by parliament. It is an Article couched in peremptory language and has been construed in accordance with basic concepts of justice.[5]

As noted by Hogan and White,[6] a similarly expansive interpretation of the provision was sanctioned by Barrington J. in *Re National Irish Banks Ltd*,[7] where it was held that the phrases "due course of the law" and "due process of the law" encapsulate "dynamic constitutional concepts into which lawyers have obtained deeper insights as society has developed".[8]

Nonetheless, the Irish courts have also recognised that the "rights protected by Article 38.1 can be qualified and restricted in appropriate cases", as long as such restrictions are proportionate and necessary.[9] As held by O'Higgins C.J. in *In re Criminal Law (Jurisdiction) Bill 1975*, "The phrase 'due course of law' (in Article 38.1) requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society".[10]

For the purpose of this Chapter, three rights in particular will be considered: the presumption of innocence, the right to cross-examination and the right to self-representation. Each of these rights will be examined separately. An overview of their origins will be presented, along with a consideration of the rationale underpinning their existence. The parameters of these rights under the Irish Constitution, the *International Covenant on Civil and Political Rights*

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[5] Costello J continued, "Those basic principles may be of ancient origin and part of the long established principles of the common law, or they may be of more recent origin and widely accepted in other jurisdictions and recognised in international conventions as a basic requirement of a fair trial". (*Heaney v Ireland* (n 4) 605 – 606).

[6] Gerald Hogan and Gerry White, *JM Kelly: The Irish Constitution* (4 edn, LexisNexis Butterworths 2003) 1039 – 1040.

[7] *Re National Irish Banks Ltd* [1999] 1 IR 145.

[8] Ibid. 180.

[9] Constitutional Review Group, *Report of the Constitutional Review Group* (May 1996) 194 – 195.

[10] *Re Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129, 152.

("*ICCPR*") and the *European Convention on Human Rights* ("*ECHR*") will then be examined.[11] Once the origins, substance and parameters of the rights have been addressed, the potential impact of a prohibition on personal cross-examination on the integrity of each right will be assessed. While it would amount to pure conjecture to reach any definitive conclusions in relation to the constitutionality or human rights implications of such a prohibition, the issues addressed during the course of this Chapter may offer guidance and insight when attempting to reach final conclusions in relation to these matters.

However, before looking at each of the rights individually, a brief overview of the history and subsequent development of the common law criminal trial will be presented in order to position an analysis of the rights in the appropriate context.

[11] Note, while the Convention applies to States of both common and civil law systems and while the judgments of the ECtHR are only binding on the State concerned with the case, other Convention States look to these judgments "for guidance as to the compatibility of their own domestic law with the requirements of the Convention". (Ben Emmerson, Andrew Ashworth, Alison Macdonald, Andrew L-T Choo and Mark Summers, *Human Rights and Criminal Justice* (3rd edn, Sweet & Maxwell 2012) 5). A similar situation applied in relation to the Covenant.

I. A Brief Overview of the Origins of the Adversarial Criminal Trial

The origins of the Irish criminal justice system are firmly rooted in the English common law tradition. The identifying feature of the system is its adversarial and accusatorial nature, which stands in stark contrast to the inquisitorial legal systems of many European countries.[12] Characterised by principles of due process and fair trial rights, the common law adversarial criminal trial appears to be a long-established creature of our legal system. Nonetheless, the adversarial criminal trial as it exists today is in fact of quite recent origins.[13]

For centuries English criminal justice (and consequently Anglo-Irish criminal justice[14]) operated under a system of privatised investigation and prosecution. Under such a regime, (the origins of which are rooted in the blood-feud system of retribution and compensation associated with primitive societies[15]) the victims of crime would personally instigate an investigation and prosecution of the accused.[16] As Beattie describes:

> If he [the victim] wanted to bring an offender to justice...the victim himself (or his agent) had to take on the burden and the expense of the prosecution, not only bringing the offence to the attention of the authorities but also preparing himself unaided for the trial, assembling witnesses, and taking the lead in laying out the evidence in court.[17]

Thus, victims who felt aggrieved enough to pursue the accused would gather prosecutorial evidence and witnesses, and bring their case before a magistrate who was the "essential link between the victim and the courts".[18]

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[12] Bacik et al (n 1) 30. Also see John Jackson and Sarah Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012).
[13] John Langbein, "The Criminal Trial before the Lawyers" (1978) 45(2) *The University of Chicago Law Review* 263.
[14] See Raymond Byrne, Paul McCutcheon, Claire Burton and Gerald Coffey, *Byrne and McCutcheon on the Irish Legal* System (5th edn, Bloomsbury Professional 2009).
[15] See Finbarr McAuley and J Paul McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxell 2000) 1 – 2.
[16] John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press 2003) 10 – 11.
[17] J.M. Beattie, *Crime and the Courts in England 1660 – 1800* (Clarendon Press 1986) 35.
[18] Ibid. 36.

In these early modern criminal trials the courtroom was a lawyer-free zone. As will be elaborated upon during the historical tracing of the right to self-representation, criminal defence (and in felony cases, criminal prosecution) was viewed as a "suitable do-it-yourself activity" and criminal trials were expected to "transpire as a lawyer-free contest of amateurs".[19] This practice was defended on the basis that allowing counsel to enter into the proceedings would hinder the court's attempts to get to the truth.[20] To this end there existed a rule against defence counsel in felony trials which survived until the early nineteenth century. Under such conditions the criminal trial took the form of an "altercation",[21] a "freewheeling affair" where the accuser and accused "told their own story, often inadequately, and the judge and members of the jury were actors in the trial joining in with questions and comments at will". [22] This system of private prosecution continued into the eighteenth century, and while many factors contributed to its eventual abandonment,[23] the introduction of counsel into the criminal trial marked a significant shift in practice and heralded the establishment of the adversarial criminal trial as we know it today.

The first significant breach in the rule against defence counsel came with the enactment of the Treason Trials Act 1696. The 1696 Act is recognised as "a turning point in the history of Anglo-American criminal procedure" which eventually led to the development of the adversary criminal trial that we recognise today.[24] The legislation was introduced in response to a series of infamous treason trials[25] in which a number of high profile political figures, who were ultimately considered innocent of the charges against them, were sentenced to a traitor's death "for want of the ability to defend effectively against baseless prosecutions".[26] The perception that these trials resulted in innocent persons being 'judicially murdered' led to a movement in which influential members of the political community began to consider

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[19]Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 11.

[20] Further justifications for the rule against defence counsel will be outlined later in this Chapter.

[21] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 13.

[22] John Hostettler, *Fighting for Justice* (Waterside Press 2006) 11.

[23] For example, Beattie notes: "Until the state assumed the management of crime in the nineteenth century and professional police forces took over the pursuit and apprehension of suspects, the gathering of evidence, and the preparation of cases – and indeed began to decide which cases would be taken to trial and which would not – these matters were left largely to the private initiative of the victim". (Beattie (n 17) 35).

[24] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 67-68.

[25] Many of the treason trials arose as a result of a number of plots and rebellions, namely the Popish Plot (1678), the Rye House Plot (1683), and the Monmouth Rebellion (1685). For further information see Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 68-78.

[26] Ibid. 69.

seriously the problems relating to the lack of safeguards in criminal procedure, with particular attention being paid to the disadvantage faced by defendants as a result of the rule against counsel in treason trials.[27] This movement culminated in the introduction of the 1696 Act which granted those on trial for treason the right to avail of counsel.

Despite the ground-breaking reform introduced by the arrival of the 1696 Act, it was not considered necessary at the time to extend the provisions of the statute to defendants on trial for felonies. Given that a good many felonies were punishable by death, it appears curious that drafters of this legislation limited its operation to cases involving charges of treason. Langbein argues that certain factors make this limitation appear more reasonable, namely the prosecutorial imbalance in treason cases, the subservience of the bench in such trials, the complexity of the offence of treason and the relative rarity of such cases.[28] However, Hostettler contends that "three of these four justifications for the limitation of defence counsel could also have been applied to some cases of felony, including murders".[29] Such propositions have led to the contention that the Act was "a piece of class legislation to protect prominent men from abuse of the law".[30] Whether this was the case or not is debatable.[31] Nevertheless, what is evident is that while the drafters of the 1696 Act were careful to confine the availability of full defence counsel to cases of treason, "they had no way of knowing that a generation later defence counsel would free himself from that tether, enter the ordinary trial, and work a revolution in common law criminal procedure".[32]

Thus, the development introduced by the Treason Trials Act 1696, though initially extremely limited in its application, acted as a catalyst for further change, resulting in the widespread sporadic granting of permission to defendants to engage counsel in trials beyond those

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[27] Hostettler described the infamous treason trials of the 1670s and 1680s as "widespread judicial murder". (Hostettler (n 22) 33).

[28] See Langbein, "The Criminal Trial Before the Lawyers" (n 13) 310 and Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 97 – 102.

[29] Hostettler (n 22) 37.

[30] Ibid. 36.

[31] For a broader discussion on this topic see Douglas Hay, "Property, Authority and the Criminal Law" in Douglas Hay, Peter Linebaugh, John G Rule, EP Thompson and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth- Century England* (Western Printing Services Ltd 1975) 17 – 63 and John Langbein, "Albion's Fatal Flaw" (1981) 98 *The Past and Present Society* 96 – 120.

[32] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 105.

concerning treason.[33] By the 1730s, less than five decades after the first breach of the rule, counsel were being allowed to act for defendants by virtue of what appears to be judicial discretion.[34] This in turn paved the way for further erosion of the rule, culminating in its complete abolition in 1836 with the introduction of the Prisoners' Counsel Act.[35] The 1836 Act expanded the right to engage counsel to all accused of felony offences and firmly established a significant shift in the nature of the criminal trial towards the adversarial system we know today.

As a system which is essentially rights-based,[36] the primary expectation of an adversarial system is "that out of a sharp clash of proofs presented by litigants in a highly structured forensic setting will come the information upon which a neutral and passive decision maker can base a satisfying resolution of the legal dispute".[37] Counsel facilitated the creation of such a system by introducing structure to the criminal trial, replacing the disjointed altercation between accused, accuser and witnesses with distinct defence and prosecution cases, clear examination-in-chief and cross-examination and established boundaries between evidence and argument.[38] As Hostettler explains, these developments subsequently encouraged the creation and advancement of "evidential objections and the recognition of burdens of proof".[39]

Therefore, the birth of the adversarial criminal trial gave rise to a broader recognition of defendants' rights and in doing so, the concept of due process and fair trial rights was enhanced.[40] It is in this context that the rights outlined above, namely the presumption of

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[33] Hostettler (n 22) 15.

[34] See, Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 17. Also, see, David Lemming, "Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers" (2005) 26(1) *The Journal of Legal History* 65. It should be noted that while this view is supported by a number of prominent legal historians, including Langbein and Lemmings, it is not as readily accepted by others. (See Hostettler (n 22) 52 and Richard Vogler, *A World View of Criminal Justice* (Ashgate Publishing 2005) 140).

[35] For a detailed consideration of the origins, introduction and implementation of the Prisoners' Counsel Act 1836 see David Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800 – 1865* (Clarendon Press 1998) Chapter 4.

[36] Hostettler (n 22) 9.

[37] Stephen Landsman, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) *Cornell Law Review* 499, 500.

[38] Hostettler (n 22) 40.

[39] Ibid.

[40] Ibid. 30.

innocence, the right to cross-examination and the right to self-representation, will be examined.

II. Presumption of Innocence

As one of the foundational principles underpinning the accused's right to a fair trial, the presumption of innocence has become a right of both "national and international pedigree".[41] It is a broad concept encompassing many different elements and attracting a variety of definitions. As a result, establishing the boundaries of the presumption can be challenging.

i. Origins of the Presumption

Hamilton explains that while the origins of many of the evidential rules associated with the presumption of innocence are well-documented and easily traced, the roots of the presumption itself are not so readily located.[42] In an attempt to trace the historical development of the presumption, Stumer refers to the concept that the prosecution must prove its case, as originally rooted in Roman times. As per the *Code of Justinian*, "the Roman law idea of proof...laid the foundation for the recognition in principle that a person should not be convicted in the absence of clear evidence".[43] It seems the original rationale underpinning this concept was informed by a recognition that accusations could be made easily and therefore, needed to be supported by proof.[44] This position was also influenced by an acknowledgement of the dangers inherent in punishing an innocent accused. However, while the initial origins of the presumption may date back to the law of ancient Rome, by the Middle Ages the emphasis on the need for the accuser to prove the case against the accused was almost made redundant by the procedure of trial by ordeal. As McAuley and McCutcheon explain, trial by ordeal operated by subjecting the accused to a "terrible test" for the purpose of establishing his guilt or innocence.[45] The fate of the accused was determined by the party's success or failure in surviving the 'ordeal'. Consequently, there was little if any need to prove the case against the defendant as that task was left to the divine power of God, who it was believed would "miraculously intervene in the trial process rather than see an innocent man

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[41] Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell 2002) 13.

[42] Claire Hamilton, *The Presumption of Innocence and the Irish Criminal Law: Whittling the Golden Thread* (Irish Academic Press 2007) 16.

[43] Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing 2010) 3. Also, refer to the case of *Coffin v United States* (1895) 156 US 432 at 453 where the US Supreme Court traced the origins of the presumption.

[44] Ibid. 2.

[45] McAuley and McCutcheon (n 15) 27. For example, the accused could be made prove his innocence by carrying a red hot iron without burning or putting his hand into boiling water without blistering.

condemned".[46] Trial by ordeal was abolished in the early thirteenth century[47] and the establishment of trial by jury[48] heralded a reintroduction of a reliance on the old Roman concept as "lawyers looked to the Roman law as a valuable source for the principles of proof and concluded that guilt must be proved and not presumed".[49]

Despite the visible re-emergence of requiring proof of guilt following the abolition of trial by ordeal, as Stumer notes, "it is doubtful whether the defendant was presumed innocent in early jury trials and it may even have been possible to obtain a conviction in the absence of any evidence other than the grand jury indictment".[50] As McAuley and McCutcheon explain, as a possible consequence of the "lingering effect of the psychology associated with trial by ordeal", the early modern trial was seen as a purely "formal confirmation ... of guilt", with the mere laying of the indictment by the grand jury taken as evidence of that guilt.[51] Therefore, in reality it would appear that while "the presumption, or something akin to it, may have existed for some time before the eighteenth century...it was by no means applied generally" with records showing that "many defendants had to struggle against a ... presumption of guilt".[52] However, from the early eighteenth century onwards, the growing presence of counsel in criminal legal proceedings affected another sea change with respect to the presumption of innocence. Defence counsel began to refer to the concept of presumed innocence when explaining the necessity for proof of guilt. Initially the judiciary demonstrated hesitation in adopting this principle and this was often reflected in their directions to the jury.[53] Nonetheless, while the progress of the concept was slow, its development was facilitated by the continued erosion of the various impediments facing the defence and as a result, by the early nineteenth century the presumption had become "commonplace".[54]

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[46] McAuley and McCutcheon (n 15) 27

[47] The practice was condemned by the Lateran Council in 1215 and in 1219 the practice was prohibited in the royal courts by Henry III.

[48] The origins of the trial by jury are rooted in the Assizes of Clarendon and Northampton which established an evidentiary model of trying cases which were decided by free laymen. See McAuley and McCutcheon (n 15) 26.

[49] Stumer (n 43) 2.

[50] Ibid. 3

[51] McAuley and McCutcheon (n 15) 27-28.

[52] Hostettler (n 22) 118.

[53] Stumer (n 43) 3 – 4.

[54] Hostettler (n 22) 119.

Therefore, as Hamilton states, it appears the presumption "gradually forged its own identity".[55] Nonetheless, the concept did not become truly cemented in criminal common law until the landmark case of *Woolmington v DPP*.[56] Reginald Woolmington was accused of murdering his estranged wife. The accused had gone to his mother-in-law's home, where the victim was staying, in an attempt to persuade her to return with him. He arrived with a sawn-off shotgun concealed under his coat and when the victim refused to accompany him home, Woolmington claimed that he threatened to shoot himself and drew the gun. The accused testified that the gun accidently went off, shooting the victim through the heart. At trial the judge directed the jury that once the prosecution had established that the victim had died as a result of the actions of the defendant, then a presumption of malice arose against him and consequently, the accused had the burden of proving that the killing was an accident. Woolmington was convicted, but appealed on the grounds that the trial judge had issued the incorrect direction to the jury. The subsequent House of Lords judgment gave birth to one of the most memorable passages on the presumption of innocence. The Court held that the trial judge had misdirected the jury and quashed the accused's conviction. On behalf of the Court, Viscount Sankey LC made the following remark:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[57]

The watershed decision of the House of Lords in *Woolmington* firmly established the solid standing of the presumption in English common law and positioned the concept at the centre of the common law criminal trial process. Interestingly, the phrasing employed by Viscount Sankey LC implies that the presumption was a long-established rule of the common criminal law and that the Court was merely reiterating the centrality of the concept.[58] However, as Stumer notes, prior to the decision in *Woolmington* there was significant evidence to support the direction issued by the trial judge which the House of Lords ultimately rejected.[59]

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[55] Hamilton (n 42) 17.
[56] *Woolmington v DPP* [1935] AC 462.
[57] Ibid. 481-82.
[58] Stumer (n 43) 7.
[59] Ibid.

Consequently, it is clear that *Woolmington* "heralded a change in the law and opened the door for increasing recognition of the principle that the prosecution should bear the burden of proof".[60]

In terms of the rationales underpinning the presumption of innocence, Lord Bingham made the following remark:

> There can be no doubt that the underlying rationale of the presumption on domestic law ... is an essentially simple one: that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so.[61]

Lord Bingham's comment eloquently encapsulates two of the fundamental justifications upon which the presumption is built. As stated, from its original inception the rationale underpinning the presumption recognised the need to prove an accusation against a person and acknowledged the dangers of convicting an innocent party of a crime they did not commit. As Ashworth notes, every person has a fundamental right not to be convicted of a crime they did not commit.[62] By apportioning the need to prove the case against the accused to the prosecution, the presumption "allocates the risk of adjudicative error" to them and thus, "reduces the risk of a wrongful conviction".[63] The damage which can ensue where an innocent person is wrongfully convicted has long been acknowledged and acclaimed in the age-old maxim "it is better that ten guilty persons escape than that one innocent suffers".[64] Moreover, the imbalance of power and "disparity of resources" between the state and the accused further strengthens the justifications underpinning the presumption. The presumption acts as a "safeguard against abuse by the State of its superior power".[65]

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[60] Stumer (n 43) 7.
[61] As per Lord Bingham, *Sheldrake v DPP* [2005] 1 AC 264.
[62] Ashworth (n 41) 15.
[63] Declan McGrath, *Evidence* (2nd edn, Round Hall Thomson Reuters 2014) 25.
[64] William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (Clarendon Press 1769) 352.
[65] McGrath (n 63) 26. For further exploration of additional points in defence of the presumption see Claire Hamilton, "Threats to the Presumption of Innocence in Irish Criminal Law: An Assessment" (2011) 15 *The International Journal of Evidence and Proof* 181, 186-186.

Therefore, while the origins of the presumption may be unclear, the arguments supporting its rationale and the justifications underpinning its importance are apparent. Nonetheless, a degree of confusion emerges once again when attempting to define the presumption and identify its parameters.

ii. Scope of the Presumption

Schwikkard notes that "despite the laudatory rhetoric associated with the presumption of innocence, there is little consensus regarding its contents and scope leading to considerable variation in respect of its normative value".[66] Similarly, Ashworth comments that given the presumption's potentially broad scope, its parameters and meaning are "eminently contestable".[67] A consideration of the various definitions of the presumption would confirm these propositions. Drawing on its origins, Campbell offers a "conventional, contemporary understanding of the presumption" as "a principle of criminal law and procedure ...prescribing that the state must bear the burden of proof in a criminal trial and...requiring that the guilt of the individual as regards a particular crime be proven beyond reasonable doubt".[68] Hamilton puts forward a broader range of definitions, each representing varying degrees of scope. Akin to the conventional definition provided by Campbell, in its narrowest sense, the presumption may be defined as "giving expression to the more prosaic evidential rules that the prosecution bears the burden of proof and that guilt must be proven beyond reasonable doubt".[69] A second approach to defining the presumption extends the concept to "include the requirement of neutrality for fact-finders".[70] However, in the context of the issue under study in this thesis, a wider definition of the presumption may be more relevant. Hamilton states that "in its broadest sense, the presumption may be seen as a means of demanding treatment of a person charged with an offence which is consistent with innocence".[71] Under this definition of the concept, creating perceptions of guilt in relation to an accused, or

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[66] Paul J Schwikkard, "The Presumption of Innocence: What is it?" (1998) 11 *South African Journal of Criminal* Justice 396.
[67] Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10 *International Journal of Evidence and Proof* 241, 242.
[68] Liz Campbell, "Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence" (2013) 76(3) *The Modern Law Review* 681.
[69] Claire Hamilton, "Threats to the Presumption of Innocence" (n 65) 187.
[70] Ibid.
[71] Ibid. 188.

perceptions of vulnerability or victimhood with respect to complainants or witnesses, could constitute an infringement of the presumption.

With these definitions in mind, the parameters of the presumption need to be considered. By assessing the boundaries of the presumption, an analysis of whether a prohibition on personal cross-examination is likely to violate the presumption may be conducted. The parameters of the presumption will be assessed by reference to the relevant jurisprudence of the Irish Courts and the European Court of Human Rights (ECtHR).

The Presumption of Innocence in Ireland

While the presumption of innocence is explicitly recognised in a number of international human rights instruments,[72] the Irish Constitution does not explicitly protect the presumption.[73] Nevertheless, the Supreme Court has held that it is implicitly provided for under Art. 38.1. In *O'Leary v Attorney General*[74] the Court declared that:

> the presumption of innocence in a criminal trial is implicit in the requirement of Article 38, s. 1 of the Constitution that no person shall be tried on any criminal charge save in due course of law. The Court does not need to go any further than to assert that such a principle is required by this Article of the Constitution.[75]

The positioning of the presumption as a necessary constitutional requirement under Art. 38.1 was restated by Hardiman J. in the Court of Appeal in *People (DPP) v O'T(D)*.[76] Hardiman J. held that the presumption is "a vital constitutionally guaranteed, right of a person accused in a criminal trial" and "is not only a right in itself: it is the basis of other aspects in due course

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[72] For example, it is explicitly recognised in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights (discussed below).
[73] In 1996 the Constitutional Review Group considered the arguments for and against making Art. 38. 1 more explicit. (Constitutional Review Group, Report of the Constitutional Review Group (May 1996) 191 – 193).
[74] *O'Leary v Attorney General* [1995] 1 IR 254.
[75] Ibid. 263.
[76] *People (DPP) v O'T (D)* [2003] 4 IR 286.

of law at common law".[77] Much of the Irish case law is this respect is not directly relevant to the topic under consideration in this thesis. For the most part the case law is concerned with issues such as shifting the evidential burden or curtailing the right to silence, particularly in relation to legislation directed at paramilitary activities.[78] Nonetheless, a small number of cases may offer some indirect guidance when assessing the constitutionality of a prohibition on personal cross-examination within the context of the presumption of innocence. It should be noted at this point that there are additional cases concerning the right to cross-examination which could offer more direct guidance in relation to the constitutionality of testimonial aids or special measures. However, the cases addressing the right to cross-examination will be discussed and elaborated on in the following section, Part II.

In *O'D (D) v DPP*[79] the applicant was charged with five counts, in respect of two complainants, of having sexual intercourse with a mentally impaired person under s. 5 of the Criminal Law (Sexual Offences) Act 1993. As part of the applicant's defence he intended to argue that the complainants were not mentally impaired. In the Circuit Court the trial judge ordered that the complainants be permitted to give their evidence via live television link, under s. 13 (1)(b) of the Criminal Evidence Act 1992. Under this provision the trial judge has a discretion to make such an order in any case, other than those concerning witnesses under the age of 18 or with a mental handicap[80] (these persons can avail of a presumptive protection under s. 13(1)(a)). Despite the fact that both complainants did in fact suffer from some level of disability, the order was issued under s. 13(1)(b) to "avoid any prejudgment that the complainants were in fact suffering from a mental impairment".[81] Nonetheless, the applicant took a judicial review challenging this decision. He claimed that "permitting the complainants' evidence to be given by video link would prejudice the jury in their deliberations on whether the complainants are mentally impaired persons for the purposes of section 5 of the Act of 1993".[82] It was submitted that by allowing the complainants to give evidence in this manner an implication

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[77] *People (DPP) v O'T (D)* (n 76) 290.
[78] For example, see *Hardy v Ireland* [1994] 2 IR 550 and *Heaney v Ireland* (n 4).
[79] *O'D (D) v DPP* [2010] 2 IR 605.
[80] As explained in Chapter 1, the term "mental handicap" is used in the 1992 Act and consequently, is used here.
[81] Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall Thomson Reuters 2013) 420.
[82] *O'D (D)* (n 79) para 4.1.

was created that they were vulnerable and that they needed to be "protected" and this consequently "created a fundamental disadvantage for the applicant".[83]

In quashing the order allowing for the complainants' evidence to be given via live television link, O'Neill J. in the High Court accepted that the circumstances of the case and the issuing of the order created a problem of perception which could result in a risk of jury prejudice. He stated that:

> The potential problem that arises is one of perception, in that, it might appear to the jury that, the complainants, who are women in the forties, are being allowed to give their evidence by video link rather than in the usual way simply because of mental impairment.[84]

The Court was also of the view that an explanation to the jury by the prosecution of the reasons for the use of a live television link or the issuing of a direction from the trial judge not to draw adverse inferences would not be sufficient to offset any potential risk. Consequently, O'Neill J. concluded "that evidence by video link in the circumstances of this case does carry with it a real risk of unfairness to the accused person"[85] and remitted the matter back to the Circuit Court.

However, upon return of the trial to the Circuit Court a further s. 13 application was made, which was granted, and an attempt to challenge the order on this occasion was unsuccessful.[86] Thus, the complainants gave evidence via live television link. During the trial judge's summing up she instructed the jury not to draw any inferences from the fact that live television links had been used to deliver testimony and explained that giving evidence in this manner was common practice in such cases.[87] Subsequently, the accused was convicted. He then appealed his conviction, basing his grounds for appeal on a similar argument to that

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[83] *O'D (D)* (n 79) para 4.2.
[84] Ibid. para 5.1.
[85] Ibid. para 5.4.
[86] *DPP v O'D* (D) [2015] IECA 273, para 13.
[87] Ibid. para 14.

advanced in the initial judicial review challenge. Again he submitted that the use of the live television link amounted to "a real and substantial pre-determination of the only real issue in the case" and that its use created "a risk of unfairness which was not capable of being, and was not in fact, remedied at trial".[88] The Court of Appeal rejected this argument and dismissed the appellant's appeal, stating that:

> the clear direction given to the jury at the conclusion of the learned trial judge's charge to the jury was sufficiently strong and clear as to render any sense of pre-determination [that] may have been in the minds of the jury of little practical consequence.[89]

While this case does not directly refer to the presumption of innocence or the creation of a perception of guilt which could interfere with that presumption, certain tentative inferences on how the courts may be expected to react to the employment of certain testimonial aids can be drawn from the judgment. It is possible to regard the outcome of the judicial review proceedings as evidence of the courts' concern surrounding perceptions of vulnerability or victimhood which certain special measures aimed at assisting witnesses might create. The High Court's initial quashing of the s. 13 application appears to acknowledge that special measures might carry a risk of jeopardising the accused's right to a fair trial, and presumably his right to be presumed innocent. Needless, to say, this was of particular concern in this case given the nature of the offence (sexual intercourse with a mentally impaired person). If this analysis is correct, it is possible that a provision prohibiting personal cross-examination could also be found to create similar perceptions and consequently, similar risks. However, it is submitted that a prohibition on personal cross-examination, if carefully framed, is capable of being reconciled with the presumption of innocence.

As will be considered further in Chapter 3, justifying a prohibition on personal cross-examination does not necessarily require an assumption of guilt or malevolence on the part of the defendant and the absence of guilt or malevolence does not necessarily reduce the trauma suffered by the complainant as a result of such cross-examination. For example, due

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[88] *DPP v O'D* (D) [2015] IECA 273, para 17.
[89] Ibid. para 27.

to the construction of the mens rea element of the offence,[90] a jury may acquit a defendant of rape while accepting that the complainant did not consent to the sexual intercourse. In such circumstances the complainant may experience deep trauma under cross-examination by an accused who is subsequently acquitted. Second, as will be discussed further in Chapter 3, even where an accused's intentions for conducting a personal cross-examination are benign, because defendants are not trained advocates,[91] an accused may unintentionally subject the complainant to undue trauma as a result of inexperience.[92]

In addition to this, it should also be noted that the outcome of the initial judicial review challenge in *O'D* has been criticised as a troubling one. O'Malley comments that it does not seem entirely clear why the defendant's right to a fair trial would have been compromised or how the jury might be prejudiced by allowing the complainants to testify via video link.[93] This conclusion seems to have been reached on the basis of an assumption as opposed to any empirical or even anecdotal evidence. Furthermore, O'Malley notes that the fact that a statutory protection put in place for the purposes of offering protection to vulnerable persons could be "readily circumvented" is unfortunate and troubling.[94] These criticisms were issued prior to the publication of the judgment of the Court of Appeal and while the judgment makes no reference to the decision of the High Court which is relevant to the issue under consideration, the dismissal of the appellant's appeal against the use of live TV link endorses the legitimacy of the testimonial aid in question.

Therefore, it is submitted that a prohibition on personal cross-examination could be reconciled with the presumption of innocence if necessary. Moreover, as mentioned previously, the case law addressing concerns surrounding cross-examination, which will be examined in Part II of this Chapter, would seem to lend support to the constitutional

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[90] This issue will be outlined further in the following Chapter.

[91] In *Maguire v Ardagh*, Hardiman J. stated: "Cross-examination is a special skill and usually an acquired one, of which a thorough knowledge of the facts of a particular case is merely the foundation. A person without experience of the art is very unlikely to be able to conduct an effective cross-examination". (*Maguire v Ardagh* [2002] 1 IR 385, 705 – 706).

[92] Also see Conor Hanly, "Finding Space for Victims' Human Rights in Criminal Justice" (Law Society Conference on Human Rights and Criminal Justice, Dublin, 2007) 21.

[93] O'Malley (n 81) 421.

[94] Ibid.

legitimacy of statutory testimonial aids and support measures for witnesses in this jurisdiction.

The International Covenant on Civil and Political Rights and the European Convention on Human Rights

As stated above, the presumption of innocence is explicitly recognised in a number of human rights instruments, including the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*.

Article 14 (2) of the ICPPR states "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". For the most part, consideration of the presumption by the Human Rights Committee ("HRC") has been concerned with "the burden and standard of proof and the operation of statutory exceptions to the burden of proof".[95] Nonetheless, it is also evident from the jurisprudence of the Covenant that the HRC are also willing to adopt a broader approach to the presumption. For example, in its General Comment 13 in respect of Art. 14, the HRC noted:

> By reason of the presumption of innocence, the burden of proof of the charges is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorities to refrain from prejudging the outcome of a trial. [96]

More recently, General Comment 13 was replaced by General Comment 32 which has this to say in relation to the presumption:

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[95] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1991) 404. Also see *Owen v France* App no(1620/07)

[96] General Comment No. 13 - Administration of Justice (Article 14) (1984) para 7. Also, see *Gridin v Russian Federation* App no (770/97).

> Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.[97]

Article 6 (2) of the *European Convention on Human Rights* is worded in a similar manner to art. 14 (2) of the *ICPPC*, stating "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

The jurisprudence of the European Court of Human Rights ("ECtHR") in relation to the parameters and scope of the presumption is extremely extensive and detailed. However, much of the case law relates to issues concerning strict liability offences[98], reversals of the burden of proof[99] and certain pre-trial and evidential matters.[100] However, the Court has never specifically considered the issue of a prohibition on the personal cross-examination of rape complainants. There is limited case law available on the extent to which other testimonial aids and support measures in general could be considered a breach of the accused's presumption of innocence. Consequently, for the purpose of this section, case law will be identified which may be applicable when assessing where the parameters of the presumption fall, and it will be considered whether a prohibition on personal cross-examination is capable of constituting a breach of the presumption of innocence, or whether it is likely to pass European human rights standards.

While initially adhering to the conventional interpretation of the presumption, the recent jurisprudence of the European Court of Human Rights indicates an "increasingly generous"

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[97] General Comment No. 32 – Right to Equality before the Courts and Tribunals and to a Fair Trial (Article 14) (2007) para 30. Also refer to *Karimov et al v Tajikistam* App no. (1108 and 1121/02) where the defendants were handcuffed and placed in a cage. Prejudicial comments were also made by a high ranking official.

[98] See *Salabiaku v France* (1988) 13 EHRR 397.

[99] See *Lingens and Leitgeb v Austria* (1983) App no (8803/79).

[100] See *Austria v Italy* (1963) 6 YB 740.

interpretation of the definition and scope of the presumption.[101] The conventional meaning of the presumption was set out in *Barberá, Messegué and Jabardo v Spain* where the Court held that:

> It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.[102]

However, since that judgment in 1989, the ECtHR has significantly broadened its interpretation of the presumption. The Court has now found the presumption to encompass a protection which has been referred to as the "reputation related" aspect of Art. 6 (2).[103] As Trechsel explains, this aspect of the presumption:

> [A]ims to protect the image of the person concerned as 'innocent', i.e. not guilty of an offence. In other words it protects the good reputation of the suspect. This means, for example, that a person who has not been convicted in criminal proceedings must not be treated or referred to by persons acting for the state as guilty of an offence.[104]

Generally, this element of the presumption is concerned with "declarations, statements or decisions" made at an early stage of proceedings or "following the termination of proceedings".[105] For example, as Campbell highlights, the ECtHR has found that the presumption will be infringed where judicial reasoning or decisions reflect an opinion that an unconvicted person is guilty or where a court expresses suspicion about an acquitted individual.[106] However, issues arising during the course of criminal proceedings or in relation to statutory procedures, such as a legislative prohibition on personal cross-examination, might not be seen as relating directly to this "reputation related" aspect of the presumption

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[101] Campbell (n 68) 684.
[102] *Barberá, Messegué and Jabardo v Spain* (1989) 11 EHRR 360 para 77. Also see *Austria v Italy* (1963) 6 YB 740, 782 – 84.
[103] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005) 164. Also refer to *Hussain v United Kingdom* (2006) 43 EHRR and *Asan Rushiti v Austria* (2000) 33 EHRR 1331, as cited in Campbell (n 68) 685.
[104] Trechsel (n 103) 164.
[105] Ibid. 166.
[106] Campbell (n 68) 685.

from an ECtHR jurisprudence perspective. Nonetheless, if the argument being advanced is that a prohibition on personal cross-examination may create a perception of guilt by implying that the witness is in need of protection (and consequently, is a victim) and that the accused is potentially dangerous (and by inference, guilty) then it may be possible to draw analogies between this issue and those more directly concerned with "reputation related" aspects of the presumption.

In terms of avoiding perceptions of guilt, a degree of guidance may be gleaned from *S and Marper v UK.*[107] The case concerned the pre-trial collection of DNA samples and their retention on a database. Neither of the applicants in the case were convicted. Subsequently, they requested that their DNA samples be destroyed, arguing that their retention implied that they were not entirely innocent.[108] However, this request was denied and their appeal of the decision by English police to attain and retain their DNA samples was rejected. The ECtHR judgment centred on the Art. 8 right to privacy. The Court held that the "blanket" retention of such samples did not strike a fair balance, and therefore, the State had overstepped the margin of appreciation afforded to them in this regard.[109] Interestingly, the Court also accepted there was a "perception" that the applicants were not "being treated as innocent".[110] It went on to note that:

> Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons.[111]

The ECtHR's reference to stigmatisation, and the concern which could arise in respect to the presumption of innocence, is of interest, particularly when assessing the presumption's boundaries in relation to the need to avoid perceptions of guilt. However, as Campbell

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[107] *S and Marper v United Kingdom* (2009) 48 EHRR 50. Also, see Campbell (n 68) 686 – 687 for a discussion and analysis of this case.
[108] Ibid. para 89. The applicant's primary argument concerned their right to privacy under Art. 8.
[109] Ibid. para 119. Also see David Harris, Michael O' Boyle, Ed Bates and Clara Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2015) 514.
[110] Ibid. para 122.
[111] Ibid.

comments, "Article 6 is not referred to expressly in the judgment... and the reference to stigma is not tested out adequately nor is the concept's relationship to the presumption of innocence explored".[112]

ECtHR jurisprudence on issues concerning the procedural conduct of a trial could also shed further light on the scope of the presumption. As Harris et al note,[113] the Court has rejected claims of inadmissibility with Art. 6 (2) in respect to "the handcuffing of a defendant in front of the jury"[114], "the arrest of a witness in the courtroom for perjury immediately after giving evidence for the accused"[115] and "the detention of a convicted person pending his appeal".[116] All of the above situations could arguably create a perception that the accused is guilty of an offence. Nonetheless, the Court found that in such situations the presumption was not infringed.

There is no clear judgment from the ECtHR about whether a prohibition on personal cross-examination would constitute a breach of the defendant's presumption of innocence by implying that he is guilty of the offence. However, it may be reasonably deduced from the jurisprudence of the Strasbourg Court that such a prohibition, if accompanied by adequate safeguards, could avoid the creation of a perception of guilt and consequently, avoid a potential infringement of the presumption of innocence. Thus, it is submitted that such a prohibition, if appropriately constructed, would fall within the margins of appreciation afforded to states under the Convention.

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[112] Campbell (n 45) 687.
[113] Harris et al (n 109) 463.
[114] *X v Austria* (1967) App no (2291/64) 24 CD 20.
[115] *X v Germany* (1983) App no (8744/79) 5 EHRR 499.
[116] *Cuvillers and Da Luz v France* (2003) (No 55052/00) hudoc DA.

II. The Right to Cross-Examination

Many writers[117] begin a discussion on cross-examination with Wigmore's now famous description of the practice and its purpose:

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination, the "truth" of direct examination as an essential portion of the trial. Not even the abuses, the misunderstandings and the puerilities which are so often associated with cross-examination have availed to nullify its value... it is beyond doubt the greatest legal engine invented for the discovery of the truth.[118]

In a similar way to the presumption of innocence, the right to cross-examine is protected explicitly under a number of human rights instruments, including the *ECHR*, and implicitly under the Irish Constitution. As Ashworth notes, the right may be alternatively described as a right to confront witnesses, which has been taken to mean that it is "a defendant's right to have the prosecution witnesses examined before a judicial officer with the defendant and a defence lawyer present".[119] Like the approach adopted in the previous section, the origins and rationales for the right will be considered before moving on to examine the scope and parameters of the right from a domestic and international perspective.

i. Origins of the Right

The concept of the right to cross-examination as understood today is intrinsically connected to the birth and development of the adversarial criminal trial. Prior to this, a system of privatised investigation and prosecution existed which took place without the aid of counsel. As highlighted previously, the system was described as an "altercation" where the victim and accusing witnesses engaged the defendant "in a confrontational dialogue about the circumstances of the alleged offence".[120] Given the confrontational nature of these trials, challenging the evidence of witnesses was necessary if proceedings were to progress.[121] Due to the absence of defence counsel, the accused was forced to take on the role of defender in

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[117] For example see Thomas O'Malley, *The Criminal Process* (Round Hall 2009) 493, McGrath (n 63) 115 and Hostettler (n 22) 38.
[118] John Wigmore, *Evidence in Trials at Common Law* (Chadbourn ed. Little Brown 1974) vol. 5 32.
[119] Ashworth (n 41) 33-34.
[120] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 13.
[121] Ibid.

order to "resist or probe the evidence of the accusers".[122] Oftentimes, the trial judge also took to questioning and cross-examining witnesses as part of their duty to direct proceedings. As Langbein explains:

> The judge's supervision of the conduct of the trial included oversight of the altercation. He would on occasion intervene to keep the exchange relevant or to prevent abusive questioning. By the early eighteenth century at the latest, the trial judge was intermediating the accused's questioning (cross-examination) of the prosecution witnesses.[123]

Proceedings continued along these lines until the presence of defence counsel became an increasingly regular feature from the mid-eighteenth century onwards. Although initially counsel's role was limited in nature, it included examining and cross-examining witnesses. The development of the process of cross-examination under the direction of counsel is thought to have "fuelled the growth of the adversary trial" by giving structure to proceedings and consequently, heralded the beginning of a permanent shift towards adversariality.[124]Thus, with the loosening and eventual abolition of the rule against defence counsel, the practice of examining and in particular cross-examining witnesses took on a central role in proceedings.

Referring to Wigmore's quote on the topic, the rationale underpinning the employment of the "legal engine" of cross-examination seems to be "the discovery of the truth".[125] While Wigmore acknowledges the inherent flaws of such a practice, this does not detract from the high praise and value which he bestows upon the process of cross-examination. Yet, not all readily agree with Wigmore's lofty description. Referring to the primary justification underpinning cross-examination, Ashworth states:

> The rationale seems to be that it is essential for the defence to be able to put questions to those witnesses by way of cross-examination, on the assumption that cross-examination is an important tool for testing reliability and truthfulness, and also to be able to observe the witnesses' demeanour during questioning, on the

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[122] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 13-14.
[123] Ibid. 16.
[124] Hostettler (n 22) 40.
[125] Wigmore (n 118).

assumption that these signs can be interpreted as providing evidence of the truth or falsehood of what they say. These assumptions are open to considerable debate...[126]

Some commentators have been particularly damning of the practice of cross-examination. Langbein described it as "a blunt instrument, a hit-or-miss safeguard against the truth-bending and truth-concealing effects of placing partisans in charge of the production and presentation of the evidence".[127] King notes that as the art of cross-examination developed it soon became a means of "commenting on the evidence, refuting or discrediting the prosecution case, and aggressively, even cruelly battling for the accused".[128] This description seems to represent a widely accepted view of the purpose of cross-examination. However, such a description is not necessarily irreconcilable with the truth-seeking purpose of cross-examination. As Charleton et al comment, despite the flaws of such a process and the tactics often used in its implementation, "Cross-examination...is still an inquiry into the truth i.e. is this witness giving accurate and reliable testimony".[129] Whether this inquiry in reality produces accurate and reliable testimony remains debatable. Nonetheless, if one accepts that the rationale underpinning the practice of cross-examination is ultimately that of truth-seeking, then its position as a fundamental element of the criminal trial process is apparent. However, in recent times there has been a growing recognition that the integrity of cross-examination can be maintained while simultaneously tempering the harsher aspects of the process.[130]

ii. Scope of the Right

Recognition that the harsher aspects of cross-examination can be tempered brings into question the scope and parameters of the right to cross-examination. As noted previously, as a right that is protected under the *ECHR* and the Irish Constitution, its position as a fundamental element of a fair trial is firmly established. Nonetheless, identifying the scope of the right is a slightly more precarious task. As O'Malley comments, "the limits of the right to

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[126] Ashworth (n 41) 34.

[127] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 270.

[128] Peter King, *Crime, Justice and Discretion in England, 1740 – 1820* (Oxford University Press 2000) 228.

[129] Peter Charleton and Stephen Byrne, "Sexual Violence: Witnesses and Suspects, A Debating Document" (2010) 1 *Irish Journal of Legal Studies* 1, 39. Also see Ian Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Right" (2010) 4 *Criminal Law Review* 255, 265 – 266.

[130] Refer to the discussion on testimonial aids in Chapter 1 and the analysis of the problems regarding cross-examination in Chapter 3.

cross-examine have been tested in a number of different contexts",[131] however, for the purpose of this Chapter, only the case law which is most relevant to the issue of personal cross-examination will be considered.

Right to Cross-Examination in Ireland

In this jurisdiction, the fundamental nature of cross-examination with respect to fair criminal trial procedure, has been endorsed in a number of significant Supreme Court decisions. In *Re Haughey* the defendant's right to cross-examine every witness giving evidence against him was conclusively asserted by the Supreme Court.[132] This position was further strengthened in *People (DPP) v Kelly*, where Fennelly J., listing a number of authorities, stated:

> It is a proposition so obvious as scarcely to need authority that the right to cross-examine one's accusers is fundamental to our criminal procedures. It is axiomatic that every witness must submit himself to the rigours of cross-examination, to having his evidence questioned, tested, challenged and contradicted and his credit impeached. Cross-examination plays a pivotal role in all adversarial proceedings under the common law system.[133]

Nevertheless, despite its clear status as a fundamental element of the constitutionally protected right to a fair trial, it has also been established that the right to cross-examine is not absolute and may be subjected to legitimate restrictions. For example, statutory provisions limiting the questioning of sexual offence complainants about their previous sexual experience are now in place across a number of common law jurisdictions, including Ireland.[134] Furthermore, the Irish Courts have also established that the right does not encompass a right to confrontational cross-examination.[135]

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[131] O'Malley, *The Criminal Process* (n 117) 106.
[132] See *Re Haughey* [1971] IR 217, 260 as per O Dalaigh CJ.
[133] *People (DPP) v Kelly* [2006] 3 IR 115, 136.
[134] Criminal Law (Rape) (Amendment) Act 1981, s. 3 (1) as substituted by Criminal Law (Rape) (Amendment) Act 1990, s. 13. This issue was discussed in Chapter 1 of this thesis.
[135] See *White v Ireland* [1995] 2 IR 268 and *Donnelly v DPP* [1998] 1 IR 321, outlined below.

White v Ireland[136] concerned a judicial review challenging the constitutionality of s. 13 of the Criminal Evidence Act 1992, which at the time permitted a witness to give evidence via video link in certain trials. A declaration that s. 13 was constitutionally invalid was sought on the basis that:

> [T]he giving of evidence by a witness who was not physically present in the court where the trial was being conducted constituted an infringement of the right of the accused to be tried in due course of law, on the grounds that a person accused of a criminal offence had a right to confront his accuser in open court.[137]

Kinlen J. rejected the applicant's argument and endorsed the use of live video link evidence, stating "That it was for a trial judge to ensure that the trial of the accused was conducted fairly and that any dangers to fair procedure arising out of the use of technology were obviated".[138] Kinlen J. also rejected the submission that there existed a right to "eyeball-to-eyeball" confrontation, noting:

> The applicant has not established a constitutional right to an "eyeball to eyeball". None should be imported. If there is a right to confrontation it is for the courts to decide the balance of hierarchy which one right yields to another...I have no doubt that the so-called specific right to eyeball to eyeball confrontation does not exist.[139]

Interestingly, Kinlen J. went on to add that even if he were incorrect and there was in fact a right to confrontation, then in such a scenario "that 'right' must yield to the 'rights' of a young child".[140] The judge came to this conclusion on the basis that the "alleged diminution of the accused's "right" is so small in consideration of all the other rights he has that it must yield to the court's concern for the well-being of the child".[141]

The notion of the accused's rights yielding to that of the well-being of the child witness in *White* is an example of the balancing act which the courts attempt to strike when such issues

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[136] *White v Ireland* (n 135).
[137] Ibid. 268 - 269.
[138] Ibid. 269.
[139] Ibid. 282.
[140] Ibid.
[141] Ibid. 281 – 282.

arise. As was highlighted in Chapter 1, in recent years there has been a growing recognition within the criminal justice system of the need to protect victims and an acknowledgement that they too are entitled to certain rights. Following this trend, the courts have placed increased emphasis on the rights of victims (and the community at large) and the necessity to take such considerations into account when adjudicating on certain issues. For example, in *DPP (Walsh) v Cash,* [142] Charleton J. noted in the context of the exclusionary rule of evidence:

> Any system of the exclusion of improperly obtained evidence must be implemented on the basis of a balancing of interests. The two most fundamental competing interests, in that regard, are those of society and the accused. I would also place the rights of the victim in the balance.[143]

This notion of 'balancing' was also referred to by Fennelly J. in *People (DPP) v Kelly*, where the Court stated:

> there is an inescapable obligation on the courts to guarantee the overall fairness of a trial ... the right to cross-examine one's accusers is an essential element in a fair trial. That is not to say that restrictions may not be imposed in the interests of overall balance and the efficiency of the criminal justice system.[144]

Nevertheless, while the courts are willing to engage in a consideration and balancing of the accused's rights with that of the victim (and society at large), it has also been firmly reiterated on a number of occasions that the accused's right to a fair trial remains paramount[145] and that any restriction on such rights must be necessary and proportionate.[146] Thus, as in *White*,

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[142] *DPP (Walsh) v Cash* [2007] IEHR 108. Also, see the Supreme Court decision (*DPP (Walsh) v Cash* [2010] 1 IR 609.

[143] Ibid. para 65. The ECtHR has also referred to the need to balance rights of the accused against those of witnesses and victims called to testify. See *Doorson v Netherlands* (1996) 22 EHRR 330, 358.

[144] *People (DPP) v Kelly* [2006] 3 IR 115, 146. However, Fennelly J. went on to note that any restriction should be limited to the extent "strictly necessary" to achieve its protective objective. (Ibid.)

[145] For example, in *Donnelly v DPP* (n 126) 348, the Supreme Court stated: "It is well established in our constitutional jurisprudence that an accused person's right to a fair trial is one of the most fundamental constitutional rights accorded to persons and that in so far as it is possible or desirable to construct a hierarchy of constitutional rights it is a superior right".

[146] In *Kelly*, Fennelly J. went on to note that any restriction on the accused right to a fair trial should be limited to the extent "strictly necessary" to achieve its protective objective. (*People (DPP) v Kelly* [2006] 3 IR 115, 146).

where the curtailment of the accused's right is minimal and is capable of being compensated for through the use of safeguards, then it can legitimately yield to that of the victim. However, this is clearly a delicate balancing act and any perceived diminution of the accused's rights which is thought to adversely affect his right to a fair trial may be deemed constitutionally invalid.

In *Donnelly v DPP*[147] the Supreme Court reaffirmed the decision in *White* by upholding the constitutionality of s. 13 of the Criminal Evidence Act 1992. While the Court acknowledged that ensuring the defendant has a fair trial involves the "rigorous testing by cross-examination of evidence against him"[148], it concluded that:

> The Court is satisfied, however, that the assessment of...credibility does not require that the witness should be required to give evidence in the physical presence of the accused person and that the requirement of fair procedures are adequately fulfilled by requiring that the witness give evidence on oath and be subject to cross-examination and that the judge and jury have ample opportunity to observe the demeanour of the witness while giving evidence and being subject to cross-examination.[149]

Therefore, with the constitutionality of s. 13 of the 1992 Act confirmed by the Supreme Court, it is evident that there is no absolute right to confrontational cross-examination in this jurisdiction. As Hogan and White note, at the time of enactment certain procedural aspects of the Criminal Evidence Act 1992 represented "a major departure from standard criminal procedure".[150] Nevertheless, the judiciary have now clearly established that "provided that

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147. *Donnelly v DPP* (n 135).

148. Ibid. 356.

149. Ibid. 357. Also note, in respect of the relationship between the right to confrontation and the right to cross-examination the Court referred to the conclusions reached by the Law Reform Commission (*Report on Child Sexual Abuse* (LRC – 1990) 68) that "a right to confront one's accuser did not enjoy the same constitutional status as the right to cross-examine an accuser (ibid. 335) Also, referring to the right in England and Wales, Dennis notes, "A defendant may have the right to cross-examine a witness against him but have no right to confront her in a physical sense, as in the case of the special measures for vulnerable witnesses....statements in the House of Lords have indicated that art.6 provides no right of physical confrontation of a witness, and the Strasbourg jurisprudence provides no support for it". (Ian Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Right" (2010) 4 *Criminal Law Review* 255, 265).

150 Hogan and White (n 6) 1074.

the right to cross-examination is preserved, Article 38.1 does not require the actual presence of witnesses".[151] Consequently, it is submitted that the recent inclusion in the Criminal Law (Sexual Offences) Bill 2015 of a provision allowing for the erection of screens to accommodate certain witnesses while giving evidence is also likely to be deemed compatible with the Constitution. As noted previously, while the majority of the protections under the 1992 Act (and under the 2015 Bill) are limited to minors, it is submitted that the justifications for implementing such protections apply equally to other vulnerable witnesses.[152]

A prohibition on personal cross-examination has yet to be enacted and therefore, a challenge to such a prohibition has yet to come before the Irish judiciary. However, given the findings of the courts thus far with respect to confrontational cross-examination and their willingness to engaging in a balancing of rights, it would be surprising if a prohibition on personal cross-examination were to constitute a breach of an accused's right to cross-examination where alternative means for accommodating the cross-examination of the witness is provided.

The International Covenant on Civil and Political Rights and the European Convention on Human Rights

Article 14 (3)(e) of the ICPPR and Art. 6 (3)(d) of the *ECHR* guarantees a defendant the right to examine or have examined witnesses against him. In both circumstances the right is one of a number of minimum rights provided for under Art. 14 (3) and Art. 6 (3) respectively which are considered necessary for "the preparation and conduct of the defence and to ensure that the accused is able to defend himself on equal terms with the prosecution".[153]

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[151] Hogan and White (n 6) 1074.

[152] This issue will be elaborated upon further in Chapter 3. In particular, the quotation from the Joint Committee on the Constitutional Amendment on Children will be considered, where it was noted that "the justifications for implementing special measures in criminal procedures to protect child victims and witnesses apply with equal force to the necessity to implement such measures for adults with intellectual disabilities or who are otherwise vulnerable". (Joint Committee on the Constitutional Amendment on Children, *Twenty-eighth Amendment of the Constitution Bill 2007: Second Interim Report* (May 2009) 53.

[153] Trechsel (n 103) 306.

In relation to the jurisprudence of the *ICPPR*, there exists a relatively small number of cases where the HRC have found a violation of article 14 (3)(e). The majority of the case law in relation to Art.14 (3)(e) refers to claims of failure on the part of the defence counsel to call witnesses on behalf of the accused or to attend proceedings.[154] In *Rouse v The Philippines* the Committee found a violation of Art.14 (3)(e) where a sexual assault complainant failed to appear during the trial, stating "the author was unable to cross-examine the alleged victim, although he was the solo eyewitness to the alleged crime...".[155] However, there is limited guidance from the jurisprudence of the HRC in respect to issues concerning confrontational cross-examination, testimonial aids or personal cross-examination by the accused. The case law which has emerged from the ECtHR offers more direction on this issue.

In *Kostovski v The Netherlands*[156] the accused claimed that his right to cross-examine had been violated under Art. 6 (3)(d) when the domestic court had denied him "the opportunity to have questions put to the anonymous witnesses" who gave evidence against him. The ECtHR found that:

> In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument...an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings...Yet such an opportunity was not afforded to the applicant in the present case, although there could be no doubt that he desired to challenge and question the anonymous persons involved.[157]

Nevertheless, while the ECtHR has accepted that the right to cross-examine is an established element of the right to a fair trial, it is not absolute. It may be subject to certain restrictions or limitations as long as any such restrictions remain consistent with the principle of "equality

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[154] For example see *Bailey v Jamaica* App no (709/1996) (21 July 1999) *Brown v Jamaica* App no (775/1997) (23 March 1999).
[155] *Rouse v The Philippines* App no (1089/2002)
[156] *Kostovski v The Netherlands* (1990) 12 EHRR 434 para 35.
[157] Ibid. para 41.

of arms".[158] For example, in *Donohue v Ireland*[159] the Court accepted that the scope of cross-examination had been restricted by the domestic court's ruling. Nonetheless, because the possibility to cross-examine the witness on his evidence had not been "entirely eliminated" and "a range of ways" still remained to test the evidence, the ECtHR concluded that the restriction did not amount to a violation of Art. 6.[160] Furthermore, in the more recent case of *Al-Khawaja and Tahery v United Kingdom* the Grand Chamber of the European Court of Human Rights emphasised that Art. 6 is primarily concerned with the overall fairness of criminal proceedings.[161] Here the Court ruled that convictions based on statements from witnesses who could not be cross examined in court did not necessarily violate the applicants' rights under Art. 6 (3) (d) where there were "sufficient counterbalancing factors".[162] Therefore, while the right to cross-examine may in principle be restricted or infringed in a particular case, a declaration of infringement may be avoided in certain exceptional circumstances. Moreover, it appears the safeguarding of sexual offence complainants from having to confront the accused would fall within these circumstances.[163]

In sexual offence trials the ECtHR has accepted that such proceedings are "often conceived of as an ordeal by the victim".[164] Speaking in relation to the anonymity of witnesses, in *Baegen v Netherlands* the European Commission of Human Rights stated:

> In the assessment of the question whether or not...an accused received a fair trial, account must be taken of the right to respect for the victim's private life... the Commission accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.[165]

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[158] *Engle and Others v The Netherlands* (1976) 1 EHRR 647 para 91.
[159] *Donohue v Ireland* App no (19165/08) (ECtHR, 12 December 2013).
[160] Ibid. para 92.
[161] *Al-Khawaja and Tahery v United Kingdom* App no.s (26766/05 and 22228/06) (15 December 2011).
[162] Ibid. para 158. In relation to Al-Khawaja's case, the Court held that the trial judge's direction, along with the evidence offered by the prosecution, had enabled the jury to conduct a fair and proper assessment of the reliability of the absent witness' testimony against Mr Al-Khawaja. Therefore, there had been no violation of Article 6. However, Tahery's conviction had been premised solely on the statement of an absent witness, and because there was a lack of sufficient counterbalancing factors to compensate for this, a breach of the Convention had occurred in this case.
[163] Harris et al (n 109) 488.
[164] *Baegen v Netherlands* App no (16696/90) (20 November 1994) para 77.
[165] Ibid.

Thus, the Convention case law indicates a willingness to accept that certain special measures which may appear not to comply with the right to cross-examine may be upheld if implemented in such a way as to avoid breaching the defendant's rights.

In *SN v Sweden*[166] the applicant, a school teacher, was accused of a number of sexual offences against an eleven-year-old male student. The complainant did not give evidence at trial but his first interview with the police was recorded on videotape. As Trechsel explains, the defence were entitled to see the tape and put forward questions in advance of a second interview, which duly took place.[167] The videotape and transcript of the second interview were then made available to the applicant in order to verify that the questions posed by the defence had in fact been put to the complainant. The applicant claimed that by preventing his defence counsel from directly questioning the complainant, his right under Art. 6 (3)(d) had been violated.

While acknowledging that the circumstances under which the witness' evidence was admitted were not ideal, the Court did not accept that there had been an infringement of the right to cross-examine. Referring to the nature of the right, the ECtHR stated that:

> Having regard to the *special features* of criminal proceedings concerning sexual offences..., this provision *cannot be interpreted* as requiring in all cases that questions be *put directly by the accused* or his or her defence counsel, through cross-examination or by other means.[168] (Emphasis added)

A number of interesting issues are raised by the above passage. First, the Court's reference to the "special features" of sexual offence trials reemphasises and reinforces the argument made throughout this thesis that sexual offence proceedings have a unique and distinctive

[166] *SN v Sweden* (2002) 39 EHRR 304 para 47.
[167] Trechsel (n 103) 321.
[168] *SN v Sweden* (n 166) para 52.

nature.[169] Second, it is particularly interesting in the context of this thesis that the Court specifically referred to personal cross-examination by the accused and implied that a limitation may legitimately be placed on such direct cross-examination.

Finally, the recent case of is *Y v Slovenia* is also worthy of consideration.[170] Unlike the cases referred to above, in *Y v Slovenia* the applicant was not the accused but the complainant in a sexual offence case. Y claimed before the ECtHR that her rights under Art. 3 and Art. 8 had been violated due to the failure of the domestic court to protect her personal integrity during the criminal investigation and trial. The applicant put forward a number of arguments in support of her claim of a breach of her fundamental rights under the *ECHR*; however, one argument in particular related to the personal cross-examination she faced at the hands of the accused. During two separate hearings the accused personally cross-examined the complainant. In the course of these cross-examinations the accused claimed he was physically incapable of assaulting Y due to a disability in his left arm. He posed questions in a manner which suggested a particular answer and he repeatedly contested the veracity of the complainant's answers, claiming that she was able to cry on cue to make people believe her.[171] He also claimed that the complainant's accusations were motivated by her mother's desire to extort money from him.[172]

The Court found against the State and awarded the complainant 13,500 euro. Noting the young age of the minor at the time of the alleged assaults[173], the Court concluded that "cross-examination should not be used as a means of intimidating and humiliating witnesses".[174] The Court held that it was the responsibility of the presiding judge to intervene where necessary to protect the integrity of the complainant. While mindful of the fact that the trial judge had

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[169] See Chapter 1 of this thesis. It should also be noted that in addition to the special features associated with sexual offence criminal proceedings, the Court also recognised that these features are even more prominent in cases involving minors. (*SN v Sweden* (n 166) para 47).
[170] *Y v Slovenia* App no (41107/10) (ECtHR, 28 May 2015).
[171] Ibid. para 108.
[172] Ibid. para 107.
[173] Ibid. para 114 – "[I]n the Court's opinion, the pre-existing relationship between the applicant and the defendant and the intimate nature of the subject matter, as well as the applicant's young age – she was a minor when the alleged sexual assaults took place – were points of particular sensitivity which called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue."
[174] Ibid. para 108.

"a delicate task of balancing the competing interests and of ensuring effective exercise of the defendant's rights...",[175] the Court concluded that:

> X's [the accused] offensive insinuations about the applicant ... exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence ... Considering the otherwise wide scope of cross-examination afforded to X, in the Court's opinion curtailing his personal remarks would not have unduly restricted his right to a defence...[176]

Thus, while the Court did not specifically refer to the prospect of prohibiting the accused from personally cross-examining the complainant in such cases, the reference to curtailing his remarks supports the possibility of placing a legitimate limitation on such cross-examination.

Consequently, given the qualified nature of the right to cross-examine under the Convention and the jurisprudence of the ECtHR in this respect (in particular in the *SN* and *Y* cases), it is submitted that if a case were to come before the European Court challenging the compatibility of a prohibition on personal cross-examination of the complainant in sexual offence trials with the Convention, it would be likely to withstand a claim of an infringement against the right to cross-examine.

[175] *Y v Slovenia* (n 170) para 114.
[176] Ibid. para 109.

III. Right to Self-Representation

The final right subject to consideration in this section is the right to self-representation. It is indisputable that a prohibition on personal cross-examination would represent a direct interference with the defendant's right to self-representation. Therefore, the question is whether such an interference is justifiable and sufficiently measured to be capable of reconciling it with the accused's right to a fair trial. Similar to the above sections, examination of this right will begin with a consideration of the origins of the right to self-representation. Interestingly, describing the accused's right to represent himself as a "right" in the conventional sense of the word has been contested from a historical perspective. This argument will be explored as the roots of the right are considered. The definition and scope of the right will then be outlined from a domestic and international perspective. Finally, a conclusion will be drawn as to whether a prohibition on personal cross-examination constitutes a legitimate and sustainable restriction on the accused's right to self-representation.

i. Origins of the Right

Hanly et al have noted that "Describing the power of the defendant to represent himself as a legal *right* seems a little odd historically".[177] Until the right to legal representation came into widespread existence in the early nineteenth century "the default position" of the common law was self-representation, "not as a right but as a necessity".[178] It is apparent that the right to legal representation and the right to self-representation are interconnected. Reference to a number of international instruments which offer protection to both these rights in a singular, collective phrase supports this preposition.[179] Therefore, in order to appreciate fully the origins and rationale underpinning what has now become known as a right to self-representation, it is necessary to consider the development of the right to legal representation and to evaluate the position of both rights in the context of each other.

As outlined earlier, until the nineteenth century prisoners facing felony charges were not permitted by law to have counsel appear on their behalf under English common law. As

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[177] Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009) 83.
[178] Ibid.
[179] For example, Art. 6 (3)(c) of the *ECHR* and Art. 14 (3)(d) of the *ICCPR*.

Langbein explains, the notion that criminal defence was a suitable "do-it-yourself activity" developed during a period when the criminal trial in its entirety was expected to play out as a "lawyer free contest of amateurs".[180] While the prohibition against defence counsel had no counterpart on the prosecution side, in reality counsel was rarely ever engaged except where cases of treason were concerned. Curiously, the rule against defence counsel was limited to cases involving felonies. Therefore, in cases of misdemeanours the rule did not apply and counsel for the defendant was permitted to appear before the court.[181]

The practice of ultimately forcing the defendant to represent himself appeared unbalanced and discriminatory; however, there were a number of justifications for such a rule which were strongly supported and endorsed at the time.

One of the main justifications advanced in favour of the rule against defence counsel was that the defendant had no need for such representation as the trial judge would act as counsel for the accused. While such a practice would stand at complete odds with the proceedings of a criminal trial today where one of the main functions of a judge is to act as an impartial presider, during the time it was thought "far better for a prisoner to have a Judge's opinion for him, than many counsellors at the bar. The Judges...have a special care of the indictment and to see that the same can be good in all respects; and that justice be done to the party".[182] Nonetheless, the uneasy equilibrium created by such a situation is obvious. The trial judge's duty to act as counsel for the accused was in tension with his other roles, such as "his responsibilities for ruling on matters of law, probing suspect defensive evidence, advising the jury about how to apply the law, and summing up the evidence for the jury".[183]

Another rationale put forward in defence of the rule prohibiting defence counsel was the contention that it was to the accused's advantage to represent himself. Given the extent to

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[180] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 11.
[181] Ibid. Langbein explains that to understand this apparent anomaly it helps to bear in mind that within the catch-all category of misdemeanours were grouped a variety of matters that would today be classified as civil or regulatory in nature.
[182] *R v Walter Thomas* 2 Bulstrode 147, 80 English Reports, 1022.
[183] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 29.

which the right to legal representation has become of paramount importance to the fair procedure requirements of the majority of criminal trials today, such a contention seems bizarre. Nonetheless, it was argued that the accused was better suited than counsel to respond to questions of fact given his proximity to the events.[184] However, as Langbein astutely comments "the fallacy in this reasoning was the assumption that because the accused may have been close to the events, he is therefore adept at explaining the circumstances of his conduct, or at cross-examining the testimony of mistaken or malevolent accusers". [185] This point is further highlighted by Beattie who states:

> It is hardly surprising that men not used to speaking in public who suddenly found themselves thrust into the limelight before an audience in an unfamiliar setting – and who were for the most part dirty, underfed, and surely often ill – did not usually cross-examine vigorously or challenge the evidence presented against them.[186]

Finally, another justification for the rule against defence counsel is one which lies uneasily with a number of the arguments advanced in its favour. As explained:

> The dubious claim that the rule against defence counsel worked to the advantage of the accused was in tension with...the frank recognition that allowing him counsel worked to his advantage by hampering the trial court's ability to convict him if he were guilty.[187]

It was feared that allowing counsel to represent the accused and in turn speak on his behalf, would diminish the accused as an "informational resource" for the courts.[188] There was also an apprehension that defence tactics employed by counsel would hinder the court's ability to adjudicate correctly.[189] As Beattie comments, the assumption made by the courts of the accused at the time was that "if he were innocent he ought to be able to demonstrate it for

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[184] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 34.
[185] Ibid.
[186] Beattie (n 17) 350. Beattie goes on to note that the evidence of the printed reports of assize trials in Surrey suggest that it was the exceptional prisoner who asked probing questions or who spoke effectively to the jury on his behalf. (Ibid. 351).
[187] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 35.
[188] Ibid.
[189] Ibid. Langbein offers a detailed examination of this issue and argues that these apprehensions were in fact well-founded. (Ibid. Chapter 5).

the jury by the quality and character of his reply to the prosecutor's evidence".[190] This put a significant emphasis on the accused's role during the proceedings, forcing him to prove his innocence on his own, unassisted by a lawyer and by depending on his immediate replies to the charges. Therefore, it was argued that if counsel for the accused was permitted, not only would it terminate the use of the accused as an "informational resource"[191] but it would also impair the courts' ability to adjudicate in a just manner.

Nonetheless, despite the dubious nature of many of the rationales underpinning the rule against defence counsel and supporting the practice of self-representation, these justifications held considerable weight for a number of centuries. It was not until the aftermath of the infamous treason trials of the 1670s and 1680s[192] that the plight of the unrepresented accused was truly brought to the attention of influential members of the English political community. As highlighted previously, the acknowledgement of the unfairness and disadvantage faced by those accused of treason led to the first rift in the rule against defence counsel (with the introduction of the Treason Trials Act 1696) and culminated in the enactment of the Prisoners' Counsel Act 1836. The 1836 Act extended the right to avail of legal representation to all defendants accused of a felony and heralded the beginning of what became the widespread recognition of the accused's right to legal representation within the common law sphere.

Therefore, when the origins of the right to self-representation are considered in conjunction with the development of the right to legal representation, it is apparent that what existed originally was not a right to self-representation but a necessity to self-represent if an accused wished to put forward a defence. In a scenario where a right to legal representation was non-existent, self-representation was the only feasible alternative to asserting no defence. Consequently, when the roots of the defendant's power to represent himself are considered, the historical inaccuracy of describing the ability to represent oneself as a legal right is confirmed. Hence, as Hanly concludes, "The defendant's right is to legal representation, not

[190] Beattie (n 17) 341.
[191] Langbein, *The Origins of the Adversary Criminal Trial* (n 16) 35.
[192] For further information in relation to these plots see Langbein (ibid.) Chapter 2A.

to self-representation; to describe the position at common law as a right is akin to recognising the right of a homeless person to sleep in a doorway".[193]

ii. Scope of the Right

Nevertheless, despite its historical origins, it is clear that the power of the defendant to represent himself at trial has become a recognised, and at times integral, facet of the right to a fair trial and consequently, an important right in and of itself. However, that is not to say that this right is absolute in nature. Both the international and domestic courts have shown a willingness to place limitations on this right in certain circumstances.

The Right to Self-Representation in Ireland

Considering the issue from an Irish perspective, while it has been established that the right to legal representation has a solid constitutional standing in this jurisdiction, there is limited direct authority on the right to self-representation. Interestingly, referring to the strong constitutional position of the right to legal representation, Walsh notes that this raises the question as to whether a criminal trial can proceed when the accused is without legal representation.[194] However, as O'Malley states, it is "assumed that an accused person is entitled to dispense with legal representation and conduct his own defence".[195] Walsh ultimately agrees, noting that there seems "little doubt that a defendant can make an informed decision to waive his right to legal representation even when the charges in question are serious".[196]

In *State (Healy) v Donoghue*[197] the Supreme Court considered the possibility of an accused waiving his right to free legal aid, and in turn his right to legal representation. The only

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[193] Hanly, "Finding Space for Victims' Human Rights in Criminal Justice" (n 92) 20.
[194] Dermot Walsh, *Criminal Procedure* (Round Hall Thomson Reuters 2002) 562.
[195] O'Malley *The Criminal Process* (n 117) 243.
[196] Walsh (n 193) 562. For a comprehensive analysis of the issues faced by the judiciary in relation to lay litigants in general see Evan Bell, "Judges, Fairness and Litigants in Person" (2010) *Judicial Studies Institute Journal* 1. Also, refer to the case of *DPP v Desmond* [2004] IECCA 46 where it was held that an accused should be facilitated if he seeks an adjournment in order to recruit legal representation after dispensing with other legal representation previously appointed.
[197] *State (Healy) v Donoghue* [1976] IR 325.

qualification imposed by the Court was that the trial judge satisfy himself that the defendant was waiving his right "intelligently and understandingly"[198], with O'Higgins C.J. stating: "no one can be compelled to accept legal aid, and a person charged is entitled to waive his right in this respect and to defend himself".[199]

Nonetheless, while the Supreme Court has remained mute on the issue of self-representation other than the brief and indirect reference in *O'Donoghue*, further limited guidance may be gleaned from a number of cases before the lower courts.

In a Court of Criminal Appeal judgment in *People (DPP) v Ramachchandran*,[200] the Court described the accused as having an "absolute right" to defend himself. Referring to the disadvantages faced by the defendant in representing himself, the Court commented that:

> Despite his difficulty in speaking English, and his lack of any experience of Court practice or procedure, he insisted on defending himself at his trial despite numerous offers of legal aid. This of course was his *absolute right to defend himself* if he wished, but, unfortunately, he has no real sense of criminal procedures and no sense of what is relevant or irrelevant in a criminal trial.[201] (Emphasis added)

Similar phrasing was employed in *DPP v Mary Kelly*.[202] Here the Court noted:

> Ms. Kelly was a lay litigant. On other occasions, when she wished, she was represented by solicitor and counsel but she has an *absolute entitlement to represent herself* if she wished. The wisdom of that course is not a matter for the Court.[203] (Emphasis added)

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198. *State (Healy) v Donoghue* (n 197) 361. Also see *DPP v Ramachchandran* [2000] 2 IR 307.
199 Ibid. 352. For further information on legal representation and the Criminal Legal Aid Scheme see Walsh (n 194) Chapter 11.
200 *DPP v Ramachchandran* [2000] 2 IR 307.
201 Ibid. 310.
202 *DPP v Mary Kelly* [2011] IECCA 25.
203 Ibid.

Ostensibly, *Ramachchandran* and *Kelly* both represent significant endorsements of the absolute nature of the right to self-representation in this jurisdiction. Nevertheless, it is submitted that while these judgments are compelling, they are not conclusive. Hanly contends that the use of the term 'absolute' in the above cases is "unfortunate" as he believes that the Courts were invoking the term's conventional as opposed to its legal definition.[204] This contention may be supported by reference to the context in which the statements were made. In both cases, the Court seems to acknowledge that regardless of the questionable wisdom of deciding to avail of the right to self-representation, an accused is nonetheless entitled to make such a decision. Therefore, the strong language employed seems to be for the purpose of presenting a solid defence of the decision to self-represent as opposed to issuing a definitive statement about the nature of such a right. Consequently, while the Irish Courts appear willing to recognise the importance of the right to self-representation and are eager to emphasis its significance from a defendant's rights perspective, that is not to say that it is unconditional in nature. Support can be garnered for this proposition by reference to both case law and a number of legislative provisions.

Burke v O'Halloran[205] involved judicial review proceedings taken by the applicant to have his convictions quashed.[206] The applicant claimed that the trial judge had erred by refusing his application to dispense with his legal representation and as a result, he claimed "that his trial, and consequently his conviction, was conducted in breach of his right to be represented in whatever way he might choose which, he says, includes a right to represent himself".[207] Here the Court found that the defendant's entitlement to conduct his defence was impermissibly interfered with by the trial judge. Clarke J. held:

> That an accused person in criminal proceedings has a right to represent him or herself seems to me to be axiomatic. While accused persons have the right to be represented and, in certain circumstances, to have a legal representative provided by the State,

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[204] Conor Hanly, "Aspects of the General Scheme of the Sexual Offences Bill 2014" (Rape Crisis Network Ireland, Public Information Seminar on the Criminal Law (Sexual Offences) Bill 2014, Dublin 2, April 2015).

[205] *Burke v O'Halloran* [2009] 3 IR 809.

[206] The applicant was convicted of a number of offences under the Protection of Animals Act 1911, the Protection of Animals kept for Farming Purposes Act 1984, and the Control of Dogs Act 1986.

[207] *Burke v O'Halloran* (n 205) 810 – 811.

> the corollary of that right is that an accused person is, prima facie, entitled to conduct his or her own defence.[208]

However, the Court went on to note that "A question might, however, arise as to whether such a right is absolute or whether there may be any limitation on that right"[209] and concluded that "there may well be other circumstances where, on the particular facts of an individual case, some limitation or conditionality as to the absolute right to represent one's self might properly be identified".[210]

Further support for this position may also be found by reference to certain statutory provisions aimed at providing support measures to witnesses while giving evidence. For example, s. 14 of the Criminal Evidence Act 1992 allows for the use of an intermediary when questioning a witness who is a minor and who is giving evidence via a live television link.[211] Though not enacted specifically for that purpose, this provision has the potential to restrict the ability of an accused to personally cross-examine a witness by inserting a third party between the accused and the witness. Consequently, it may be seen as lending support to the legal legitimacy of restricting the defendant's right to self-representation. Furthermore, as will be examined in the following Chapter, the Criminal Law (Sexual Offences) Bill 2015 appears to further support the argument that a limited prohibition on personal cross-examination is a potential, constitutionally valid, legislative option.

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[208] *Burke v O'Halloran* (n 205) 818.

[209] Ibid.

[210] Ibid.

[211] "(1) Where—
(a) a person is accused of an offence to which this Part applies, and
(b) a person under 18 years of age is giving, or is to give, evidence through a live television link,
the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put."
Commenting on the use of intermediaries prior to the introduction of s. 14 of the 1992 Act, the Law Reform Commission stated "the guarantees of a trial 'in due course of law' do not necessarily preclude a restriction of some nature on an accused person's general right to cross-examine his accuser without an intermediary". (Law Reform Commission, *Report on Child Sexual Abuse* (LRC 31 – 1990) 77.

A final point worthy of attention relates to the historical origins of the right to self-representation as highlighted at the beginning of this section. It was submitted that describing the ability of the defendant to represent himself as a legal right is somewhat curious given that historically the right to legal representation developed out of a necessity (as opposed to a right) to self-represent. Drawing on this concept, Hanly contends that the accused's entitlement to waive his right to legal representation in favour of self-representation, is a power or a choice in the absence of a prohibition, not necessarily a right.[212] Relying on constitutional jurisprudence in the United States, Hanly refers to the Supreme Court decision in *Singer v US*[213] where the Court held that: "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right".[214] Therefore, while an accused may have a right to legal representation and an entitlement to waive that right to representation, it does not necessarily transpire that he consequently has an absolute right to self-representation.

Therefore, in light of the above considerations, it is submitted that while the ability to self-represent is a right which the Irish Courts are clearly willing to acknowledge and realise in certain situations, there also appears to be an implied (and in *Burke* an explicit) willingness to uphold limitations on the exercise of the right in certain circumstances.

The International Covenant on Civil and Political Rights and the European Convention on Human Rights

Article 14 (3) (d) of the *International Covenant on Civil and Political Rights* (*"ICCPR"*) states that:

> [Everyone shall be entitled] to be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him,

[212] Hanly, "Aspects of the General Scheme of the Sexual Offences Bill 2014" (n 204).
[213] *Singer v United States* 380 US (1965) as cited in ibid.
[214] Ibid. 34.

in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

It has been noted that a plain reading of Article 14(3)(d) seems to suggest that the right to self-representation may be curtailed in the interests of justice.[215] From the relatively limited jurisprudence that is available on this issue, this would appear to be the case. However, it is apparent that "extreme care must be taken when grappling with so amorphous a concept as the 'interests of justice'".[216] In this respect, it is clear that it is not a concept which the Human Rights Committee will allow to be usurped at the expense of the defendant, as was highlighted in the case of *Michael and Brian Hill v Spain.*[217]

This case involved criminal proceedings in Spain, where the Hills considered their legal aid lawyer to be incompetent. As a result, Michael Hill insisted he represent himself. The Committee denied this request in light of the fact that the relevant Spanish legislation required the imposition of counsel in a criminal case of this nature. The Human Rights Committee concluded that "Michael Hill's right to defend himself was not respected, contrary to article 14, paragraph 3 (d), of the Covenant".[218]

While this case may seem to affirm the importance placed upon the right to represent oneself, in *Hill* counsel had been imposed against the wishes of the defendants who were unable to exert any control over the conduct of their defence and who, it appears, received an unfair trial in numerous other respects.[219] It is also worthy of note that the HRC in this case did not consider whether all the provisions in domestic criminal codes requiring counsel in serious cases were incompatible with the Covenant but instead simply stated that a breach of Article 14(3)(d) had occurred.[220] Therefore, as Jorgensen comments, it would

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[215] Refer to Nina Jorgensen, "The Right of the Accused to Self-Representation before International Criminal Tribunals" (2004) 98(4) T*he American Journal of International Law* 711) and Paul Gunning, "Fair Trial and the Right to Self-Representation in International Criminal Law" (2006) 6(1) *Hibernian Law Journal* 1, 9

[216] Gunning (n 215) 10.

[217] *Michael and Brian Hill v Spain* App no (526/ 1993).

[218] Ibid. para. 14.2.

[219] Jorgensen (n 215) 715.

[220] Ibid. 716.

appear that the key aspect which can be extracted from the *Hill* case may be that the defendants should have been allowed "to maintain some control over their proceedings".[221]

While the *Hill* case may be viewed as an example of the willingness of the HRC to defend the right to self-representation, other decisions by the Committee have confirmed the limited nature of the right in certain circumstances. For example, in *Torregrose Lafuente et al v Spain*[222] the Committee did not find that a violation of Article 14 had taken place where the defendant had been denied the opportunity to appear before the Constitutional Court without being represented by counsel. The author argued that it was discriminatory to allow persons holding a law degree to appear before the Constitutional Court without counsel when persons who do not hold law degrees were required to be represented. This decision by the domestic court was made in line with national legislation, the purpose of which, the Court argued, was to ensure that a person with knowledge of the law be in charge of applying for any remedy before the court. The Committee accepted this argument and found the author's allegations of a violation of Article 14 inadmissible.[223] In this regard, similar decisions were reached by the Committee in *Marin Gomez v Spain*[224] and *Sanchez Gonzalez v Spain*[225]. An almost identical argument to that in *Torregrose* was advanced in *Gomez* with regard to the same legislation. Here, the HRC, referring to its earlier findings in *Torregrose*, found that the requirement of counsel in such a situation "reflected the need for a person with knowledge of the law to be responsible for handling an application to the domestic Constitutional Court" and thus, found there was no violation of Article 14.[226]

Hence, the jurisprudence of the Human Rights Committee would appear to indicate a desire to maintain the right to self-representation, however, such a desire does not extend to the creation of an absolute right.

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[221] Jorgensen (n 215) 716

[222] *Torregrose Lafuente et al v Spain* App no (866/99).

[223] Note, Joseph *et al* comment that perhaps the HRC were diverted by the complaint's second claim of discrimination under Article 26 and therefore "neglected to analyse the impugned legislation in terms of Article 14(1)". (Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights*, 2nd ed. (Oxford: Oxford University Press, 2004) at 440).

[224] *Marin Gomez v Spain* App no (865/1999).

[225] *Sanchez Gonzalez v Spain* App no (1005/2001).

[226] *Gomez* (n 224) para 8.4.

The corresponding provision of the *European Convention on Human Rights* is found in Article 6(3)(c). This article guarantees the right of the accused to defend himself in person, however, similar to Article 14(3)(d), this is not an absolute right. The provision states:

> Everyone charged with a criminal offence has the following minimum rights...(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

As commented upon by Jorgensen, it is noteworthy that the above provision draws a direct link between the phrase "interests of justice" and the right to free legal assistance, whereas the corresponding provision of the *ICCPR*, as cited above, does not create such an obvious link, suggesting that the phrase "interests of justice" can have a broader relevance and function.[227] With this in mind, it is interesting that despite the fact that the wording of Article 6(3)(c) arguably place a greater restriction on the ability of States to assign counsel than Article 14(3)(d) of the *ICCPR*, it appears the Strasbourg Court has been more willing than the HRC to affirm the right of the States to assign counsel against the will of the accused in the interests of justice. [228]

One of the leading cases in this respect is *Croissant v Germany*.[229] In this case the accused did not seek to defend himself, but the case does deal with Art. 6 (3)(c) in a broader context and in particular with the issue of the imposition of counsel on an unwilling defendant. Croissant argued that the imposition by the court of a third lawyer to his defence was a violation of the Convention under Art. 6 (3)(d). In dismissing Croissant's argument, the Court held that the decision to appoint the lawyer was based on the "need to ensure that Mr. Croissant was adequately represented throughout his trial having due regard to its probable length and to the size and complexity of the case".[230] The court went on to hold that the national courts could override the wishes of the defendant and impose counsel where "there are relevant and sufficient grounds for holding that this is necessary in the interests of justice".[231]

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[227] Jorgensen (n 215) 711.
[228] Gunning (n 215) 12
[229] *Croissant v Germany* (1993) 16 EHRR 135.
[230] Ibid. para 29.
[231] Ibid. para 30.

The Strasbourg Court came to a similar finding in *Philis v Greece*.[232] Here it was argued that a provision in the Greek Code of Criminal Procedure stating that at a hearing before the Court of Cassation the parties must be represented by a lawyer was incompatible with Art. 6 (3)(c). The applicant presented his case before the Greek Court of Cassation, despite the fact that the relevant provision of the Greek Code required that he be represented by a lawyer. As a result of his not being duly represented the applicant's appeal was declared inadmissible, yet the European Commission did not accept any complaint in this regard. Similarly, in the more recent case of *Correia de Matos v Portugal*, the Court confirmed once again that the interests of justice were a "relevant and sufficient" reason for insisting upon legal representation.[233] The Court went on to state that a margin of appreciation applies, noting that the contracting States are "better placed that the [Strasbourg] Court" to decide whether the interests of justice require legal representation to be imposed.[234]

It is important to note, however, as Harris et al point out, that despite these findings attesting to the limitations which may be placed on the right to self-representation, a state may be in breach of Art. 6 (3)(c) if it impedes the exercise of an accused's right in a manner which is seen as unduly severe or unnecessary for the purpose of ensuring a fair trial.[235] This issue was highlighted in the case of *Brandstetter v Austria*.[236] Here the accused had been convicted of defamation on the basis of an allegedly false statement made by him when defending himself at an earlier trial for another offence. While the Court did not find that a violation of Art. 6 (3)(c) had taken place, it did accept that "the position might be different if it were established that, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising" his rights of defence, including his right to self-representation.[237]

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[232] *Philis v Greece* (1991) 13 EHRR 714.
[233] *Correia de Matos v Portugal* App no (48188/99) (ECtHR, 15 November 2001). Interestingly, the applicant brought his case separately but simultaneously under both the *ECHR* and the *ICCPR*. (*Correia de Matos v Portugal* (1123/02))The HRC came to the opposite conclusion to that of the ECtHR, highlighting the interesting counterpoise presented by the jurisprudence of the HRC to the European material.
[234] Ibid.
[235] Harris et al (n 109) 476.
[236] *Brandstetter v Austria* A 211 (1991) 15 EHRR 378.
[237] Ibid. para 53.

Thus, it is apparent from the Strasbourg case law that while the right to self-representation is a guaranteed right, it is not an absolute one. The decisions outlined above indicate a willingness on the part of the Court to "consider the concept of a fair trial from a holistic perspective".[238] Consequently, it is submitted that a limited prohibition on the right to self-representation would not necessarily represent an unduly restrictive infringement on the accused's right from an *ECHR* perspective.

[238] Gunning (n 215) 12.

Conclusion

This Chapter began by reference to Art. 38.1 of the Irish Constitution. Although brief and rather vague in nature, this article has been invoked to protect an array of rights which have been held as fundamental to the concepts of due process and a fair trial. Three rights in particular were identified as being especially relevant to the primary issue under consideration in this thesis.

The presumption of innocence, the right to cross-examine and the right to self-representation were individually considered. The origins and rationales underpinning each right were established and the scope and parameters of the rights were discussed from a constitutional *ICCPR* and *ECHR* perspective. In relation to each right, it was concluded that while they were internationally and domestically recognised as fundamental elements of the right to a fair trial, they were nonetheless not absolute in nature. Examples of legitimate exceptions or restrictions which have been placed on the three rights were considered and comparisons were drawn between the nature of these restrictions and that of a prohibition on personal cross-examination.

The analysis conducted in this Chapter can be used to inform and guide observations and conclusions reached in the final Chapter, Chapter 5. However, prior to this, in light of the issues addressed in this Chapter, Chapter 3 will consider the central issue of this thesis.

3. Personal Cross-Examination in Rape Trials

Introduction

Having established an appropriate framework and context for this thesis in the previous Chapter, this Chapter addresses the central topic of this research project. It will present a detailed examination of the practice of personal cross-examination by the defendant in rape trials.

Until relatively recently this issue was neglected in Ireland. While other aspects of the rape trial have attracted wide-spread scrutiny and as a result, have been the subject of various reforms, the practice of personal cross-examination has escaped any significant degree of investigation. The neglect of this issue is surprising, particularly in light of the fact that many other common law jurisdictions, including England and Wales, New Zealand and various states in Australia, have already tackled this issue through the introduction of a statutory prohibition on such cross-examination.[1]

This Chapter will begin by outlining the cross-examination process in rape trials and the difficulties presented by this process, even when conducted by a professional lawyer. Having done this, consideration will be given to the various problems which arise where a defendant dispenses with his legal representative and conducts a personal cross-examination of the complainant. The situation in this jurisdiction will then be examined, including the relevant case law, the various calls for reform and any significant legislative developments.

By presenting a focused examination of the various problems surrounding personal cross-examination in rape trials, a broader understanding and appreciation of this issue can be achieved.

[1] The reforms in these jurisdictions will be considered in detail in Chapter 4.

I. Cross-Examination in Rape Trials

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination, the "truth" of direct examination as an essential portion of the trial. Not even the abuses, the misunderstandings and the puerilities which are so often associated with cross-examination have availed to nullify its value. It may be that in more than one sense, it takes the place in our system that torture occupied in the medieval system of the civilians. Nonetheless, it is beyond doubt the greatest legal engine invented for the discovery of the truth.[2]

As Wigmore stated above, while cross-examination is one of the key mechanisms employed for the discovery of the truth, it remains a procedure riddled with negative characteristics. It is an "inherently unpleasant" process for any witness.[3] Unfortunately, in many respects, such unpleasantness is unavoidable given the nature of the adversarial system and the manner in which the two parties are pitted against each other.[4] As Heffernan and Ní Raifeartaigh explain, the purpose of cross-examination is "to test the credibility of the witness and the accuracy of the evidence-in-chief".[5] It is natural that a witness in such a situation will feel under siege. However, Wigmore's reference to cross-examination usurping the position previously held by torture in the medieval civilian legal system is particularly poignant in relation to cross-examination in rape trials.

As Leahy points out, the manner in which rape complainants are treated during the trial process and particularly during cross-examination, has been a focus of feminist criticism for quite some time.[6] While some commentators have attempted to argue that rape

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[2] John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: including the Statutes and Judicial Decisions of all Jurisdictions of the United States* (Little Brown 1905) para. 1367 in Peter Charleton and Stephen Byrne, "Sexual Violence: Witnesses and Suspects, A Debating Document" (2010) 1 *Irish Journal of Legal Studies* 1.

[3] Conor Hanly, "Finding Space for Victims' Human Rights in Criminal Justice" (Law Society Conference on Human Rights and Criminal Justice, Dublin 2007) 16.

[4] Ibid.

[5] Liz Heffernan and Úna Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) 35.

[6] Susan Leahy, "In a Woman's Voice – A Feminist Analysis of Irish Rape Law" (2008) 26 *Irish Law Times* 203, 208.

complainants are not treated differently to other victims within the criminal justice system[7], it is now widely acknowledged that cross-examination can prove particularly disturbing and distressing for rape complainants.[8] As discussed in Chapter 1, often the trial experience is said to be so upsetting for some complainants that it has been described as "secondary victimisation".[9] There is considerable evidence to support this proposition. Lees states:

> The judicial 'rape', where a woman's reputation is put on trial by the court is, according to many victims, as humiliating as the actual rape. In some respects it is worse, more deliberate and systematic, more subtle and more dishonest, masquerading in the name of justice.[10]

Numerous studies and research have demonstrated that victims of rape leave the witness stand (and ultimately the courtroom) feeling violated, humiliated and traumatised.[11] The nature of the adversarial system and the particular procedures, tactics and purposes of cross-examination[12] often result in complainants feeling confused as to their role in the proceedings. Under the adversarial system, victims of crimes are merely witnesses. The positioning of rape complainants as witnesses in the trial process is a concept which many have difficulty accepting and understanding.[13]

Furthermore, other distinct elements associated with cross-examination in rape and sexual offence trials make the process particularly distressing for complainants. First, the nature of

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[7] See Gregory Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom* (University of Chicago 1993) and Doreen McBarnet, "Victim in the Witness Box: Confronting Victimology's Stereotype" (1983) 7 *Contemporary Crises* 293.

[8] See David Brereton, "How Different are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials" (1997) 37(2) *British Journal of Criminology* 242, 259 and Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre 1998) 45 – 50. Interestingly, writing in 1998, Bacik et al also briefly referred to the defendant's ability to personally cross-examine the complainant in England and Ireland and noted that reform of this issue had been recommended in England. (ibid. 48).

[9] See Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 441 and Julie Allison and Lawrence Wrightsman, *Rape: The Misunderstood Crime* (Sage Publications 1993) 172.

[10] Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Open University Press 1997) 53.

[11] See Sue Lees, *Carnal Knowledge: Rape on Trial* (The Women's Press Ltd 2002).

[12] See Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009) 72. Hanly et al highlight a number of the tactics employed by the defence including trapping the complainant, exploiting inconsistencies and discrediting the witness.

[13] Leahy (n 6).

the offence itself is arguably distinct from other serious or non-sexual violent offences. Rape and sexual offences have been described as having a "special status unlike any other crime" due to the extent of the intrusion on the victim's body and her sense of personal integrity.[14] O'Malley notes that the perpetrators of sexual offences, while inflicting physical and psychological harm, also humiliate the victim in a "uniquely personal way".[15] Given the specific nature of such offences, it is not surprising that certain lines of intrusive and embarrassing questioning relating to the sexual attack may be particularly traumatic for a complainant. In addition, due to the centrality of the issue of consent in such cases, the complainant's credibility is much more likely to come under attack in a rape or sexual offence trial than in trials for other offences.[16] This can involve attacks on a complainant's character[17], socialising habits, mental and emotional stability and in particular, previous sexual history.[18] Hence, such questioning can leave complainants feeling as if they, as opposed to the defendant, are on trial.[19]

Consequently, it is not surprising that such a process results in complainants suffering considerable distress and trauma. Nonetheless, as Hanly points out, due to the nature of the adversarial system, where such distress is as a result of genuine questioning which seeks to test the reliability and credibility of an allegation, the upset which is caused is arguably unavoidable.[20] Therefore, in relation to cross-examination the challenge is to distinguish between avoidable and unavoidable distress.[21] The Law Reform Commission endorsed a similar approach in their report entitled *Rape and Allied Offences*, stating:

> No doubt the re-telling and reliving by the complainant of a terrible event in her life will always be painful, but every effort should be made to eradicate from the system features which cause unnecessary additional stress.[22]

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[14] Described as such in a submission from the New South Wales Westmead Sexual Assault Service as cited in the New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* (LRC 101 – 2003) 56.
[15] O'Malley, *Sexual Offences* (n 9) 1.
[16] David Brereton, "How Different are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials" (1997) 37(2) *British Journal of Criminology* 242, 244.
[17] Ibid. 259.
[18] See Part IV of Chapter 1 – "Sexual Experience Evidence".
[19] Thomas O'Malley, *Sexual Offences: Law, Policy and Punishment* (Round Hall 1996) 240.
[20] Hanly "Finding Space for Victims" (n 3) 16.
[21] Ibid. Hanly refers to the need to distinguish between "distress and humiliation arising incidentally from cross-examination and distress and humiliation that represent the purpose of cross-examination".
[22] Law Reform Commission, *Report on Rape and Allied Offences* (LRC 24 – 1988) 14.

Thus, in this respect it is strongly argued that personal cross-examination by the defendant is an unnecessary distress which can be avoided, and hence, our legal system should seek to achieve such avoidance.

II. Personal Cross-Examination of the Complainant by the Defendant in Rape Trials – The Problems

Throughout most common law jurisdictions a person charged with a criminal offence is entitled to avail of professional legal assistance, funded by the State if required.[23] Nonetheless, defendants are also entitled to dispense with this legal assistance and represent themselves. If a defendant decides on this course of action, it will have little direct effect on the complainant in the vast majority of situations. After all, the defendant's competency to self-represent or the possible encroachment upon his right to a fair trial as a result of his choice to dispense with counsel are issues which are not of direct concern to the complainant. Hence, as Hanly et al note, in many situations there is "little reason for victim-advocates to complain about the defendant's decision to self-represent".[24] However, this position changes when a self-represented defendant proposes to conduct a personal cross-examination of a rape complainant.

The serious and potentially far-reaching concerns which emerge when a defendant proposes to conduct a personal cross-examination of the complainant in a rape trial have been recognised across a number of common law jurisdictions.[25] As highlighted above, cross-examination is an inherently unpleasant process for victims of crime generally and particularly for victims of rape. However, these unpleasant and potentially traumatic effects are augmented when the questioning is conducted personally by the defendant in a rape trial.[26] By allowing such a practice to take place, the defendant is given an opportunity to abuse his right to cross-examination by forcing the complainant to endure what is likely to be a traumatic and humiliating ordeal. Moreover, given that many defendants in rape cases would be known to the complainant, in such cases the complainant may not only be cross-examined by the accused but by an accused who was acquainted with her prior to the attack.[27] This

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[23] Hanly et al, *Rape and Justice* (n 12) 82. As per *State (Healy) v O'Donoghue* [1976] IR 325, in any case where the defendant's constitutional right to legal representation applies and the defendant does not have the financial means to secure that representation for himself, the State has a positive duty to provide the defendant with legal representation. (For further information see, for example, Dermot Walsh, *Criminal Procedure* (Thomson Round Hall 2002) Chapter 11).

[24] Ibid. 83.

[25] See Chapter 4 of this thesis.

[26] Hanly, "Finding Space for Victims" (n 3) 21.

[27] Refer to Chapter 1, Part II of this thesis where the statistics concerning 'acquaintance' rape are considered.

potentially adds another "distinctive dynamic" which makes cross-examination by an unrepresented accused particularly problematic in sexual offence cases.[28]

A number of potential consequences can flow where such cross-examination takes place. First, the possibility that a personal cross-examination could result in a violation of the complainant's rights under the *European Convention of Human Rights* ("*ECHR*") must be considered. Under Art. 8 of the *ECHR* the complainant's right to respect for her personal life could potentially be breached by excessively intrusive questioning.[29] Similarly, Art. 3 protects against degrading treatment, a right which could be violated if the victim is made to suffer a certain degree of anguish as a result of the cross-examination.[30] In Ireland, this issue has yet to present itself in the form of a case being taken to the ECtHR as a result of exposure by a rape complainant to personal cross-examination by the defendant. Nonetheless, there is evidence of this course of action being pursued by rape victims in other jurisdictions.[31]Arguably, if such a situation were to arise in the course of a rape trial, the judge could protect against inappropriate or abusive questioning through the exercise of his/her general supervisory jurisdiction in relation to the cross-examination of witnesses.[32] However, as previously discussed, this power must be exercised with caution, and moreover, in other jurisdictions it has proven insufficient to prevent the complainant suffering unnecessary trauma under cross-examination.[33]

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[28] This issue is discussed by the New South Wales Law Reform Commission (NSW Law Reform Commission (n 14) 4) and will be further considered in Chapter 4.

[29] See Hanly, "Finding Space for Victims" (n 3) 25.

[30] See Ibid. 21.

[31] In England, following the case of *R v Edwards* (*The Times*, 23 August 1996) where the defendant subjected the complainant to a six day personal cross-examination, the victim, Julia Mason, decided to pursue her complaint to the European Court of Human Rights claiming breaches of article 3, 8, 13 and 14. (*JM v United Kingdom* (App No 41518/98) European Court of Human Rights, 4th Section, 28 September 2000) However, Mason withdrew her complaint upon hearing of the Youth Justice and Criminal Justice Bill and after settling with the Home Office. (O'Malley, *Sexual Offences* (n 9) 414) (The case will be discussed further in Chapter 4). Furthermore, as discussed in Chapter 2, a recent ECtHR case (*Y v Slovenia* [2015] (Application no 41107/10)) dealt with a complaint by a sexual offence complainant following the personal cross-examination she faced at the hands of the accused.

[32] The trial judge's supervisory role in relation to the cross-examination of witnesses was discussed in Part V of Chapter 1.

[33] As will be highlighted in Part I of Chapter 4, in England and Wales the ability of the trial judge to control abusive and intrusive cross-examination was advanced as a potential option for dealing with personal cross-examination of complainants by defendants in sexual offence trials. However, as will be outlined, in a number of cases such attempts to control questioning failed.

Second, it is possible that the knowledge that such a cross-examination may occur could potentially aggravate the already high attrition rate in such cases, which in turn could heighten deterrence in relation to the initial reporting of the incident itself. As will be outlined in subsequent chapters, rape cases where personal cross-examination occur are generally of a high-profile nature and attract a significant volume of media attention in their specific jurisdictions.[34] Such publicity has the potential to create an impression that such cross-examinations occur more frequently than they do. Consequently, as Hanly et al comment, the knowledge that one could face cross-examination by the defendant himself "must have an effect upon the willingness of a person to engage with the criminal justice system".[35]

A third potential consequence relates to the manner in which such cross-examination could affect the quality of the complainant's evidence. As Bacik et al note:

> There is now an increasing acknowledgement of, and empirical evidence in support of, the view that if an individual is traumatised by their court appearance, then this can affect what they say in court, how they say it and consequently their credibility in the eyes of others...[36]

Similarly, referring to methods which could potentially improve the quality of a complainant's evidence, Temkin states: "It is not only the presence of the public which may intimidate the complainant. She may be equally if not more disturbed by the sight of the defendant himself".[37] If the mere presence of the defendant can adversely affect the quality of a complainant's evidence, it seems inevitable that personal cross-examination could have a similar, if not more detrimental, affect.

Thus, allowing a defendant in a rape or sexual offence trial to conduct a personal cross-examination of a complainant forces her to endure a traumatic ordeal, which in turn could potentially effect attrition rates, reporting rates and the quality of the complainant's evidence.

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[34] This issue will be expanded upon in the subsequent comparative Chapter.
[35] Hanly et al, *Rape and Justice* (n 12) 354.
[36] Bacik et al (n 8) 41.
[37] Jennifer Temkin, *Rape and the Legal System* (2nd edn, Oxford University Press 2002) 318.

However, while the validity of the above arguments and the potential negative consequences of such cross-examination have been recognised, it has also been argued that describing the exercise of the defendant's right to cross-examine a complainant in a rape trial as an abuse of that right implies both that he is guilty and that his motives are malevolent.[38] However, categorising personal cross-examination as an abuse does not require an assumption of guilt or malevolence on the part of the defendant. As referenced in Chapter 2, the absence of guilt or malevolence does not necessarily reduce the trauma suffered by the complainant; such cross-examination could still amount to an abuse even when the defendant is acquitted or where his intentions are genuine. For example, due to the construction of the mistaken belief defence[39], a jury may acquit a defendant of rape while accepting that the complainant did not consent to the sexual intercourse. Therefore, in such circumstances the complainant may experience deep trauma under cross-examination by an accused who is subsequently acquitted. Furthermore, even when an accused's intentions for conducting a personal cross-examination are benign, because defendants are not trained advocates[40], in attempting to cross-examine a complainant in person, an accused may unintentionally subject the complainant to undue trauma as a result of inexperience.

Unfortunately, regardless of the defendant's ultimate guilt or innocence, where personal cross-examination is permitted in a rape trial, it is impossible to determine whether such an abuse will or will not occur prior to cross-examination. Allowing the defendant to personally cross-examine the victim involves running the risk of subjecting the complainant to such an abuse.[41] Consequently, prohibiting the accused from conducting a personal cross-examination would eliminate this risk. Equally, a prohibition also removes the potential of such cross-examination adversely affecting attrition rates, reporting rates and the quality of the complainant's evidence.

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[38] Scottish Executive, *Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials – A Pre-Legislative Consultation Document* (Edinburgh 2000) 14. This consultation document will be examined in detail in Chapter 4, Part II.

[39] This issue is outlined in Part III of Chapter 1.

[40] In *Maguire v Ardagh*, Hardiman J. stated: "Cross-examination is a special skill and usually an acquired one, of which a thorough knowledge of the facts of a particular case is merely the foundation. A person without experience of the art is very unlikely to be able to conduct an effective cross-examination". (*Maguire v Ardagh* [2002] 1 IR 385, 705 – 706).

[41] Hanly, "Finding Space for Victims" (n 3) 21.

III. Personal Cross-examination by the Defendant in Rape Trials – The Situation in Ireland and Calls for Reform

Apart from the limited provision in s. 14 of the 1992 Act (as discussed in Chapter 1), as of yet no statutory provision exists prohibiting the defendant's right to self-representation in rape trials in Ireland.[42] The Criminal Law (Sexual Offences) Bill 2015 proposes the introduction of a limited prohibition, but the Bill has yet to be enacted.[43] Hence, in this jurisdiction the defendant is entitled to conduct a personal cross-examination of the complainant.

While reported incidents of such cross-examinations in Ireland are few, there have been cases where it has occurred. In 2005 (the *"2005 case"*[44]) two accused were charged with a number of offences against a female complainant, including false imprisonment, assault causing harm and rape. The case was complicated, particularly due to the fact that it involved two accused and the various assaults took place over a number of days. The complainant, a twenty-four year old Polish woman, travelled to Ireland in June 2004 with the two co-defendants, both of whom were also from Poland.[45] At the material time, the complainant was in a relationship with the older of the two accused. Once they arrived in Ireland, the two accused and the complainant moved into a rented house in Galway. The woman testified that from 16 July to 19 July 2004 she was subjected to a series of assaults.[46] On 16 July she was forced into a car by the two defendants and driven from Galway to Dublin and then back again. The complainant was then held in her house by the two co-accused for a number of days.[47] The

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[42] As discussed previously, although not the intended purpose of the provision, s. 14 of the 1992 Act can potentially restrict personal cross-examination through the employment of an intermediary. However, the provision is discretionary, only applicable in extremely limited circumstances and subject to certain pre-requisites (such as where television links are employed during cross-examination). Furthermore, it is limited to child witnesses and therefore does not protect adult complainants. Thus, as O'Malley comments, in practice, "Irish law imposes no formal restriction on the right of self-represented defendants to cross-examine prosecution witnesses, including complainants of sexual offences". (O'Malley, *Sexual Offences* (n 9) 413).

[43] Refer to footnote 1, in the Introduction to this thesis.

[44] While the accused in question was found guilty of a number of the offences, he was acquitted of one charge of rape (and a number of other sexual offence charges) and the jury failed to reach a verdict in respect to an additional rape charge. Therefore, to avoid the risk of identification of the complainant and the accused, the proceedings cannot be named and instead will be referred to as the *"2005 case"*.

[45] Thomas Mac Ruairi, "Two have Denied Charges in Trial at Central Criminal Court Hearing Locked in House and made to have Sex with Men, Woman tells Jury Trial" *Connacht Tribune* (Galway, 8 June 2005).

[46] Ibid.

[47] Ibid.

victim testified that during this time she was falsely imprisoned, verbally and physically assaulted and raped.

The older of the two accused was charged with two counts of assault causing harm, two counts of threatening to seriously injure, a charge of false imprisonment, three charges of oral rape, two charges of anal rape and two charges of rape.[48] His younger co-accused was charged with two counts of rape and one charge of oral rape, assault causing harm, threatening to seriously injure and false imprisonment.[49] While both accused began the trial in June 2005 with legal representation, prior to the cross-examination of the complainant the eldest accused dispensed with his legal counsel and proceeded to represent himself.[50] Consequently, the complainant was cross-examined by the defendant.

Ultimately, the jury, which deliberated for over 23 hours, failed to agree on a verdict in relation to one of the rape charges against each of the accused.[51] The eldest defendant was found not guilty of the remaining charges of rape but was convicted of false imprisonment, threating to seriously injure and two counts of assault causing harm.[52] His co-accused was acquitted of five charges including oral rape, rape, threatening to seriously harm, assault causing harm and false imprisonment.[53] Subsequently, the State decided not to pursue a

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[48] Mac Ruairi, "Two have Denied Charges in Trial" (n 45).
[49] Ibid.
[50] Thomas Mac Ruairi, "Prosecution Case Completed in Rape Trial of Polish Men" *Connacht Tribune* (Galway, 24 June 2005). Furthermore, it appears the cross-examination of the complainant was lengthy. The RNCI reported that the "the accused cross-examined the complainant in person at great length during a trial that lasted 31 days in total". (Rape Crisis Network Ireland, *Position Paper on Legal Recommendations from "Rape and Justice in Ireland"* (Galway, 2012) 4)
[51] Thomas Mac Ruairi, "Jury Fails to Agree Rape Case Verdict" *Irish Independent* (Dublin, 6 July 2005). In relation to the other charges of rape, both were found not guilty.
[52] Ibid.
[53] Ibid.

retrial against the two men in relation to the charge of rape upon which the jury had failed to agree.[54]

This case brought the reality of such cross-examination to the attention of a number of commentators and victim-advocacy groups. However, interestingly, there was a notable lack of concern or outcry about the case from the public in general. This stands at odds with the general reaction to such cases in other jurisdictions, and was remarked upon by the Rape Crisis Network Ireland ("RCNI") in their position paper entitled *Agenda for Justice: Towards Ending Injustice for Survivors of Sexual Violence*. The position paper identified prohibiting the right of a defendant to represent himself as one of its recommended changes to legislation and practice procedures.[55] Referring to the above *2005* case the position paper noted:

> When a similar tactic was adopted by Milton Brown in an English case, such was the level of outrage that the defendant was able to sack his legal team and conduct his defence in person, cross-examining his victim for days (he was eventually convicted), that the law was subsequently changed ... - withdrawing the right to self-representation to defendants in rape trials. Ireland has no such restriction in our jurisdiction and further we have no such sense of outrage when the...[*2005* case]...was given extensive press coverage. [56]

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[54] Thomas Mac Ruairi, "No Retrial on Rape Charge for Pole" *Irish Independent* (Dublin, 7 July 2005). Also see Thomas Mac Ruairi, "Polish Men not Guilty of Rape Charges" *The Irish Times* (Dublin, 6 July 2005). Furthermore, the more recent case of *DPP v Stephen Walsh* (Central Criminal Court, 2011) is also worthy of note. In this case, the accused was charged, and subsequently convicted, of two counts of sexual assault and nine counts of defilement against a 17 year old girl. He dismissed his legal representation close to the conclusion of the trial and proceeded to represent himself. Thankfully, the cross-examination of the complainant had already occurred and therefore, the victim was spared personal cross-examination by the accused. Nonetheless, the case is illustrative of the ongoing potential for such cross-examination to occur. See "Rapist Guilty of Sex Assault and Defilement of Child" *The Irish Times* (Dublin, 11 November 2011), Conor Lally, "Ten Years' Jail for Rapist over Sexual Assault of Child" *The Irish Times* (Dublin, 21 December 2011) and "Convicted Child Rapist Walsh Jailed for 10 Years" *Breaking News.ie* (Dublin, 20 December 2011) <http://www.breakingnews.ie/ireland/convicted-child-rapist-walsh-jailed-for-10-years-532960.html> accessed on 2 October 2015).

[55] Rape Crisis Network Ireland, *Agenda for Justice: Towards Ending Injustice for Survivors of Sexual Violence* (Galway, 2005) 4. Also see Rape Crisis Network Ireland, *Submission on Substantive and Procedural Legal Reforms in relation to Sexual Offences* (Galway, 2012).

[56] Ibid. 8. In this respect, the RCNI's description of the trial as receiving extensive press coverage may be misleading. While the case did receive significant media coverage, the fact one of the defendant was self-representing himself was not widely reported on. This issue will be discussed further in the coming paragraphs.

The issue was afforded further attention in a national study commissioned by the RCNI. In *Rape and Justice in Ireland*, Hanly et al conducted a brief examination of the issue, including its historical context, before strongly recommending that the ability to personally cross-examine a complainant be abolished immediately.[57] Referring to cases where personal cross-examination has occurred, the authors opined:

> At the very least, such cases can hardly inspire confidence in potential complainants. It is strongly recommended therefore, that such personal cross-examination be abolished immediately as has been done in a number of common law jurisdictions...[58]

This recommendation was later endorsed by the then Director of Public Prosecutions, James Hamiltion, who commented that:

> I believe that...the number of such cases in our jurisdiction are very small, but, by allowing such conduct in our courts, the potential for adverse impacts is disproportionately high, not least to the complainant.[59]

As the former Director of Public Prosecutions noted, it is true that the number of such cases in this jurisdiction are quite small. The most publicised Irish trial is undoubtedly the *2005 case*. Nonetheless, there is some evidence that there have been other instances where such cross-examination has occurred. For example, in a 2010 paper entitled *Sexual Violence: Witnesses and Suspects*, Judge Peter Charleton alluded to having witnessed such cases. Referring to cross-examination in rape cases, Judge Charleton commented:

> In cases where an accused, and *I have seen this happen*, decides to be unrepresented, or to sack counsel at the last minute to achieve an adjournment, useful guidelines have been laid down in England for the conduct of such a trial by an unrepresented defendant.[60] (Emphasis added)

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[57] Hanly et al, *Rape and Justice* (n 12) 354.
[58] Ibid.
[59] James Hamilton, *Paper (Untitled)* (Launch of 'Rape and Justice in Ireland, Galway, 7 December 2009).
[60] Charleton and Byrne (n 2) 41. The issue of personal cross-examination by the accused in sexual offence trials is also mentioned briefly by Charleton et al in Peter Charleton, Paul Antony McDermott and Marguerite Bolger, *Criminal Law* (Butterworths 1999) 642.

Unfortunately the author made no further reference to these cases and no citations were provided. However, upon interview with the author[61], it emerged that the case referred to was that of *DPP v JT*.[62] In this case, the complainant, who had a mental disability, was the daughter of the accused. The accused was convicted of sexual offences against the victim, whom he personally cross-examined during the trial. It was a relatively high profile case, not as a result of the personal cross-examination which took place, but due to the fact that the case also dealt with the competency of spouses to give evidence against each other. In fact, the personal cross-examination which the complainant faced in this trial does not appear to have been reported upon, with all available literature on the trial referring primarily to the spousal privilege element of the case.[63]

The above example is illustrative of the difficulty which can arise in terms of identifying trials where a defendant has personally cross-examined a complainant. It is problematic for a number of reasons. In such cases there is no written judgment available unless the case is appealed, and even then, it does not necessarily mean that reference will be made to the fact that a defendant self-represented. Unless the appellate court specifically refers to this in the judgment, there may be no indication that personal cross-examination occurred. The media is the principal source for identifying when and where such cases occur. However, to date research for this thesis has shown that even when such cases are reported, the fact that a defendant is self-representing may not necessarily appear in the article. For example, five separate newspaper reports, by two different reporters, in various newspapers were discovered in relation to the *2005* case, yet only one of these newspaper articles referred to the fact that one of the co-accused had chosen to self-represent. An article in the *Connacht Tribune* mentioned this in a very fleeting manner:

> The eldest accused, ages 29, *who defends himself*, has pleaded not guilty to two charges of assault causing harm, two charges of a threat to seriously injure, a charge of false imprisonment, three charges of oral rape, two charges of anal rape and two charges of rape.[64] (Emphasis added)

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[61] Interview by this author with The Hon. Mr Justice Peter Charleton, Supreme Court Judge, The Four Courts (Dublin, 2 December 2014).
[62] *DPP v JT* (unreported, CCA, 27 July 1988).
[63] For example, see Law Reform Commission, *Report on Contempt of Court* (LRC 46 – 1994) 15.
[64] Mac Ruairi, 'Prosecution Case Completed in Rape Trial of Polish Men' (n 50).

Thus, even when rape cases are reported, details such as the practice of personal cross-examination by the defendant may be omitted.[65] Therefore, one is often dependent on accounts from individual victims or on the limited resources of victim-advocacy groups[66] to bring such cases to the attention of the legislature and the public at large.

Nonetheless, despite the limited information available on rape cases involving personal cross-examination by the accused in this jurisdiction, the issue has been identified and reform has been recommended.[67] Moreover, with the recent publication of the Criminal Law (Sexual Offences) Bill 2015, it would appear that an attempt to respond to these calls for reform are underway. However, while the 2015 Bill is a step in the right direction, it is submitted that to date the proposed reform falls short of fully addressing the issue.

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[65] This may account for the lack of public concern in relation to this case.

[66] In relation to the *2005 case*, the Rape Crisis Network Ireland did much to highlight the plight of the complainant. (Rape Crisis Network Ireland, Position Paper on *Legal Recommendations from "Rape and Justice in Ireland"* (Galway, May 2012) 4-5). The author contacted the RCNI seeking additional information. However, it transpired that all the information available to the RCNI in relation to the issue of personal cross-examination had already been published by the organisation and had been sourced by the author. (The RCNI was contacted via email and a response was received from Caroline Counihan (Legal Policy Director) on 25 June 2013) The author also conducted an interview with the Dublin Rape Crisis Centre in relation to this issue. However, no additional information on the specific topic of personal cross-examination by the defendant was available. (Ellen O'Malley-Dunlop, CEO, Dublin Rape Crisis Centre (Dublin, 18 October 2014)).

[67] More recently, the issue was highlighted in the Irish Daily Mail, where the proposed amendment under the then General Scheme of the Criminal Law (Sexual Offences) Bill 2014 was outlined. (Kevin Keane, "Rapist Allowed to Question Victims; Concerns as Law Reform Fails to Protect the Vulnerable" *Irish Daily Mail* (Dublin, 27 April 2015)). Moreover, in the latest edition of *Sexual Offences*, O'Malley refers to the issue and implies that further consideration of the topic is needed. (O'Malley, *Sexual Offences* (n 9) 413 – 415).

IV. Recent Reform Developments - The Criminal Law (Sexual Offences) Bill 2015 – Section 35 (14C)

As previously outlined, in September 2015 the Criminal Law (Sexual Offences) Bill was published. The primary purpose of the bill, as described by the Minister for Justice and Equality, Frances Fitzgerald, was to "substantially strengthen our law ... and to send a message to all victims of sexual offences that we recognise the unfathomable harm and trauma inflicted upon them".[68] As noted, the Bill was hailed as "the most comprehensive and wide-ranging piece of sexual offences legislation to be introduced in almost a decade".[69] In particular, the 2015 Bill includes a number of amendments aimed at minimising the trauma experienced by victims of sexual offences and children during the trial process.[70] As discussed, these reforms include provisions allowing for the removal of wigs and gowns during the giving of evidence[71] and a section which permits the giving of evidence from behind a screen.[72] Moreover, s. 38 deals with and regulates the disclosure of third party records in certain trials.[73]

However, of significant relevance to this research is s. 35 (14C). This provision proposes the insertion of a new section to the Criminal Evidence Act 1992, entitled "Protection against Cross-Examination by Accused". Speaking before the Seanad during the Second Stage of the 2015 Bill, Minister Fitzgerald stated:

> The bill provides for a number of amendments...designed to support and protect victims of sexual offences during the trial process. Measures to further protect child victims of sexual offences from any additional trauma during the giving of evidence include... preventing a person accused of a sexual offence from personally cross-

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[68] Seanad Éireann Deb (Minister Frances Fitzgerald) 6 October 2015, vol 242 col 6.
[69] Ibid.
[70] See, Department of Justice and Equality, "Minister Fitzgerald Publishes Heads of new Criminal Law (Sexual Offences) Bill 2014" (Press Releases, 27 November 2014) <http://www.justice.ie/en/JELR/Pages/PR14000349> accessed 18 May 2015.
[71] Section 35 (14B).
[72] Section 35 (14A).
[73] Commenting on the operation of this provision, Minister Fitzgerald noted: "The appropriateness of the disclosure of such records will be the subject of a pre-trial hearing and any disclosure will, while respecting the rights of an accused to a fair trial, take account of the right of a victim of a sexual offence to privacy. Only records, or parts thereof, which are likely to be relevant to an issue at trial and which are necessary for the accused to defend the charges against him or her should be disclosed." (Seanad Éireann Deb (n 68)).

> examining a person under the age of 14 years ... [and] between the ages of 14 and 18 years.[74]

The impetus for this particular provision appears to emanate from recommendations made by two Oireachtas Committees; the Joint Committee on Child Protection ("Child Protection Committee")[75] and the Joint Committee on the Constitutional Amendment on Children ("Children Amendment Committee").[76] In 2006 the Child Protection Committee addressed the special needs of child witnesses, and in particular child complainants, in relation to cross-examination. The Committee referred to a number of submissions they had received recommending the introduction of a "prohibition of personal cross-examination by the accused (to be effected by removing the right of an accused in such cases to represent himself)".[77] Commenting on the enactment of such prohibitions in a number of common law jurisdictions, the Committee stated that "while such a provision would be a significant departure from existing practice in this jurisdiction, it is not, in effect, different from the use of an intermediary, as provided for in section 14 of the Criminal Evidence Act 1992".[78] The Committee concluded its argument for the introduction of such a prohibition in relation to child witnesses in sexual offences cases by stating that:

> By virtue of their age alone, and in many cases also by virtue of their relationship with the accused, child witnesses and, in particular, child complainants, will be especially susceptible to intimidation, even if unintentional, should they be cross-examined personally by the complainant. [79]

Three years later, the Children Amendment Committee reiterated the Child Protection Committee's call for reform in this respect and noted that "every effort should be made to progress in this area".[80] Interestingly, while confining its recommendations to matters concerning children, the Committee also commented that:

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[74] Seanad Éireann Deb (n 68).
[75] Joint Committee on Child Protection, *Report on Child Protection* (November 2006).
[76] Joint Committee on the Constitutional Amendment on Children, *Twenty-eighth Amendment of the Constitution Bill 2007: Second Interim Report* (May 2009) 53.
[77] Joint Committee on Child Protection (n 75) 72.
[78] Ibid. 72 – 73. This provision was discussed in Chapter 1, Part V of this thesis.
[79] Ibid. 73.
[80] Joint Committee on the Constitutional Amendment on Children (n 76) 53.

> It must be observed, however, that the justifications for implementing special measures in criminal procedures to protect child victims and witnesses apply with equal force to the necessity to implement such measures for adults with intellectual disabilities or who are otherwise vulnerable... The Committee considers that the implementation of ... [legislative measures]... for the benefit of child victims and witnesses provides an opportunity to put in place analogous measures for the protection of vulnerable adults.[81]

In addition to the recommendations advanced by the two Oireachtas Committees, it appears at least two further submissions calling for a reform of the current position in respect to personal cross-examination were received by other Oireachtas Committees. Both the Rape Crisis Network Ireland and Dublin Rape Crisis Centre made submissions calling for a prohibition on personal cross-examination in rape and sexual offence trials.[82] However, those submissions proposed a prohibition to protect both child and adult sexual offence complainants.

Section 35 (14C) of the 2015 Bill provides:

> 14C. (1) Where—
>
> (a) a person is accused of an offence to which this Part applies, and
>
> (b) a person under the age of 14 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.

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[81] Joint Committee on the Constitutional Amendment on Children (n 76) 53.

[82] See Rape Crisis Network Ireland, *Submission on Substantive and Procedural Legal Reforms in relation to Sexual Offences* (Galway, December 2012) 11 – 12 and Rape Crisis Network Ireland, *Submission on Sexual Violence: Recommendations for Reform of the Criminal Justice System* (Galway, June 2013) 13 - 14. Note, in the latter paper reference is made to a paper delivered by this author at the University College Cork Centre for Criminal Justice and Human Rights Conference in June 2013. (Ibid.) Moreover, in an interview conducted with Ellen O'Malley-Dunlop of the Dublin Rape Crisis Centre by this author reference was made to a submission made to the Joint Oireachtas Committee on Justice, Defence and Equality recommending a prohibition on personal cross-examination in sexual offence cases. A copy of the Submission document was not available. (Interview conducted by this author with Ellen O'Malley-Dunlop, CEO, Dublin Rape Crisis Centre (Dublin, 18 October 2014)).

(2) Where—

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

(b) a person who has attained the age of 14 years but is under the age of 18 years is to give evidence,

the court may direct that the accused shall not personally cross-examine the witness.

Under s. 12 of the Criminal Evidence Act 1992, the offences include sexual offences[83], offences involving violence or the threat of violence and attempting, conspiring, aiding, abetting, counselling, procuring or inciting the commission of either of the latter offences.

As is evident from the Minister's speech during the Second Stage of the Bill, and given the subject matter of the two Joint Oireachtas Committee reports which recommended the introduction of such a provision, it is clear that the intention behind the provision is to protect minors who are called to give evidence in such cases.[84] As per the wording of the section, these minors do not have to be complainants to avail of the protection offered, yet it can be assumed that in the vast majority of situations this will in fact be the case. This aspect of the provision is to be commended as it recognises that the need to offer protection against

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[83] Currently, s. 2 of the 1992 Act, as amended, provides: "'sexual offence' means rape, an offence under section 3 of the Criminal Law (Sexual Offences) Act, 1993, sexual assault (within the meaning of section 2 of the Criminal Law (Rape) (Amendment)Act, 1990), aggravated assault (within the meaning of section 3 of that Act), rape under section 4 of the Criminal Law(Rape) (Amendment) Act, 1990, or an offence under —
(a) section 3 or 6 of the Criminal Law Act, 1885,
(aa) section 6 of the Criminal Law (Sexual Offences) Act 1993;
(b) section 4 of the Criminal Law (Sexual Offences) Act, 1993,
(c) section 1 or 2 of the Punishment of Incest Act, 1908,
(d) section 17 of the Children Act, 1908,
(e) the Criminal Law (Sexual Offences) Act 2006".
However, s. 33 of the 2015 Bill proposes the substitution of "sexual offences" under the 1992 Act with the following definition: "'sexual offence' means rape, sexual assault (within the meaning of section 2 of the Criminal Law (Rape) (Amendment) Act 1990), aggravated sexual assault (within the meaning of section 3 of that Act), rape under section 4 of that Act or an offence under— (a) section 3 or 6 of the Criminal Law Amendment Act 1885, (b) section 5 of the Criminal Law (Sexual Offences) Act 1993, (c) section 6 of the Criminal Law (Sexual Offences) Act 1993, (d) section 1 or 2 of the Punishment of Incest Act 1908, 19 5 10 15 20 25 30 35 (e) section 4A or 5A of the Child Trafficking and Pornography Act 1998, (f) section 249 of the Children Act 2001, (g) the Criminal Law (Sexual Offences) Act 2006, or (h) section 3, 4, 5, 6, 7 or 8 of the Criminal Law (Sexual Offences) Act 2015, excluding an attempt to commit any such offence".

[84] Seanad Éireann Deb (n 68).

personal cross-examination may extend beyond complainants to other witnesses under the age of 18 in such trials. The scope of offences which the provision proposes to cover is also admirable. The provision includes offences of non-sexual violence within the category of scenarios where personal cross-examination can potentially be prohibited. Doing so acknowledges that cross-examination by the accused in person may also be problematic in cases involving non-sexual violence as in sexual offence cases. While a detailed consideration of this issue is outside the direct scope of this thesis, as will be seen in Chapter 4, a number of other jurisdictions employ a similar approach and have widened the category of offences to which a protection against personal cross-examination may apply.

The parameters of the section are noteworthy. The provision categorises minors into two age-dependant groups. Subsection (1) appears to offer a presumptive prohibition to witnesses under 14 (the judge shall prohibit personal cross-examination unless he/she is of the opinion that the proper administration of justice requires such cross-examination), while ss. (2) proposes a discretionary prohibition in relation to witnesses under the age of 18 (the judge may direct that the accused shall not personally cross-examine the witness). Therefore, the prohibition is not mandatory, but presumptive (in relation to ss (1)) and discretionary (in respect of subsection (2)) in nature.[85]

The age categories chosen are of interest, and while they may appear somewhat arbitrary, they are in fact supported by precedent. A number of the testimonial aids under the Criminal Evidence Act 1992 require the witness to be under 18 years of age to avail of them. However, s. 16 (1)(b)(i) of the 1992 Act provides that in certain specific circumstances, a video recording of any statement made during an interview with a member of the Gardaí by a person under the age of 14 years, and against whom an offences is alleged to have been committed, is admissible as evidence in certain cases of any fact stated where direct evidence by that

[85] This issue will be expanded upon in Chapter 5.

person would be admitted.[86] Furthermore, section 27 (1) of the 1992 Act permits a child witness under 14 year of age to give unsworn evidence if the court is satisfied that he/she is capable of giving an "intelligible account" of events. Nevertheless, while the age categories under s. 35 (14C) may be supported by reference to the 1992 Act, this does not eliminate the potential problems which could arise as a result of the two age categories. From a policy perspective, the purpose of such a distinction appears motivated by a desire to offer greater protection to the younger and presumably more vulnerable of the two groups.

Nevertheless, as noted by Hanly, the distinction under s. 35 (14C) represents a "curious disconnect" between the two categories of minors.[87] Illustrating this disconnect, Hanly gives the example of a 12 year old complainant in a sexual offence trial, who due to her age, would have the protection of the presumptive prohibition under the provision at the pre-trial stage. Nevertheless, it is quite possible that if the case is delayed or adjourned for a sufficient amount of time, when it eventually comes to trial, the complainant may have reached the age of 14 and consequently, the presumptive prohibition will have been replaced with a discretionary one.[88] The fact that the provision, if enacted, will allow such a scenario to take place is not only curious but also problematic.

Another notable aspect of the provision is the limitation of its application to minors. Thus, adult sexual offence complainants (or indeed any other category of adult witnesses) are not protected by this prohibition on personal cross-examination. Indeed, considering the context in which the reform was recommended by the two Joint Oireachtas Committees, this limitation is not particularly surprising. There is clear precedent for offering greater protection in criminal proceedings to children than to other witnesses, particularly when

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[86] As amended by s. 20 of the Criminal Justice Act 2001 and s. 4 of the Criminal Law (Human Trafficking) (Amendment) Act 2013. Note, s. 16 (1)(b) was not commenced until 2008 and was not used in trial until 2010. (In the 2010 case, the accused was acquitted and therefore, to avoid the risk of identification of the complainant and the accused, the proceedings cannot be named. (See Miriam Delahunt, "Video Evidence and Section 16 (1)(b) of the Criminal Evidence Act 1992" (2011) (16 (1) *Bar Review* 2). Also, refer to *DPP v JPR* (1.5.2013), Bill No CC0057/12 ex temp, where O'Malley J in the Central Criminal Court confirmed that age eligibility arises at the time of the recording of the statement, not at the date of trial. Finally, see s. 16 (1)(b)(ii), which extends ss. (1)(b)(i) to include witnesses (not just complainants) under the age of 18 in relation to specific offences.

[87] Conor Hanly, "Aspects of the General Scheme of the Sexual Offences Bill 2014" (Rape Crisis Network Ireland, Public Information Seminar on the Criminal Law (Sexual Offences) Bill 2014, Dublin 2, April 2015)

[88] Ibid.

those children are also sexual offence complainants. For example, as previously highlighted, the majority of support measures and testimonial aids provided for under the Criminal Evidence Act 1992 are age restricted. There are a number of reasons why putting in place protective measures is appropriate and indeed necessary in relation to children, yet not as easily justified where adult witnesses are concerned. Due to age and maturity levels, children are considered more susceptible to fear and intimidation and therefore, are in need of heightened protection. Moreover, given the constitutional considerations at play in this jurisdiction, limiting protective measures to the most vulnerable of witnesses is more likely to be found compatible with the Constitution.

Nonetheless, as discussed previously, allowing personal cross-examination of any complainant by the defendant in a rape or sexual offence trials is problematic for a number of reasons which are not unique to minors who give evidence in such trials. In expressing his surprise that the proposed provision does not protect adult sexual offence complainants, Hanly notes that "the level of trauma that can be applied to a victim of a sexual crime is not limited by age...it may be magnified by age but it is not limited".[89] Therefore, it is submitted that if the problems associated with personal cross-examination in sexual offence trials are accepted as justifications for prohibiting it where minors are concerned, as with the provision of the 2015 Bill, then surely much of the same reasoning can be applied to cases involving adult sexual offence complainants.

From a procedural perspective, the provision is quite detailed. The sub-provisions appears to draw heavily on sections of the English Youth Justice and Criminal Evidence Act 1999 (which will be discussed in detail in Chapter 4). Subsections (3) – (5) state:

> (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

[89] Conor Hanly speaking in an interview with the Irish Daily Mail. (Keane, "Rapist allowed to question victims" (n 67)).

(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.

Thus, ss. (3) of s. 35 (14C) holds that when an accused is self-represented in such a trial and is prohibited from cross-examining a child witnesses under the provision, the court will invite the accused to appoint a legal representative, paid for by the State, for the purpose of cross-examining the witness. If the defendant fails or refuses to appoint a legal representative, then the court will assess whether cross-examination of the witness is necessary in the interests of justice. Upon a decision that it is necessary, the Court will then appoint a legal representative to conduct the cross-examination of the witness on the accused's behalf.

A number of safeguards are also put in place to ensure that where such a situation arises, and an accused is prohibited from conducting a cross-examination in person, he will not be subjected to any prejudicial inferences drawn from the fact that he is prohibited from personally cross-examining a complainant. Subsection (6) of s. 35 (14C) states:

(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.

As Minister Fitzgerald stated, such safeguards "protect the rights of the accused to a fair trial".[90] Thus, it appears that the provision makes a substantive attempt to protect the witness from personal cross-examination while ensuring that the accused is not prejudiced or disadvantaged.

Finally, s. 35 (14C)(7) and s. 39 clarify, for the most part, matters in relation to the payment of a legal representative employed for the purpose of cross-examining a witness under the provision. Section 31 (14C) (7) states:

(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).

This subsection provides clarification that 'legal aid', within the meaning of the Civil Legal Aid Act 1995, includes representation engaged by the Legal Aid Board on behalf of the accused in relation to the cross-examination of a witness under s. 35 (14C).

Furthermore, s. 39 provides for the granting of the legal aid certificate when s. 35 (14C) is applicable. The Memorandum accompanying the 2015 Bill describes the provision as inserting a new subsection which provides for "legal aid in respect of representation for an accused who is prohibited from conducting a cross-examination in proceedings related to a sexual offence".[91] Specifically it states:

[90] Seanad Éireann Deb (n 68).
[91] Criminal Law (Sexual Offences) Bill 2015, *Explanatory and Financial Memorandum* 13.

Section 28 of the Civil Legal Aid Act 1995 is amended by the insertion of the following subsections after subsection (5A):

> "(5B) Notwithstanding any other provisions of this Act, where an accused person is prevented from conducting a cross-examination referred to in section 14C of the Criminal Evidence Act 1992, the Board shall grant a legal aid certificate to the accused for the purpose of his or her being represented in relation to such cross-examination.

Upon an initial reading, it is not immediately clear whether this subsection applies if the court, as opposed to the accused, appoints the legal representative. This issue was queried with the Department of Justice and Equality and it was confirmed by a Department Official that the subsection is applicable whether the legal representative is employed by the accused or the court.[92] While this is indeed reassuring, in it submitted that this sub-provision could have been worded in a manner which avoids any potential for confusion. Nonetheless, it remains the case that these provisions ensure that an accused, who is prevented from personally cross-examining a witness as a consequence of s. 35 (14C) of the 2015 Bill, is provided with a legal representative, funded by the State, for the purpose of cross-examining such a witness.

Section 35 (14C) of the 2015 Bill constitutes a significant development. If enacted in its current form, it will address, if in a limited sense, an issue which to date has been neglected by the Irish legislature. However, it is submitted that as it stands the reform does not go far enough in that it does not offer protection to all complainants in sexual offence cases. As was stated by the Children Amendment Committee, oftentimes the justifications for introducing special measures to protect children are equally applicable to vulnerable adults.[93] It is submitted that this is the case in relation to a prohibition on personal cross-examination of the complainant by the defendant in rape and sexual offence trials. Consequently, the shortcoming of s. 35 (14C) in this respect is disappointing. This shortcoming will be addressed further in the concluding Chapter, following a comparative analysis of similar provisions in other jurisdictions.

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[92] In an email response received from the Department Official (received on 19 January 2016), it was stated that the subsection would apply "whether the [legal representative] is engaged by the accused or appointed by the court".

[93] Joint Committee on the Constitutional Amendment on Children (n 76) 53.

Conclusion

The recently published Criminal Law (Sexual Offences) Bill 2015 finally shed some limited and long-overdue light on an aspect of sexual offence trials which has, for the most part, been overlooked in this jurisdiction. Until recently, personal cross-examination by the defendant in rape and sexual offence trials remained a topic in need of attention in Ireland. However, the 2015 Bill attempts to rectify this deficit to a certain degree.

Unfortunately, while the 2015 Bill represents a step in the right direction, it is submitted that it does not go far enough as its scope is limited to witnesses who are minors. Thus, from an international perspective Ireland still lags behind its fellow common law jurisdictions where positive steps have already been taken to ensure that personal cross-examination by the accused in sexual offence trials is restricted or prohibited. These developments will be considered in Chapter 4. However, before examining the approach adopted in other common law jurisdictions, it is first important to consider the potential constitutional and human rights considerations at play if a prohibition on personal cross-examination, either of a limited or more inclusive nature, were to be introduced in Ireland.

4. The Approach in Common Law Jurisdictions: A Comparative Examination of Relevant Legislative Reforms

Introduction

This Chapter involves a multi-jurisdictional comparative analysis, examining the approach to personal cross-examination by the defendant of the complainant in rape and sexual offence trials adopted in a number of common law jurisdictions.

The two previous Chapters addressed issues which were central to this research project. Chapter 2 involved a detailed examination of personal cross-examination by the defendant of the complainant in rape and sexual offence trials. The Chapter concluded by submitting that such cross-examination by the defendant was an issue worthy of further consideration and potentially reform through legislative prohibition. However, the possibility of such a reform giving rise to constitutional and human rights considerations was acknowledged. Consequently, the subsequent Chapter addressed these considerations and further examined the concerns that a prohibition on personal cross-examination could give rise to under the Irish Constitution and the *European Convention on Human Rights*.

This Chapter embarks upon a multi-jurisdictional, comparative examination of the same topic. It will examine the approach adopted by a number of common law jurisdictions towards personal cross-examination in sexual offence trials and the reforms implemented in these jurisdictions. While each of the jurisdictions under consideration have implemented a prohibition on personal cross-examination by defendants in sexual offence trials, there are variations in the form and scope of these prohibitions. By examining the different reform models adopted in other jurisdictions, a comprehensive evaluation of the advantages and disadvantages of each approach can be conducted. Such an evaluation will be of assistance when considering potential reform in Ireland.

The comparative analysis conducted throughout this Chapter primarily focuses on common law jurisdictions. The Irish legal system is a common law system and consequently closely resembles the systems in England and Wales, and in other jurisdictions colonised by the

British Empire, including Canada, New Zealand and Australia. Common law jurisdictions are precedent-based, possessing "an identifiable body of law...which grew out of centuries of judicial decisions and which has established the major categories into which legal rules are placed".[1] Conversely, civil law jurisdictions operate under legal systems characterised by the comprehensive codification of the law.[2] Given the contrast between these two systems of law, and considering the nature and purpose of this thesis, focusing attention on other common law countries seems appropriate.

The first jurisdiction to be considered is England and Wales, one of the first common law jurisdictions to reform the law in this area. Moreover, s. 35 (14C) of the recently published Criminal Law (Sexual Offences) Bill 2015 appears to draw on aspects of the English provision. Consequently, an analysis of the approach adopted in this jurisdiction has much to recommend it. Next, Scotland will be considered. Arguably, given that Scots law is a hybrid system influenced by both common and civil law traditions, it may seem like a strange inclusion. However, it is precisely because of these differences that it merits examination. Moreover, there are a number of demographical similarities between Ireland and Scotland, including a similarly sized population, which facilitate the drawing of useful comparisons. Moving further afield, the two Australian jurisdictions of New South Wales and Victoria will then be considered, as will New Zealand. Like Ireland, these jurisdictions have a tradition of drawing on reforms previously implemented in England and Wales. Therefore, where any similarities or deviations occur in the reform approaches adopted by these jurisdictions, a comparative analysis bears the advantage of offering insight from an Irish perspective. Finally, the approach in Canada will be examined. In contrast to the other common law jurisdictions under consideration, Canada adopted a different approach to addressing the issue of personal cross-examination by the defendant in rape trials. Despite this, s. 35 (14C) of the Irish 2015 Bill also appears to draw on aspects of the relevant Canadian legislation. Consequently, it is worthy of inclusion in this Chapter.

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[1] Raymond Byrne and Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System* (5th edn, Bloomsbury Professional 2009) 4.

[2] For a brief and general overview of the two systems see ibid. 4 – 5. For a more focused overview of the differences between the law on rape and the trial process in common law jurisdictions versus civil law ones, see Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre 1998).

Each of the jurisdictions will be considered separately. The background and context in which the issue arose in each country will be considered first. Next, any relevant pre-legislative research and material will be examined. The legislative provisions giving effect to any relevant reform will then be outlined and examined, and any commentary evaluating the reception and implementation of the reforms will be addressed. Before concluding this Chapter, tentative conclusions will be drawn in relation to the potential strengths and weaknesses of the various methods of reform.

Finally, it is important to note that this Chapter will not present an in-depth examination of the various advantages and disadvantages surrounding a prohibition on personal cross-examination by the defendant in rape trials. This issue was addressed in detail in Chapter 3. Many of the reports, research papers and commentary which will be examined in this Chapter reiterate the same points in relation to the benefits (and potential disadvantages) of prohibiting personal cross-examination. Therefore, in order to avoid repetition, the analysis will instead be concentrated on the discussion and debate surrounding the various options for reform.

I. England and Wales

Personal cross-examination of the complainant by the defendant in sexual offence trials was addressed in England almost two decades ago. During the mid to late 1990s a number of high profile rape cases emerged in which the defendant represented himself. As a result of these cases, legislative action was taken in an attempt to tackle this issue.

i. Background

The issue of personal cross-examination by the defendant was first addressed in a limited manner in England and Wales in 1991. Section 55 of the Criminal Evidence Act 1991 inserted a new section, s. 34A, in the Criminal Justice Act 1988. The provision offered protection to child complainants and witnesses from personal cross-examination by the accused in relation to trials concerning sexual, violent or cruelty offences.[3] However, there was a number of issues with this provision, including a complete lack of any procedural guidance. Moreover, it was limited to minors, and therefore, similar to the current provision under the Irish 2015 Bill, offered no protection to adult rape complainants.

As noted, following a number of high profile cases in the mid 1990s, significant attention was drawn to the plight of the adult sexual offence complainant forced to endure personal cross-examination by the defendant. *R v Edwards*[4] was one of the first high profile cases in this respect. The complainant was a thirty-four year old woman named Julia Mason. On 9 December 1995, she was abducted at a bus stop in London by the defendant, Ralston Edwards, and taken to his home "where she was subjected to a savage and prolonged rape".[5] Three days after the attack Edwards was arrested. The case, which centred on the issue of the complainant's consent, went to trial at the Old Bailey Central Criminal Court in August 1996. As Rock explains, "only Julia Mason's evidence could establish that her consent was

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[3] Section 34A – "(1) No person who is charged with an offence to which section 32(2) above applies shall cross-examine in person any witness who—
(a) is alleged—
(i) to be a person against whom the offence was committed; or
(ii) to have witnessed the commission of the offence; and
(b) is a child...."

[4] *R v Edwards*, *The Times*, 23 August 1996.

[5] Paul Rock, *Constructing Victims' Rights: The Home Office, New Labour and Victims* (Clarendon Press 2004) 348.

lacking, and her examination-in-chief and cross-examination assumed a pivotal importance".[6] Edwards dismissed his legal representation and despite the judge requesting on two occasions that he reconsider his position, he remained determined that he would waive his right to legal representation.[7] Edwards' cross-examination of the complainant lasted a total of six days, during which he wore the same clothes which had been worn at the time of the rape.[8] His questions appeared to have been designed to "relive the rape"[9] and many of them were "prurient, repetitive and distressing".[10] Subsequently Julia Mason was reported as having observed that:

> What made it worse was that Edwards was defending himself. At least when a barrister is asking the questions he is doing it to get to the truth. When a rapist is asking the questions he knows what he's done and he's furthering the act. From the moment he opened his mouth the filth and degradation of my ordeal was replayed in violent and vivid detail.[11]

Edwards was convicted and the Court sentenced him to two terms of life imprisonment. However, the personal cross-examination endured by the victim caused a media outcry throughout England.[12]

The *Edwards* case was not an isolated incident and a succession of copycat cases followed. In a subsequent trial, Milton Brown[13] also dismissed his defence counsel in order to represent himself. Brown forced his two victims to endure a five-day cross-examination during which he insisted they read aloud intimate sections from their statements.[14] The accused was found

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[6] Rock (n 5).
[7] Ibid.
[8] Jennifer Temkin, *Rape and the Legal System* (2nd edn, Oxford University Press 2002) 320.
[9] Ibid.
[10] Rock (n 5) 348.
[11] Sandra Laville, "Degraded Victim Abandons Anonymity" *The Telegraph* (London, 18 May 2001).
[12] For example, see Helen Nowicka, 'Rape Victim's Six-Day Ordeal in Witness Box' *The Independent* (London, 22 August 1996).
[13] The accused subsequently applied for leave to appeal his conviction and sentence. This application was refused (*R v Brown (Milton)* [1998] 2 Cr App R 364).
[14] Charles Walford, "Rapist who Forced his Victims into Days of Questioning in Court is Back on the Streets After Being Released Early" *The Daily Mail* (London, 17 January 2012).

guilty of two counts of rape, two counts of indecent assault and one count of false imprisonment. In sentencing him to sixteen years' imprisonment, Judge Pontius commented:

> [I]t is a highly regrettable and extremely sad aspect of this case that despite my repeated efforts during the first two days of your trial you insisted on dispensing with the services of highly competent leading and junior counsel and solicitors...thereafter subjecting your victims to merciless cross-examination clearly designed only to intimidate and humiliate them. In the course of your questioning you made outrageous and repulsive suggestions to both witnesses.[15]

Temkin[16] identifies a series of additional cases where defendants engaged in similar conduct, including the trials of Camille Hourani[17] and Patrick Simms.[18] In *Hourani,* the defendant forced the complainant, a 27 year old nurse, to come to court numerous times and prepare herself for questioning.[19] However, the defendant repeatedly delayed his cross-examining of the complainant and as a result the victim was sent away five times without being questioned. On the sixth occasion the defendant finally decided to proceed with the cross-examination. The complainant spent a day in the witness stand, during which time she was continuously reduced to tears by the defendant.[20] Similarly, Patrick Simms subjected his victim to a three day ordeal in the witness box before being found guilty of rape and grievous bodily harm. [21] During the cross-examination, Judge Lewis Collins refused to allow the complainant to answer some questions and warned Simms not to ask "questions designed to humiliate", stating: "I am not allowing this line of questioning because it is irrelevant and offensive".[22]

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[15] *R v Brown (Milton)* (n 13) 368.
[16] Temkin (n 8) 320.
[17] *R v Hourani, The Times*, 5 April 2000. Also see *R v Simms, The Times*, 7 October 2000. Despite legislation commenced in September 2000 prohibiting personal cross-examination in rape trials, a loophole in the law (a series of hearings had begun prior to the commencement of the new provision) allowed Simms to cross-examine the complainant. See Shenai Raif, "Rapist gets Life after Taunting Victim in Courtroom" *The Independent* (London, 07 October 2000).
[18] *R v Simms, The Times*, 7 October 2000.
[19] Jason Bennetto, "New Law to Protect Rape Victims due Next Month", *The Independent* (London, 08 August 2000).
[20] Ibid.
[21] Raif (n 17).
[22] Ibid.

The coverage of these cases highlighted the issue of personal cross-examination in rape trials and this, coupled with the work carried out by various lobbying groups, led to sustained calls for reform.[23]

From the outset there was much debate surrounding the issue, and disagreement over the most appropriate course of reform.[24] Initially, it appears the judiciary attempted to tackle the problem themselves. In the Court of Appeal judgment of *R v Brown (Milton),* Lord Bingham CJ put forward a number of suggestions.[25] As Temkin comments, in attempting to address the problem Lord Bingham called upon both "the judicial duty to do everything to minimize trauma for participants in the trial and the powers that judges have to protect witnesses and control irrelevant and repeated questioning".[26] The Lord Chief Justice noted:

> Judges do not lack power to protect witnesses and control questioning. The trial judge is the master of proceedings in his court. He is not obliged to give an unrepresented defendant his head to ask whatever questions, at whatever length, the defendant wishes.[27]

Lord Bingham CJ noted that "it will often be desirable, before any question is asked by the defendant of the complainant in cross-examination, for the trial judge to discuss the course of proceedings with the defendant in the absence of the jury".[28] It was suggested that by doing this the judge could identify the general nature of the defence and establish what points the defendant took issue with in the complainant's evidence. [29] Having done this, as a second measure Lord Bingham CJ noted that:

> it should be made clear in advance that the defendant will be required, having put a point, to move on, and if he fails to do so the judge should intervene and secure

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[23] For example, see Steve Boggan and Melvyn Howe, "Twenty-one Years for Rapist who Humiliated Victims in Court", *The Independent* (London, 17 January 1998).
[24] See "Rape Case Horror Splits Profession", *The Lawyer* (27 August 1996) <http://www.thelawyer.com/rape-case-horror-splits-profession/82676.article> accessed 27 March 2014.
[25] *R v Brown (Milton)* (n 13).
[26] Temkin (n 8) 321.
[27] *R v Brown (Milton)* (n 13) 371.
[28] Ibid.
[29] Ibid.

> compliance... if the defendant proves unable or unwilling to comply with the judge's instructions the judge should, if necessary in order to save the complainant from avoidable distress, stop further questioning by the defendant or take over the questioning of the complainant himself.[30]

Thirdly, he suggested that if the defendant seeks to dominate or intimidate the complainant, or even if there was a reasonable fear that he will do so, the judge should order the erection of a screen between the defendant and the witness.[31] Finally, the Lord Chief Justice commented that the Court of Appeal would "be very slow indeed, in the absence of clear evidence of injustice, to disturb any resulting conviction"[32] where the judge has been forced to intervene to protect the complainant from inappropriate questioning.

While Lord Bingham's attempts to address the concerns arising from personal cross-examination in rape trials were admirable, they were criticised as inadequate.[33] In particular one of the victims in the *Milton Brown* case expressed the view that Lord Bingham's recommendations had not gone far enough, stating: "Alleged sex attackers should not be allowed to question their victims at all. The ordeal is too terrible. I do not think most women could cope."[34] The subsequent cases of Camille Hourani and Patrick Simms illustrated how the Lord Chief Justice had "seriously underestimated the lengths to which some defendants were prepared to go in rape trials and the difficulties which judges experience in controlling them".[35] In the latter case, despite numerous rebukes from the judge, this did not prevent Simms from asking the complainant "intimate questions about sex, her sexual health and her underwear".[36] Furthermore, the victim in the *Edwards* case, Julia Mason, was so disturbed by the ordeal that she was subjected to during the trial that she decided to pursue her complaint to the European Court of Human Rights (claiming breaches of Articles 3, 8, 13 and 14). While

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[30] *R v Brown (Milton)* (n 13) 371.
[31] Ibid.
[32] Ibid.
[33] Temkin (n 8) 322.
[34] Ian Burell, "Judges get Power to Stop Rape Trial Ordeal" *The Independent* (London, 07 May 1998).
[35] Temkin (n 8) 322.
[36] ibid.

Mason subsequently withdrew her case, it nonetheless remained clear that more effective and robust methods were called for in order to address the issue.[37]

ii. Path to Reform

In June 1998 the Home Office issued a report entitled *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*.[38] The purpose of the report was to consider the treatment of vulnerable witnesses in the criminal justice system. However, in the introduction specific reference was made to the *Edwards* case and the trauma suffered by the victim during the trial. [39] Consequently, personal cross-examination by the defendant in rape trials was high on the agenda of issues to be addressed by the Working Group.

The Group began their examination of the issue by considering the rights of the defendant under Art. 6 of the *ECHR*, dedicating particular attention to the right of the accused to represent himself in person. This issue was examined in Chapter 2 of this thesis, which included a consideration of the ECtHR judgement in *Croissant v Germany*.[40] Referring to that judgment, the Working Group noted that a requirement under German law that a defendant be legally represented was held to be compatible with Article 6.[41] The Group then considered a number of different solutions to the problem. These included:

1. A mandatory prohibition on defendant cross-examining, as in the case of child witnesses.
2. A presumption that the defendant cannot personally cross-examine a witness, unless the witness agrees to the cross-examination.
3. A rebuttable presumption that cross-examination by an unrepresented defendant should be prohibited, but with the judge having discretion to permit this to proceed, after taking into account certain factors.

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[37] As Rock notes, Mason withdrew her complaint upon hearing of the Youth Justice and Criminal Justice Bill and after settling with the Home Office (Rock (n 5) 349).
[38] Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (London, June 1998).
[39] Ibid. para 1.3.
[40] *Croissant v Germany* (1993) 16 EHRR 135. See Chapter 2 of this thesis.
[41] Home Office (n 38) para 9.34.

4. It should be left to the Judge's discretion to determine whether an unrepresented defendant should be permitted to cross-examine a witness, subject to guidance, e.g., an overriding interests of justice criterion.
5. A combination of options. [42]

The Working Group briefly considered the merits of the various options. In relation to option 2, they were of the opinion that such an approach could potentially leave the victim in a vulnerable position, while options 3 and 4 could lead to inconsistent decisions.[43] Hence, it was decided that the most appropriate approach was to recommend that there be a "mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault".[44] In issuing this recommendation, the Group recognised the potential impact such a prohibition could have on the defendant's rights. Thus, it was proposed that the prohibition be limited to the cross-examination of complainants in rape and serious sexual assault trials, allowing personal cross-examination to take place in relation to other witnesses if necessary.[45] The relatively speedy manner in which the Working Group came to the conclusion that a mandatory prohibition was the most suitable approach may have been influenced by the prohibition already in place in relation to child witnesses. As noted in the report (and outlined at the beginning of this section), s. 34A of the Criminal Justice Act 1988 placed a mandatory prohibition on defendants in sexual, violent or cruelty offence cases from personally cross-examining a child complainant or witness.[46] Unfortunately, as referred to earlier, the legislation provided no guidance in relation to the procedures to accompany this provision. There was no provision clarifying who would put the questions to the witness in place of the defendant (however, it appears the presumption was that a legal representative would do so).[47] Moreover, as the Working Group noted, there was a lack of legislation clarifying the procedures for addressing a situation where the defendant refused to co-operate with his legal representative.[48] Thus, these were issues which the Working Group endeavoured to address in their report, and ultimately in their recommendations.

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[42] Home Office (n 38) para 9.36.
[43] Ibid para 9.37.
[44] Ibid. para 9.39.
[45] Ibid para 9.38.
[46] The provision was introduced by the Criminal Justice Act 1991 and subsequently, repealed by the Youth Justice Criminal Evidence Act 1999.
[47] Home Office (n 38) para 9.35.
[48] Ibid.

Upon recommending that a mandatory prohibition be imposed upon the defendant, the Working Group went on to propose that "where an unrepresented defendant is prohibited from personal cross-examination he should be granted legal aid, without means testing, to obtain legal representation for cross-examination purposes only".[49] It appears this recommendation was an attempt to avoid the lack of guidance which existed in relation to the 1988 Act.

Next the Working Group examined the potential procedures for addressing the problems which arise where a defendant refuses legal representation. In doing so it seems that the Working Group were, once more, attempting to improve on the previous situation in respect of child witnesses under the 1988 Act. They began their examination of the issue by assessing the importance of testing the complainant's evidence against the defendant, even where he refused legal counsel. It was stated that:

> It is highly desirable that the defendant's case should be put to the complainant; otherwise it will be difficult for a jury properly to evaluate the evidence. The defendant should not be able to prevent his case being put as the proceedings do not 'belong' to him.[50]

Consequently, the Group reasoned that it was necessary to provide the trial judge with the appropriate discretion to assess whether, in the interests of justice, the evidence against the accused required testing.[51] Needless to say, in respect of a crime of such seriousness, it would almost always be necessary in the interests of justice for cross-examination to take place. Therefore, where cross-examination is deemed necessary, the Working Group considered the various options open to the court to facilitate cross-examination where the defendant refuses legal counsel.

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[49] Home Office (n 38) para 9.43.
[50] Ibid. para 9.48.
[51] Ibid.

First the Working Group assessed whether it would be appropriate to empower the trial judge to cross-examine the complainant on behalf of the accused. Although not specifically referred to in the report, this procedural method was already in place in a number of common law jurisdictions.[52] At the time this was also the procedure invoked in relation to unrepresented defendants who refused legal representation in child witness cases (although, as previously stated, this procedure was not legislatively provided for).[53] However, it is clear that this approach was not favoured by the Working Group. It noted that it was "reluctant to suggest that a judge should step down from the role and 'enter the affray' in this way. This may not be acceptable to the defendant and it may have an adverse effect on the jury".[54]

Next the Group briefly considered whether a "Mackenzie Friend" could be used to conduct the cross-examination of the complainant.[55] Again, the Working Group concluded that such an approach would not be suitable as it might cause additional problems. It was submitted that the defendant might choose a person who could hamper his case, or someone who might be even less suitable than the accused to cross-examine the complainant. For example, the Group noted that "the defendant might choose someone...such as a convicted rapist who might subject the victim or witness to a worse ordeal that the defendant himself might have done".[56]

Consequently, the Working Group dismissed the above options in a speedy manner. Significantly more consideration was given to the possibility of appointing a 'friend of the court' or an 'amicus curiae' to conduct the cross-examination on the accused's behalf.[57] The report refers to the judgment in *R v Brett Mark Mills*[58] where this approach was rejected on the basis that the purpose of an amicus was to assist the court on points of law and not to advise the defendant.[59] In this case the Court of Appeal held that "It must be borne in mind

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[52] For example, in the Northern Territory of Australia (Sexual Offences (Evidence and Procedure) Act, s. 5).
[53] Home Office (n 38) para 9.50.
[54] Ibid.
[55] Ibid. para 9.51. Note, a 'Mackenzie Friend' may assist a lay litigant in court. To do so, such a person does not need to be legally qualified.
[56] Ibid.
[57] Ibid. 9.52.
[58] *R v Brett Mark Mills* (unreported, Court of Criminal Appeal, 21 March 1997).
[59] Home Office (n 38) para 9.52.

that an Amicus is there to assist the court...and is not counsel for the defendant. He would not take instructions from the defendant and would not cross-examine the witness on his behalf".[60] Despite the Court of Appeal's clarification in relation to this matter, it appears that often there is confusion as to the role of an amicus. As Berg notes, an amicus is an assistant to the Court itself; however, it seems the term is "often improperly used in a loose sense to refer to any lawyer who appears for an accused by way of an appointment".[61] As a result there has been "an unfortunate blurring of the distinction between the distinct roles of counsel and amicus whereby an 'expanded' role has been posited for the latter".[62]

It seems possible that the Working Group may have engaged in this "blurring" of roles. Despite the Group's acknowledgement of the *Mills* judgment it appears that they remained of the opinion that providing the court with the discretion to appoint someone to conduct the cross-examination on behalf of the accused was the most appropriate option. Unfortunately, the reasoning employed by the Working Group in reaching this recommendation lacks clarity. In a concise paragraph the Group put forward the following argument and recommendation:

> The Criminal Procedure (Insanity) Act 1964, however, provided a precedent for the court to appoint someone to put the defendant's case where he is unrepresented. Where it has been determined by a jury that someone is under a disability and is unrepresented action 4A of the 1964 Act (as inserted in 1991) empowers the court to appoint a person to put the case for the defence. The Working Group takes the view that someone who wilfully refuses legal representation either for the conduct of his whole case, or for cross-examination purposes only, has placed himself under a disability and considers that a similar procedure to that in the 1964 Act should be available in a scheme to prohibit defendant cross-examination.[63]

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[60] *R v Brett Mark Mills* (unreported, Court of Criminal Appeal, 21 March 1997) as quoted in Home Office (n 38) para 9.52.

[61] David Berg, "A Status Precarious and Perilous: The Lawyer, The Self-Represented Accused, and Section 486.3 Appointments" (2013) 34(1) *For the Defence: Criminal Lawyers' Association Newsletter* 27, 28.

[62] Ibid.

[63] Home Office (n 38) para 9.53.

The Group therefore recommended that "the court should have discretion to assess whether it is necessary in the interests of justice for the defendant's case to be put and, if so, have power to appoint a person to undertake this task".[64]

This line of reasoning may appear superficially attractive, however, it is arguably flawed from both ethical and legal perspectives. Assimilating mental disability with self-imposed legal 'disability' for the purpose of facilitating or endorsing a similar procedure to that of the 1964 Criminal Procedure (Insanity) Act is inappropriate. The two are not comparable. Moreover, other than the abstracts quoted above, nothing else is said in this regard. No further guidance is given as to the role of a person so appointed or to the duties they might owe to the court or to the accused.

iii. Legislation - Youth Justice and Criminal Evidence Act 1999

The majority of the Working Group's recommendations were subsequently included in the Youth Justice and Criminal Evidence Bill 1998, which was introduced in the House of Commons in March 1999. The Labour Secretary of State for the Home Department at the time, Jack Straw MP, commented that the bill would bring forward many of the Working Group's recommendations,[65] including the recommendation prohibiting personal cross-examination. He went on to state:

> The Bill is...designed to help the criminal justice system deliver justice for the people who are affected by crime. It has been a constant theme, across the parties, that, whatever the merits of our criminal justice system—and it has many merits—over the years, the interests of the victim and of the wider community have been undesirably marginalised. We must re-establish the system so that proper dignity and respect are given to the victim and to the community, both of whom are directly and indirectly victimised by crime.[66]

[64] Home Office (n 38) para 9.54.
[65] House of Commons Deb 15 April 1999 vol 329 col 386.
[66] Ibid. col 385.

In the House of Commons the bill received considerable support and endorsement. For example, Sir Alan James Beith, MP, of the opposing Liberal Democrats, expressed his party's support for the Bill, stating:

> Although the Bill has some points of controversy in it, its aims, purposes and philosophy are fully supported by my party and very much in line with what we have sought to do and with what we put before the electorate at the general election...Chapter II of part II is designed to protect children and complainants in certain sexual offence trials from the traumatic experience of cross-examination by defendants in person. That provision is clearly directly inspired by the controversy that followed two rape cases in which individuals were subjected to prolonged and distressing cross-examination by—as it was proved—their attackers: the Milton Brown and Ralston Edwards cases.[67]

In July 1999 the Youth Justice and Criminal Evidence Act 1999 ("1999 Act") was enacted, with s. 34 of the Act commencing in September 2000. Section 34 provides that:

> No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either—
>
> (a) in connection with that offence, or
>
> (b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.

Section 62 of the 1999 Act states that this prohibition applies to trials for rape, burglary with intent to rape, indecent assault and various other sexual offences.[68] Section 35 replaced the mandatory prohibition on the personal cross-examination of child complainants and

[67] House of Commons Deb (n 65) col 408.

[68] For further detail see Youth Justice and Criminal Evidence Act 1999, s. 62 which also refers to sexual offences in this context meaning any offence under Part 1 of the Sexual Offences Act 2003.

witnesses, previously provided for under s. 34A of the Criminal Justice Act 1988.[69] For complainants and witnesses who are not covered by the mandatory prohibitions provided for under s. 34 and s. 35 (i.e. witnesses who were not sexual offence complainants or child complainants/witnesses), s. 36 provides the trial judge with the discretion to prohibit unrepresented defendants from cross-examining witnesses. This discretion may be exercised in cases where the court is satisfied that the circumstances of the witness and the case merit a prohibition, and that it would not be contrary to the interests of justice.[70]

The introduction of a discretionary prohibition like that contained in s. 36, along with mandatory prohibitions, is admirable. While the prohibition under s. 36 does not provide the same level of protection as is provided for complainants of sexual offences under s. 34, the provision still acknowledges that personal cross-examination by the defendant may be inappropriate in cases other than those dealing with sexual offences. While a detailed examination of wider provisions introduced to protect other vulnerable witnesses against personal cross-examination would be beyond the scope of this thesis, briefly considering such provisions illustrates the manner in which consideration of the plight of specific vulnerable witnesses, such as sexual offence complainants, can lead to a wider appreciation of the potential issues faced by other witnesses.

From an Irish law perspective, the procedural aspects introduced alongside the prohibition under the 1999 Act are of particular interest. It appears that strong guidance was gleaned from these procedural provisions by the drafters of s. 35 (14C) of the Irish 2015 Bill.[71] Under the English 1999 Act, unrepresented defendants who are prohibited from personal cross-examination will be requested to appoint their own legal representatives for the purpose of cross-examination.[72] However, if a defendant fails or refuses to appoint counsel, the court is

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[69] The 1999 Act repealed s. 34A of the 1988 Act. Section 35 of the 1999 Act retained the mandatory prohibition under the old provision and also expanded upon the offences to which it applied to include offences of kidnapping, false imprisonment and abduction (see ss. (3) of the provision which implemented this expansion. Subsection (3) has also been subject to a number of amendments and additions since its enactment).

[70] When considering whether to prohibit personal cross-examination under this section the court must have regard for a number of considerations provided for under s. 36 (3). Also see *Explanatory Notes*, Youth Justice and Criminal Evidence Act 1999, s. 36.

[71] The similarities between the relevant aspects of the English and Irish provisions will be considered in more detail in Chapter 5.

[72] Section 38 (2) of 1999 Act.

required, as was recommended in the Working Group's report, to consider whether it is necessary in the interests of justice for cross-examination to take place.[73] As Temkin notes, this would seem "inevitable in serious sexual assault cases".[74] Therefore, in such situations, as per s. 38 of the 1999 Act, the court will appoint a legal representative (paid for by the State[75]), who will be responsible to the court rather than the defendant, to conduct a cross-examination. Section 38 (4) and (5) read as follows:

> (4) If the court decides that it is necessary in the interests of justice for the witness to be so cross-examined, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the accused.
>
> (5) A person so appointed shall not be responsible to the accused.

Section 38 differs in one notable respect from the recommendation advanced in the Home Office report. As outlined, the Working Group, through the employment of questionable reasoning, recommended that the trial judge be empowered to appoint a "person" for the purpose of conducting a cross-examination of the complainant. Section 38 provides for this recommendation but with one major difference; namely, the requirement that he/she be a legal representative. It is unclear what motivated the departure from the recommendation advanced in the Home Office report. It is possible that the problematic nature of the reasoning underpinning the Working Group's recommendation was recognised. However, other problems arose with the decision to provide for the appointment of a legal representative, as opposed to a "person".

As per s. 38 (4), the legal representative will cross-examine the complainant "in the interests of the accused", but as per ss. (5), the legal representative "shall not be responsible to the accused". Understandably, these sub-provisions have led to confusion and unfortunately the explanatory notes accompanying the 1999 Act do little to clarify the situation. The relevant

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[73] Section 38 (3). See Temkin (n 8) 324.
[74] Ibid.
[75] Section 40 of the 1999 (as amended by the Access to Justice Act 1999) provides for the payment of such a representative "out of central funds".

section of the *Explanatory Notes* states that if the court decides that it is in the interests of justice to test the complainant's evidence then:

> [I]t will appoint a legal representative with rights of audience in the court to cross-examine the witness in the interests of the defendant. However, a court-appointed representative will not have been instructed by the defendant and so cannot be responsible to him.[76]

Consequently, the exact role of the court-appointed legal representative remains unclear. Referring to the *Code of Conduct of the Bar of England and Wales,* the relevant paragraphs provide that a barrister has an "overriding duty to the court to act with independence in the interests of justice".[77] However, they must also "promote and protect fearlessly and by all proper and lawful means the lay client's best interests...".[78] The current *Criminal Procedure Rules* specifically refer to s. 34 and s. 38 of the 1999 Act. However, the rules simply state that where a legal representative is appointed by the court under s. 38(4), the appointment will terminate at the conclusion of the cross-examination of the witness.[79]

Therefore, even after consulting the 1999 Act, the *Explanatory Notes*, the *Code of Conduct of the Bar* and the *Criminal Procedure Rules,* a significant degree of vagueness remains with respect to the court-appointed representative's legal and professional responsibilities and duties. Unsurprisingly, this was a matter of concern for the Bar Council and consequently they requested that the Criminal Bar Association issue "brief guidance to assist with the issues which arise when the court appoints legal representatives to act on behalf of defendants".[80] These guidelines were published in 2003 and contain a number of recommendations. For

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[76] Youth Justice and Criminal Evidence Act 1999, *Explanatory Notes*, s. 38.
[77] Bar Council, *Code of Conduct of the Bar of England and Wales* (2004) para 302.
[78] Ibid. para 303(a).
[79] *Criminal Procedure Rules*, Rule 31.2. However, see *Abbas v Crown Prosecution Service* [2015] EWHC 578. In this case the legal representative had continued to assist the appellant after cross-examination had taken place. Here the Court held that "The aim of the legislation...is simply to stop the accused cross-examining the witness. It is not to prevent the person appointed to cross-examine from playing any other part in the trial."(Ibid. para 47).
[80] The Bar Council of England and Wales, *Court Appointed Legal Representative: Commentary* (November 2003), s. 1 as cited in Berg (n60) 33. Aaron Dolan, a researcher with the Criminal Bar Association of England and Wales, was contacted in an attempt to source this paper. However, their records only date back to 2007 and therefore the paper was not available.

example, it was recommended that *the Code of Conduct* be amended to allow a barrister who has been so appointed to represent the interests of the accused to whom he/she owes no duty.[81] Furthermore, the Bar Council submitted that as a consequence of s. 38 (5) ("A person so appointed shall not be responsible to the accused") the legal representative should not communicate with the accused in any substantive sense and the legal representative need not conduct the cross-examination where he/she believes that it would not be in the interests of the accused.[82]

Needless to say, the report issued by the Criminal Bar Association merely offers guidance and is not legally binding. However, it is submitted that the concerns surrounding the ambiguity of the exact role and duties of a court-appointed legal representative are possibly of a more theoretical or academic nature than a practical one. From a case law perspective, issues in this respect appear to have arisen only on a very limited number of occasions and without resulting in any particularly concerning outcomes.[83] Nonetheless, even if such problems arise more in theory than in practice, it remains an issue worthy of attention and consideration when assessing reform models. Interestingly, in this respect, a number of other common law jurisdictions have chosen not to follow the English legislation. For example, as will be outlined in Part IV of this Chapter, in Victoria (Australia) the legislation provides that the court-appointed legal representative must "act in the best interests of the accused person if the accused person does not give instructions to that legal practitioner".[84]

The decision of the English legislature to exempt court-appointed legal representatives from such a responsibility would appear to have been influenced by the law relating to advocates' liability in the UK. During the drafting of the 1999 Act, barristers in England and Wales were not legally liable for negligent representation of clients. This immunity from liability, known as 'advocates' immunity', was granted to barristers to ensure that the duty they owed to the court would not be compromised by the potential exposure to a negligence claim by an unhappy client. However, this issue had been before the English courts on a number of

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[81] The Bar Council of England and Wales, *Court Appointed Legal Representative: Commentary* (November 2003) s. 4.
[82] Berg (n 61) 33.
[83] For example, refer *Abbas v Crown Prosecution Service* (n 79).
[84] Crimes (Sexual Offences) Act 2006, s. 37CA (8) now incorporated into the Criminal Procedure Act 2009.

occasions, with the frequency of such challenges to the immunity increasing in the decades prior to the enactment of the 1999 Act. Subsequently, 'advocates' immunity' was abolished by the House of Lords in 2000.[85] Therefore, possibly in anticipation of the abolition of advocates' immunity, and given the likelihood that an unrepresented accused who has representation imposed upon him will feel particularly disgruntled, removing the court-appointed legal representative's responsibility towards the accused seems a practical decision.

In addition to this, following a theme emphasised by the Working Group throughout the report, further safeguards have been put in place by the 1999 Act in order to ensure that the defendant is not left at a disadvantage. For example, where the court-appointed representative has conducted the cross-examination it was recognised that "he may not have been able to test the evidence of the witness as fully as a representative appointed by the defendant himself".[86] Therefore, s. 39 of the 1999 Act requires the judge to consider whether it is necessary for the jury to be given a warning to ensure that the defendant is not prejudiced by the fact that the cross-examination was conducted by a court-appointed legal representative rather than a person acting as the accused's own legal representative.[87] The judge is also obliged under this section to consider warning the jury that it should not draw prejudicial inferences from the fact that the defendant has not been permitted to cross-examine personally.[88]

Dennis notes that s. 39, along with s. 38, seem sufficient to ensure compliance with Art. 6 (3) (d) of the *ECHR*, which guarantees an accused the right to examine or have examined the witnesses against him.[89] Furthermore, given that the prohibition on the right to self-representation is limited to the cross-examination of the complainant, the prohibition remains compatible with the defendant's right to self-representation. Thus, as Temkin notes,

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[85] *Arthur JS Hall* and *Co. v Simons* (*2000*) 3 AER 673. Note, in Ireland the legal situation in relation to 'advocates' immunity' remains unclear. (See Desmond Ryan and Raymond Ryan, "A Bar to Recovery? Barristers, Public Policy, and Immunity from Suit" (2005) 10 *Bar Review* 209). This issue will be discussed further in Chapter 5.

[86] Temkin (n 8) 324.

[87] Section 39 (1)(b).

[88] Section 39 (1)(a).

[89] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 631.

the conscientiously conceived provisions of the 1999 Act, which were drafted to provide the utmost scope to accommodate the defendant, also "ensure that the complainant will not be deterred from acting as a witness out of fear of a personal cross-examination by the accused".[90]

To date it appears that these propositions remain true. From a compatibility perspective, no issues seem to have arisen and no challenges or appeals have been taken. As highlighted above, the Working Party, along with the legislature,[91] were aware of the importance of ensuring compatibility with international law. Hence, the well-balanced provisions of the act, coupled with the limited nature of the prohibition placed on the defendant's right to self-representation, seems to have effectively allayed concerns of an abuse of the defendant's human rights and due process rights. Similarly, in terms of the provision's ability to reassure complainants and prevent deterrence, it can be assumed that these goals have been achieved. Given that the relevant sections of the 1999 Act introduced a blanket ban on personal cross-examination by the defendant, no attempts have been made to conduct such a cross-examination since the commencement of these provisions. Thus, it seems that Temkin's proposition as outlined above was correct. Since the fear of facing personal cross-examination by the defendant no longer exists, it would appear that complainants are no longer deterred from acting as witnesses as a result of this fear.

The legislation implemented in England and Wales offers guidance in relation to the potential reform of the issue of personal cross-examination of complainants in sexual offence trials in Ireland. Indeed, the relevant provisions of the 1999 Act have much to recommend them, a proposition which is supported by the fact that many of the procedural aspects accompanying the prohibition found favour with the drafter of s. 35 (14C) of the Irish 2015 Bill. The manner in which the prohibition accommodates the rights of the defendant, and the various safeguards which are attached to it, ensure its compatibility with domestic and international human rights instruments by protecting the defendant's right to a fair trial and his right to self-representation. Furthermore, while accommodating the accused, the provisions simultaneously provide sufficient protection to the complainant against personal cross-

[90] Temkin (n 8) 324.
[91] For example, see House of Commons (n 65) col 3911.

examination. This removes the possibility of such cross-examination having an adverse effect on attrition rates, reporting rates and the quality of the complainant's evidence.

The implementation of similar reform, which offers protection to all sexual offence complainants in Ireland, is worthy of close consideration. However, in order to be in a position to provide a fully informed discussion about potential reform in this jurisdiction, it is first necessary to consider the approach adopted in a number of other common law jurisdictions. Such an examination will also assist in identifying the strengths and possible weaknesses of the English reform model.

II. Scotland

There are a number of compelling reasons why Scotland is worthy of consideration in the comparative section of the thesis. As a neighbouring jurisdiction to Ireland which is similar in population, it has the potential to offer an insight into the frequency of such cases. Furthermore, the contrasting approaches of Scotland and England and Wales in relation to the prohibition of personal cross-examination provides for an interesting comparison, offering an opportunity to consider alternative methods of reform in Ireland.

Known as Scots law, the legal system which operates in Scotland is a hybrid system, containing elements of both civil and common law systems.[1] As a result, while certain aspects of Scots law mirror that of other common law jurisdictions, other elements are more at odds. In this respect, features of the criminal trial in Scotland, particularly those relating to procedural aspects of the law, differ significantly from criminal trials which take place under the common law system. For example, "disclosure of statements and evidence prior to trial is much more far-reaching in England and Wales than in Scotland, where there is great reliance on oral advocacy".[2] Such differences present an alternative dimension with which to examine the method of reform chosen in Scotland and provide a different perspective when evaluating the approach adopted.

i. Background

As outlined in the previous section, from the mid-1990s onwards, the media coverage of the plight of rape victims forced to face personal cross-examination at the hands of their offenders caused public outcry and concern throughout England and Wales. Unsurprisingly, the ripple effect of this outcry was felt in the neighbouring jurisdiction of Scotland, where the attention of the public and the government was drawn to the potential problems which

[1] For an overview of how Scots law developed and the structure of the legal system, see Christina Ashton, "Structure of the Legal System" in Karen Fullerton (ed), *Understanding Scots Law: An Introduction to Scots Law, Procedure and Legal Skills* (2nd edn, Thomson Reuters 2007) 27.
[2] Scottish Executive, *Sexual Offences (Procedure and Evidence) (Scotland) Bill: Policy Memorandum* (SP Bill 31, June 2001) 8.

such an issue could present in their own jurisdiction. The evidence suggested that such cases were uncommon in Scotland.[3]

However, similar to the situation in England, it emerged that while the number of such cases was low, when they did occur their profile was high.[4] An example of such a high profile case is that of John Anderson in 2000. Anderson was accused of raping a thirteen-year-old schoolgirl and her forty-two-year-old mother whom he had previously befriended. The accused, whom it appears fell out with his legal team shortly before the trial began,[5] conducted his own defence, questioning both complainants personally for more than three hours each.[6] The thirteen-year-old complainant claimed that the defendant had plied her with alcohol and LSD drugs before raping her.[7] It was alleged that this occurred on two occasions between July 1999 and January 2000.[8] The attack on the second complainant, the mother of the schoolgirl, was also said to have taken place in January 2000.[9] The jury at the High Court in Perth, returning majority verdicts, found Anderson not guilty of raping the mother and returned a verdict of not proven[10] in respect of the teenager.[11] After the trial, Anderson defended his actions, stating that he did not feel remorse for cross-examining the

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[3] Scottish Government, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007) para 1.26.

[4] Ibid.

[5] "Rape Case Man Walks Free", *BBC News* (8 June 2000). http://news.bbc.co.uk/2/hi/uk_news/scotland/782750.stm accessed on 25 August 2014

[6] Auslan Cramb and Nick Britten, "Rape Suspect Cleared after Questioning Girl", *The Telegraph* (London, 9 June 2000).

[7] "Schoolgirl Quizzed By Man Accused of Raping her", *The Herald Scotland* (Edinburgh, 3 June 2000).

[8] Ibid.

[9] Ibid.

[10] This is a verdict available to juries in Scotland.

[11] Auslan Cramb and Nick Britten, "Rape Suspect Cleared after Questioning Girl" *The Telegraph* (London 09 June 2000). After the trial it emerged that the accused had faced another two rape charges fifteen months previously (in this case, the Crown subsequently withdrew the indictment due to insufficient evidence). During that the trial Anderson had also conducted his own defence. However, for some reason, that trial received very little media attention. Later the trial judge, who coincidently presided over both of Anderson's rape trials, stated "Anderson conducted his own defence in the first trial because I refused him an adjournment to obtain legal representation". ("Rape Case Reform Plans Attacked" *BBC News* (19 February 2001). http://news.bbc.co.uk/2/hi/uk_news/scotland/1178281.stm accessed on 25 August 2014. Unfortunately, no further explanation appears to be available in this respect. Also see ("Rape Case Man Walks Free" (8 June 2000) http://news.bbc.co.uk/2/hi/uk_news/scotland/782750.stm accessed on 25 August 2014).

two complainants because he knew them well. He stated 'It was not as if they were strangers to me, and I didn't go into any details of anything sexual or anything like that'.[12]

The fallout from the Anderson trial was significant and widespread. The father of the teenage complainant highlighted the ordeal suffered by his daughter, stating:

> My daughter has tried to commit suicide just a week ago and was brought to court from hospital...She has told the truth from the start and I just don't know what effect this is going to have on her in the long term...I want to get the law changed so nobody else can get to question their victim like that.[13]

Victim advocacy groups also came out in strong support for a change to the law following the trial. Spokesperson for Victim Support Scotland, Alison Paterson, stated:

> Going to court for the victim of a sexual crime is stressful enough having to relive the ordeal...Imagine having to relive that ordeal at the hands of the perpetrator - albeit the alleged perpetrator at that stage...No woman, no child should have to go through that ordeal face to face...It really means an already bad experience can become disastrous.[14]

Therefore, given the concerns to which this case gave rise and the calls for reform which it generated, the then Labour Scottish Executive was spurred into taking action. This action initially came with the commissioning of a pre-legislative consultation document entitled *Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials*.[15]

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[12] "Rape Case Man Walks Free" (n 5). After the trial Anderson claimed that he had been denied access to counsel. However, no further information was provided by the defendant in this regard and there does not appear to have been subsequent legal proceedings in this respect.
[13] Ibid.
[14] Ibid.
[15] Scottish Executive (Justice Department), *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials – A Pre-Legislative Consultation Document* (2000). The consultation document was researched by the Justice Department. However, when expressing views and recommendation throughout the document, they refer to the "Executive" as opposed to the "Department".

ii. Path to Reform

Published in November 2000, this consultation document sought to address two specific aspects of the law of evidence in rape and sexual offence trials: "Cross-examination of a complainer by the accused personally; The admissibility of evidence about the complainer's sexual history or character". [16] Hence, one of the main proposals put forward in this consultation document:

> [A]ddressed a concern by the Scottish Executive that there was a trend developing in Scotland, similar to that in England, of an accused person dispensing with their legal representation and seeking to conduct the cross-examination of the complainer in a manner that was particularly intimidating and upsetting".[17]

The document represents a comprehensive examination of the various issues and problems surrounding this aspect of the law and considers a wide range of measures capable of addressing the situation. In this respect, when compared with its counterpart in England (the Home Office Working Group report)[18] the Scottish consultation document offers a considerably more comprehensive examination of the available options for reform and the advantages and disadvantages of each approach.

The Executive began by addressing a number of criticisms of the current law. Attention was drawn to the possibility of the accused humiliating and traumatising the complainant through personal cross-examination and the potential for such cases to increase the risk of future copycat cases occurring.[19] In making these criticisms the Executive acknowledged that there could be instances where the accused had legitimate reasons for representing himself. For example, it was submitted that the accused might not trust lawyers and might

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[16] Scottish Executive, *Redressing the Balance* (n 15) 7. The term 'complainer' as opposed to 'complainant' is employed throughout the consultation document. This term was used because at the time it was the terminology used in the relevant Scottish legislation. (ibid. 8).
[17] Scottish Government (n 3) para 1.24.
[18] Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (London, June 1998).
[19] Scottish Executive, *Redressing the Balance* (n 15) 13.

have felt let down by the legal system in the past.[20] Equally, a defendant may wish to "assert his freedom and his right to autonomy and choice".[21] However, the Executive came to the conclusion that:

> The question to be answered is whether the cost, in terms of the potential restriction of the freedom of action of some accused persons, is sufficiently outweighed by the benefit which is sought to be achieved, i.e. the avoidance of the risk of these freedoms being abused, resulting in humiliation and distress to witnesses. In the Executive's view the cost is outweighed by the benefit.[22]

Therefore, having come to the conclusion that prohibiting personal cross-examination was a desirable reform, the Executive went on to consider the various options available for implementing such a prohibition.

Ultimately, four options for reform of the law were presented by the Executive in the consultation document:

1. Requiring the accused to be represented for cross-examination of the complainer.
2. The court to have discretion to appoint legal representative for the accused in particular circumstances.
3. Requiring the accused to be legally represented throughout the trial.
4. Questioning of the complainer to be done by the Judge.[23]

Given that the first option was adopted in England and Wales, considerable attention was directed at this potential reform method. However, much of this attention was focused on

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[20] Scottish Executive, *Redressing the Balance* (n 15) 14.
[21] Ibid. 15.
[22] Ibid. 15.
[23] Ibid. 17 – 21.

how such an approach would be unsuitable in Scotland, due to the significant differences between the Scots law system and the common law system. As explained, in a Scottish criminal trial:

> [E]ach side is responsible for the preparation of its own case, taking its own statements from witnesses, which are not disclosed to the other side. Evidence then emerges during the course of the trial; there are no opening statements setting out the facts which the prosecution will seek to prove and the defences which the accused's lawyer will put forward.[24]

This is in marked contrast with the process in common law jurisdictions where witnesses give attested statements prior to the trial and there is generally much fuller disclosure between both sides prior to the commencement of court proceedings.[25] As a result, in England it is "possible for a lawyer, who is 'parachuted in' part way through the trial, to prepare relatively quickly by reading the attested witness statements and other items of evidence which have previously been disclosed".[26] However, for a similar method to be effectively employed in Scotland, the defence counsel would have to be present and involved in the trial from the outset. Consequently, the Executive noted that "it would generally be more difficult for a lawyer coming into a case part way through the trial to prepare, in a Scottish case, than would seem to be the case in England".[27] That said, the Executive did acknowledge that while this method did present a number of significant problems, these issues were not insurmountable.[28] However, from the tone of the document, and given the obvious issues which such an approach would present in the context of Scots law, it was apparent that the Executive was anxious to find an alternative method of reform if possible.

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[24] Scottish Executive, *Redressing the Balance* (n 15) 17.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid. 18. For example, it was suggested that having a lawyer shadowing the case from the beginning was one possible solution.

In relation to the second option (granting the court a discretion to appoint a legal representative for the accused in particular circumstances), it was noted that this approach had a number of benefits, the main one being that it bestowed upon the trial judge the flexibility to decide whether the appointment of a legal representative was appropriate in a case by case basis.[29] However, it appears the disadvantages of this approach outweighed the advantages. The view was expressed that such an approach could lead to inconsistencies and potential inefficiencies if the trial judge failed to exercise his/her discretion in appropriate cases.[30] Furthermore, such an approach would not have the desired effect of allaying the complainant's fears of being personally cross-examined, as it could not be guaranteed prior to the commencement of the trial that such a situation would not occur.[31] Similarly, the Executive found that the fourth option of allowing the trial judge to put the questions to the complainant also presented more disadvantages than advantages. Allowing the judge to act as a "filter" or "mouthpiece" for the accused could lessen potential disruptions caused by imposing representation upon a defendant.[32] However, this appeared a weak justification in the face of a myriad of disadvantages, including the potential that such a process would appear artificial, the possibility that the approach could undermine the judge's position as an impartial and independent referee and the fear that allowing the trial judge to take on such a role could lead to greater opportunities for appeals.[33]

In terms of the third option (requiring the accused to be legally represented throughout the trial), it is clear from the outset that the Executive favoured this approach. The substantial benefits presented by this method were outlined:

> It would ensure that the case for the defence can be properly prepared and consistently and competently presented...It would mean that the trial looked "normal", especially to the jury...and would ensure that there was seen to be an even contest between the Crown and the accused...It would mean that no particular

[29] Scottish Executive, *Redressing the Balance* (n15) 19.
[30] Ibid.
[31] Ibid.
[32] Ibid. 21.
[33] Ibid.

witness was singled out as being different from any other in terms of preference or disadvantage.[34]

While the Executive acknowledged that a lawyer in such a situation might face difficulty in preparing a case where the accused refused to cooperate with him/her, the argument was made that this difficulty also applied to options 1 and 2.[35] The only substantial difficulty which the Executive foresaw in respect of this approach related to its compatibility with the *European Convention on Human Rights*, which posed a significant difficulty. It was noted that while the right to self-representation could be legitimately restricted,[36] this restriction "must only be to the minimum extent necessary".[37] The Executive acknowledged that such an approach could be viewed as extending beyond this "minimum extent necessary" and thus conceded that it was less likely to be compatible with the *ECHR* than option 1 or 2.[38] Nonetheless, despite the potential compatibility issue, the Executive went on to opine that while none of the options were ideal, they were "inclined towards Option 1 or 3, with the preferred option in policy terms being Option 3".[39]

The consultation document provides comprehensive discussion on a number of procedural issues. A conscious effort was made to address the wide range of procedural intricacies which could emerge. The Executive unambiguously stated that regardless of the restriction placed upon the accused's right to self-representation, whether it be for the full extent of the trial or just for the cross-examination of the complainant, the defendant should have "exactly the same right to legal assistance of his own choosing as he does at the moment, if he is willing to exercise that choice. It is only where he fails to do so that the court may make the choice for him".[40] The Executive agreed that where an accused refused to appoint a legal representative, the court should have the power to do so.[41]

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[34] Scottish Executive, *Redressing the Balance* (n 15) 20.
[35] Ibid.
[36] Ibid. Again, reference was made to the case of *Croissant v Germany* (1993) 16 EHRR 135.
[37] Ibid.
[38] Ibid.
[39] Ibid. 21.
[40] Ibid. 25.
[41] Ibid.

In terms of the responsibility of the court-appointed legal representative, the Executive recognised the potential difficulties faced by a lawyer placed in such a situation, particularly where the accused refused to cooperate or communicate with the legal representative. Reference was made to the corresponding English legislation, where, as was highlighted in the previous section, a legal representative appointed by the court has no responsibility towards the accused. While the Executive did not explicitly recommend that such an approach be adopted in Scotland, it did state that "clearly any responsibility the lawyer has to the accused must be severely limited in cases where the accused has not co-operated with the lawyer or has even tried to obstruct or mislead him".[42]

Thus, having outlined in considerable detail the various reform options available, the potential mechanisms for implementing these reforms and their own preferences in this regard, the consultation document was published in November 2000 with a request for feedback and submissions. In total, 67 submissions and responses were received from a variety of sources, including women's groups, rape crisis support organisations and victim support groups.[43]

iii. Legislation - Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

On the back of this pre-legislative consultation document, and taking into consideration the various submissions they received in response to the document, the Sexual Offences (Procedure and Evidence) (Scotland) Bill was drafted and introduced in parliament on the 28 June 2001, along with a *Policy Memorandum*.[44] For the most part the Bill represented the options favoured by the Executive in the consultation document. As noted, a total of 67 submissions were received in response to the call for views on the various proposals advanced in the consultation document.[45] In relation to the reform option endorsed in the consultation document and contained in the Bill (which required the accused to be legally

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[42] Scottish Executive, *Redressing the Balance* (n 15) 27.
[43] Scottish Executive, *Policy Memorandum* (n 1) 10.
[44] Ibid.
[45] Ibid. 10.

represented throughout the trial), the Executive stated that this approach "attracted the support of half of those who responded, and gained substantially more backing than any of the other alternatives".[46] Furthermore, it was also noted by the Executive that the various procedural mechanisms proposed in the consultation document (which subsequently appeared in the Bill) attracted little comment, and therefore presumably little criticism, in the submissions received.[47]

Prior to the parliamentary Stage 1 Debate on the general principles of the Bill[48], the Justice 2 Committee[49] considered the merits of the Bill and subsequently published a report. The Committee, which received submissions from a wide variety of individuals, interest groups and victim advocacy organisations, concluded that:

> [T]he Executive has struck the right balance between the protection of the complainer and the rights of the accused to a fair trial. The committee therefore recommends that the Parliament agrees to the general principles of the Sexual Offences (Procedure and Evidence) (Scotland) Bill.[50]

In parliament the Bill was met with similar approval. The Deputy Minister for Justice, Iain Grey, opened the Stage 1 Debate, stating:

> This is a short but important bill, whereby the Executive fulfils a commitment to improve significantly the way victims of sexual crimes are treated in our criminal justice system, while still ensuring that those accused of such crimes receive a fair

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[46] Scottish Executive, *Policy Memorandum* (n 1) 11.
[47] Ibid.
[48] Which took place on 21 November 2001.
[49] The Justice 2 Committee (whose membership consisted of a cross-party selection of MPs), a successor of the Justice and Home Affairs Committee was established by the Scottish Executive "[t]o consider and report on matters relating to the administration of civil and criminal justice, the reform of the civil and criminal law and such other matters as fall within the responsibility of the Minister for Justice. (http://www.scottish.parliament.uk/parliamentarybusiness/PreviousCommittees/15210.aspx accessed on 25 August 2014).
[50] Justice 2 Committee, *Thirteenth Report 2001: Stage 1 Report on the Sexual Offences (Procedure and Evidence (Scotland) Bill* (SP Paper 446, 2001) para 81.

> trial. Those have been our twin objectives throughout the process leading up to today's debate.[51]

Support for the Bill was also voiced by members of the opposition parties. For example, Roseanna Cunningham, MSP, of the Scottish National Party stated that her party "supports and welcomes the general intent of the Bill, which is—of course—aimed at protecting the complainer and other witnesses from humiliating and distressing questioning, principally in rape trials".[52] However, concern was also expressed about the compatibility of the Bill with *ECHR* requirements. Cunningham went on to state:

> Article 6.3(c) of the ECHR provides a minimum right to an accused *"to defend himself in person or through legal assistance of his own choosing"*. We already know that that is not an absolute right. There are areas, however, in which the legislation might—or more likely will—face challenges. First, if we do what we intend to do with the bill, accused persons will be completely barred from conducting their defence in person. Because we have not restricted the measure to cross-examination of complainers, I am slightly concerned that it might end up being construed as a greater than necessary interference with the right that is set out in article 6.3(c) of the ECHR.[53]

Indeed, this concern was also raised by the Justice 2 Committee. The members of the Committee were aware of the fact that there was clearly a balancing act to be struck between "the rights of the accused to defend themselves (under article 6) and the complainer's rights to respect for private and family life (under article 8) and to protection from inhuman and degrading treatment (under article 3)".[54] However, having taken into consideration the views of a number of influential contributors, it appears the Committee were satisfied that the Bill remained within the obligations provided for by the *ECHR*. In

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[51] Scottish Parliamentary Deb 21 November 2001 (Iain Grey).
[52] Ibid. (Roseanna Cunningham).
[53] Ibid.
[54] Justice 2 Committee (n 50) para 24.

particular, the Committee noted the views of the Scottish Human Rights Centre and that of Professor Christopher Gane,[55] noting:

> SHRC agreed that the Executive's proposals could be considered ECHR compliant, although the more limited restriction would be even more clearly consistent with ECHR principles. Professor Gane's view was that "if there were a personal right to question witnesses, the European Court of Human Rights has made it very clear that any such right should be balanced against the interests of witnesses and the interests of the administration of justice more generally.[56]

Similarly, during parliamentary debates the Deputy Minister for Justice, while acknowledging that there had been debate and concern surrounding the compatibility of the Bill,[57] reassured parliament, noting:

> The body of case law that the European Court of Human Rights has built up suggests that a rule that requires an accused to be legally represented is usually regarded as legitimate. It is clear that limitations on the rights conferred by article 6.3(c) may be justified by circumstances that make them appropriate in the interests of justice. Such circumstances may arise when the accused's rights under article 6 must be balanced against the rights of others under the convention.[58]

Ultimately, it appears that the compatibility issue was not considered sufficiently contentious or irreconcilable with *ECHR* obligations to warrant amendment. In November 2002 the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 came into effect,

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[55] Professor Gane acted as a consultant to the Scottish Executive in relation to the government's various human rights obligations.
[56] Justice 2 Committee (n 50) para 24.
[57] For example, the trial judge presiding over the Anderson case was particularly critical of such a reform. (Auslan Cramb, 'Plan to Stop Rape Victim Questioning "Misguided"' *The Telegraph* (London, 20 February 2001).
[58] Scottish Parliamentary Debates (n 51).

with s. 1 inserting a new section, s. 288C, into the Criminal Procedure (Scotland) Act 1995 ("1995 Act").[59] Section 1 (1) of the 2002 Act provides as follows:

> (1)An accused charged with a sexual offence to which this section applies is prohibited from conducting his defence in person at the trial.[60]

By adopting the approach favoured in the pre-legislative document of a prohibition on self-representation for the duration of the trial, the drafters avoided the necessity to specify the category of witnesses to whom such a category should apply. As was the case in England and Wales (and in a number of the other jurisdictions which will be explored in the subsequent sections) once a prohibition on the personal cross-examination of sexual offence complainants was decided upon, debate emerged as to whether the protection should be extended to include a wider scope of witnesses. However, given that the Scottish legislature chose to introduce a blanket prohibition on self-representation in relation to sexual offence trials generally, which witnesses beyond sexual offence complainants, if any, should be protected by the prohibition became a moot point.

Section 2 of the 2002 Act also created a new section, s. 288D, which was inserted into the 1995 Act. This section allows the court to appoint a solicitor to represent the accused where he refuses to appoint one himself; or dismisses his solicitor; or where the solicitor withdraws. Furthermore, ss. (4) of the provision provides that the appointed solicitor has a duty to "ascertain and act upon the instructions of the accused".[61] Where the accused refuses to give instructions or where the instructions given are inadequate, the solicitor must then "act in the best interests of the accused".[62] As highlighted above, in the consultation document the Executive referred to the approach adopted in England and noted that there the court-appointed legal representative owed no responsibility to the accused. However, as stated in the *Policy Memorandum*, when submissions were received

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[59] Since 2002 there have been minor, but not substantive, amendments to s. 288C and s. 288D. Section 288C was amended to clarify that the accused shall also be prohibited from conducting his defence in person in relation to any preliminary hearings or in relation to a victim statement proof (a procedure specific to Scottish law).

[60] Subsection (2) outlines the sexual offences to which s. 288C (1) applies.

[61] Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, s. 2(4)(a).

[62] Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, s. 2(4)(b).

in relation to this issue "most respondents from the legal profession felt this was excessive and unnecessary".[63] Hence, this feedback clearly influenced the drafters of the legislation.[64]

In relation to the compatibility concerns, despite the potential difficulties raised prior to the enactment of the 2002 Act, there have been few issues since then. In 2007 the Scottish Government published a report entitled, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*.[65] This report represented the culmination of over a year's research conducted by the government into the operation of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The research focused primarily on s. 7 – s. 10 of the 2002 Act which related to the restriction of sexual history and sexual character evidence and to the disclosure of the accused's previous convictions. The neglect of s. 288C may be reflective of the fact that there appeared to be little to report on in respect to the prohibition on personal representation by the accused. Indeed, in the twelve-part report, a mere three paragraphs are dedicated to this issue.[66] Furthermore, these paragraphs offer little or no information on the subsequent impact of the provision but instead reiterate the initial justification for the legislation. However, a year after the report was published, a challenge concerning s. 288C and s. 288D of the 1995 Act came before the High Court of Justiciary.[67]

In *McCarthy (John Joseph) v HM Advocate*[68] the appellant was "convicted of having sexual intercourse with two girls under the age of 16, and of supplying class A drugs".[69] The appellant had three different legal representatives during the course of his trial, all of whom withdrew from acting as his representative. Due to the prohibition on personal

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[63] Scottish Executive, *Policy Memorandum* (n 2) 11.
[64] Note, since the 2002 Act the prohibition against personal cross-examination by the accused has been extended to other witnesses. Section 288E prohibits an accused from conducting their own defence in certain types of offences involving a child witness under the age of 12, while s. 288F provides the court with a discretion to prohibit a person from conducting their own defence in any case other than a sexual offence case where the court is satisfied that this is in the interests of the vulnerable witness and not prejudicial to the fairness of the trial. Both these section were inserted into the Evidence Act 1995 by the Vulnerable Witnesses (Scotland) Act 2004.
[65] Scottish Government (n 3).
[66] Ibid. para 1.24 – 1.26.
[67] The High Court of Justiciary is Scotland's superior criminal court.
[68] *McCarthy (John Joseph) v HM Advocate* [2008] HCJAC 56.
[69] Ibid. para 1039.

representation contained under s. 288C of the 1995 Act, the court appointed a solicitor to represent the accused as per s. 288D. The solicitor then subsequently appointed two solicitor advocates. McCarthy appealed his conviction arguing that s. 288C and s. 288D were incompatible with the *European Convention on Human Rights*. In relation to s. 288C, the Scottish Court dealt with the issue in a very brief and concise manner:

> The rights which the provisions are said to contravene are those in art 6(3)(c) to "defend himself in person or through legal assistance of his own choosing". The first question is whether a provision which prohibits an accused from defending himself in person is a contravention of art 6(3)(c). The answer to that is in the negative. This was made clear by the European Court of Human Rights in Croissant v Germany (supra) when examining art 140 of the German Code of Criminal Procedure which provided that: "(1) The assistance of a defence counsel is necessary where: 1. the trial at first instance is conducted in the Court of Appeal or the Regional Court ..." This requirement, effectively to be represented by a lawyer, which the court recognised found parallels in the legislation of other contracting states, "cannot ... be deemed incompatible with the Convention" (pp 150–151, para 27). That would seem to be an end of this issue.[70]

Thus, the Court held that "In short, if a system allows a person to be represented by a lawyer, then art 6(3)(c) will be satisfied".[71] In respect to s. 288D, it was argued that the provision contravened the accused's person right to have legal assistance of their own choosing. However, similar to the above response, the Court dispensed with this argument in a decisive and direct manner:

> The second issue is whether the statutory provisions contravene the right of an accused person to have legal assistance of his own choosing. The answer to that is also firmly in the negative. The provisions do not in any way impede an accused person from selecting his legal representatives from those available and willing to act for him. It is only where the accused person has not done so, and the court is

[70] *McCarthy (John Joseph) v HM Advocate* (n 68) 1046.
[71] Ibid.

"not satisfied that the accused intends to engage a solicitor" that it can appoint one.[72]

Hence, the High Court of Justiciary, in rejecting the appellant's incompatibility argument, firmly endorsed the legitimacy of the prohibition on personal representation from an *ECHR* perspective in Scotland.[73]

The finding of compatibility with the *ECHR* of the prohibition on self-representation in the above case is undoubtedly of significance when evaluating the Scottish method of reform. Arguably, due to the hybrid system of law in place in Scotland, an examination of the approach employed by the Scottish legislature towards tackling this issue is not as directly applicable to the main purpose of this thesis as an examination of the other common law jurisdictions. However, it would be short-sighted not to consider the various benefits which the Scottish approach can offer. As highlighted above, imposing representation for the entirety of the trial can ensure that delays are averted and can avoid distinguishing between witnesses in sexual offence trials. Furthermore, the depth of research which was undertaken in the jurisdiction and the various reports and papers available on the topic are in themselves a valuable resource. As a result, knowledge can be gained from an analysis of this method of reform, which can offer additional insight when considering a potential reform of personal cross-examination in rape and sexual offence trials in Ireland.

[72] *McCarthy (John Joseph) v HM Advocate* (n 68) 1047.
[73] From my research it appears that this case was not appealed to the ECtHR.

III. New South Wales

New South Wales ("NSW") is the largest populated jurisdiction in Australia (a federal, multi-jurisdictional country consisting of six major states and two main territories). While a federal state, the majority of Australian criminal law is under the legislative jurisdictions of the individual states/territories. In the last decade or so, a number of the jurisdictions have tackled the issue of self-represented defendants in rape and sexual offence trials through the introduction of prohibitions on personal cross-examination.[1]

New South Wales was the first penal colony of Australia to establish a legal system which operated separately from the British Empire.[2] As a result it is perhaps not surprising that NSW is home to one of the more advanced legal and political systems within Australia. It has a long-established Law Reform Commission, an active Judicial Commission and an accessible Parliamentary Library Research Service. Furthermore it is the only Australian jurisdiction in which a standalone law reform report was undertaken specifically examining the issue of personal cross-examination by the accused in sexual offence trials. Consequently, conducting comparative research of the approach adopted in this jurisdiction towards the issue of personal cross-examination in rape trials offers a number of benefits.

i. Background

Similar to the other jurisdictions under consideration, in NSW there existed only anecdotal evidence that personal cross-examination had occurred in rape and sexual offence trials. There was no statistical evidence on the frequency of this occurrence, however, the anecdotal information available indicated that the situation only arose in a very small number of cases.[3] Nonetheless, despite the small number of such cases, they often

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[1] A number of jurisdictions in Australia, including the Northern Territory, Western Australia, Queensland, Victoria and New South Wales have introduced prohibitions on personal cross-examination by the accused in sexual offence trials.

[2] See Alex C Castles, *An Australian Legal History* (Sweet & Maxwell 1982).

[3] See New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* (101 – 2003) 4 and New South Wales Legislative Assembly Deb 2 September 2003, 2957. During the Attorney General's, Bob Debus, introduction of the bill to the Legislative Assembly reference was made to a submission from the DPP who cited "one example of an unrepresented accused cross-examining his daughter, the complainant, for approximately 10 days" (Ibid.).

attracted wide-spread media attention and provoked extensive public outcry. This was particularly so in relation to the *Skaf* trial.[4] Bilal Skaf was the leader and orchestrator of a series of vicious gang rapes in Sydney in 2000. In total four complainants were raped and assaulted by a number of offenders on three separate occasions.[5] During the course of their trial, Skaf and his co-defendant, his brother Mohammad, dismissed their counsel in order to self-represent.[6] The personal cross-examination of the complainants which took place caused public outcry, followed by calls for legislative intervention.[7] In response the Attorney General referred the matter to the Law Reform Commission ("LRC"). However, the outrage caused by the *Skaf* case was not unique and three years after the *Skaf* trial similar outcry was caused when it emerged that the defendants in another series of gang rape trials were attempting to represent themselves and in doing so, personally cross-examine the complainants. The *'K Brothers''* cases involved four Pakistani brothers and a Nepalese national who were found guilty of the 'Ashfield Gang Rapes'. These rapes and sexual assaults were committed over a six month period in 2002 and involved up to six complainants.[8] Given the number of defendants, the range of offences and the number of complainants involved, there was a series of back-to-back trials in relation to the 'Ashfield Gang Rapes'. However, in one trial in particular involving two of the four brothers it came to light, prior to the commencement of the trial in mid-September 2003, that the defendants intended to represent themselves.[9] This resulted in heightened and intense debate among media and political circles about whether such a cross-examination should be permitted.

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[4] *R v Bilal Skaf, R v Mohammad Skaf*, (unreported, DC, 2002) (Finnane J.). Decision not available. See LICA Crime Library (NSW) "Gang Rape Case No 2 - R v Bilal Skaf, R v Mohammed Skaf"<http://guides.sl.nsw.gov.au/content.php?pid=242811&sid=2147007> accessed 24 August 2015.

[5] For a detailed account of the attacks see the trial judge's original sentencing of Bilal Skaf. (DC 15 August 2002) (Finnane J.). (Australian Broadcasting Corporation, "Sentencing of Bilal Skaf" <http://www.abc.net.au/4corners/stories/s675775.htm > accessed 24 August 2015).

[6] Both Skaf brothers were found guilty of rape and a number of other sexual assaults. However, there was a number of retrials and appeals, resulting in a reduction of the sentences of both defendants. See LICA Crime Library (n 4) and Emma Alberici, "Rape Victim May Not Have to Give Evidence in Skaf Retrial" (TV Programme Transcript) Australian Broadcasting Corporation, 4 February 2005 <http://www.abc.net.au/7.30/content/2005/s1297095.htm> accessed 24 August 2015.

[7] See David Caruso and Timothy Cross, "The Case in Australia for Further Reform to the Cross-Examination and Court Management of Child Witnesses" (2012) 16(4) *International Journal of Evidence and Proof* 364, 373.

[8] Geesche Jacobsen "Brothers' Violent Gang Rape Revealed" *The Sydney Morning Herald* (Sydney, 21 July 2005).

[9] See Caruso and Cross (n 7) 374 and Geesche Jacobsen "Brothers' Violent Gang Rape Revealed" *The Sydney Morning Herald* (Sydney 21 July 2005).

This debate ultimately led to legislative reform, which some argued was hastily introduced in order to avoid the dilemma presented by the then pending *'K Brothers''* trial. [10]

ii. Path to Reform

In March 2002, in response to the *Skaf* case, the Attorney General of NSW, Bob Debus, referred the issue of personal cross-examination of the complainant by the defendant in rape and sexual offence trials to the NSW Law Reform Commission. The report, entitled "Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials", was published in June 2003, three months prior to the start date of the *'K Brothers'* case. The Report is unique in that it deals almost exclusively with the issue of personal cross-examination by the defendant in sexual offence trials,[11] presumably because of the pending *'K Brothers'* case and the anxiousness of the Government of the day to address this issue in a speedy manner.

The report began by acknowledging that the number of cases in which a self-represented accused personally cross-examined a complainant was small, yet not insignificant. The Commission was of the view that regardless of the small number of such cases, the issue remained worthy of attention, stating that "Not only is it important that every victim should be protected from further victimisation, but also that any risk of further victimisation be diminished in order to increase the readiness of victims to report offences".[12] In making such a statement the LRC specifically referred to the distinct nature of sexual offence trials and identified a number of factors which make such cases particularly distressing for

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[10] Ultimately, the legislation prohibiting personal cross-examination was enacted before cross-examination of the complainants in the *'K Brothers'* trials took place. In this respect, during the second reading of the bill, it was criticised by opposition parties for its hurried nature. Specifically, referring to the Bill, Andrew Tink (MP, Shadow Attorney General) of the Australian Liberal Party (in opposition) noted "It has been introduced with great speed. The reason for that, and it is a matter of public record, is that the legislation has been brought into force to be applied in a trial that is to commence in approximately two weeks. I am disappointed about the timing of this bill in the sense that when the Leader of the Opposition and I became aware of the procedural issue in this case, we pleaded with the Attorney General to recall Parliament and introduce this bill at a time far more distant from the trial." (NSW Legislative Assembly Deb (n 3) 2959). Also see Nick O'Malley, "Swift Change to the Law on Quizzing Rape Victims" *The Sydney Morning Herald* (Sydney, 16 July 2003).

[11] In the other jurisdictions under consideration in this comparative Chapter, where Law Reform reports are available on this issue, only sections are dedicated to the topic. By contrast, in NSW the entire report was centred on the issue of personal cross-examination by the defendant of the complainant in sexual offence trials.

[12] NSW Law Reform Commission (n 3) 5.

complainants, including the nature of the crime, the role played by consent with its focus on the complainant's credibility and the likelihood that the accused is known to the complainant in a personal capacity.[13] The Commission contended that these aspects often resulted in sexual offence trials, and in particular cross-examination, proving particularly distressing and traumatising for complainants.[14]

Upon examining the current law and balancing the accused's right to test the evidence before him against the need to minimise the trauma to which the witnesses may be exposed, the LRC decided that a prohibition on personal cross-examination was desirable.[15] In reaching this conclusion the Commission referred to such cross-examination as "inherently offensive to the proper administration of justice" and emphasised the substantial public interest which exists "in ensuring that witnesses are not subjected to procedures that might be oppressive or humiliating".[16] They also referred to the potential of giving the accused an "inappropriate advantage by allowing such cross-examination to take place", stating that "the most likely motive for refusing representation is the desire to obtain an advantage by virtue of the intense character of direct personal confrontation".[17] Such factors lead the Commission to conclude that:

> It is the view of the Commission that the benefit to complainants and to the community in general outweighs any perceived detriment to accused persons. This view essentially stems from the conclusion that, if cross-examination can be provided by a legal practitioner, the potential or perceived advantage of personal confrontation sought by an accused who chose to be unrepresented is neither a necessary nor a desirable element of the administration of justice.[18]

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[13] NSW Law Reform Commission (n 3) 10.
[14] As a consequence, the LRC recommended that the prohibition advanced in the report should apply to sexual offence complainants only. While accepting that there may well be legitimate reasons for applying a similar prohibition in relation to other cases (such as domestic violence), the Commission concluded that any consideration of an extension of the prohibition beyond sexual offence complainants would necessitate a much broader analysis, which would be beyond the scope of the report. (Ibid. 59).
[15] Ibid. 45.
[16] Ibid.
[17] Ibid. 47.
[18] Ibid. 47 – 48.

The Commission then sought to address the nature and procedures which should accompany such a prohibition. The LRC rejected the possibility of allowing the court to retain a degree of discretion in respect to imposing a prohibition on personal cross-examination. The advantages of this option were listed by the LRC and they included accommodating a complainant who wished to be cross-examined by the defendant[19], offering flexibility[20] and effectively creating a presumption against cross-examination in person.[21] Nonetheless, the Commission submitted that a discretionary prohibition would also create an "unreasonable level of uncertainty".[22] The effectiveness of a discretionary prohibition is dependent on the particular judge and as a result, this approach could lead to inconsistencies and uncertainty for complainants. By contrast, a mandatory prohibition limited to cross-examination of the complainant would circumvent many of these issues. Such a prohibition is applied uniformly and indiscriminately, it ensures standardised protection for complainants and it avoids wasting court time and resources.[23] Consequently, a mandatory prohibition on personal cross-examination by the defendant of the complainant was endorsed by the LRC.

Having established that such a prohibition was desirable, the Commission acknowledged that a prohibition on personal cross-examination was only acceptable if an alternative means of effectively testing the complainant's evidence was provided.[24] The LRC proposed that appointing a legal representative for this purpose was the most suitable approach. Prior to advancing such a proposal, the Commission considered alternative approaches, namely whether the trial judge or a neutral intermediary should put the questions to the complainant in place of the accused. The manner in which this issue is addressed in the report is of particular interest in relation to the analysis of the final approach adopted by the legislature.

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[19] NSW Law Reform Commission (n 3) 52.
[20] New South Wales Parliamentary Library Research Service, *Briefing Paper: Cross-Examination and Sexual Offences Complainants* (BP 18/03 – 2003) 29.
[21] New South Wales Law Reform Commission (n 3) 53.
[22] Ibid. 54.
[23] Ibid. 53.
[24] Ibid. 70.

In a number of Australian jurisdictions the trial judge was employed to put the questions to the complainant.[25] However, the Commission immediately emphasised that submissions to the LRC were "overwhelmingly of the view that the questions should not be asked by the trial judge".[26] It was reasoned that were the trial judge to take on such a role it would jeopardise his/her neutrality and could potentially result in inappropriateness.[27] Indeed, this view was held by law reform agencies in a number of other jurisdictions, including England and Wales. [28]

Similarly, the Commission also found that a neutral intermediary ("NI") could not fulfil the role to the same level of satisfaction as that of a legal representative. It was proposed that a NI could take on a role similar to that which already existed in relation to child witnesses under the Evidence (Children) Act 1997 (NSW). Under this legislation a child witness is cross-examined by a person appointed by the court. The intermediary puts to the child the questions posed by the accused.[29] The NI acts as a "mere mouthpiece"[30] and must not offer the accused legal or other advice.[31] While the majority of submissions to the LRC expressed dissatisfaction with this option, there were a few notable supporters, namely the Director of Public Prosecutions and the Department for Women[32]. In his submission to the Commission, the DPP noted that:

> It is not necessary that the third person be a legal practitioner. The appointed person should not have any influence on cross-examination. In addition, a friend or relative of the accused should not be enlisted as a third party, as there may have existed a domestic or known relationship between the victim or the vulnerable witness and the relative or friend and this may add to any intimidation or humiliation that the complainant may feel. Suggestions for a third party could

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[25] This is the approach adopted in the Northern Territory.
[26] NSW Law Reform Commission (n 3) 67.
[27] Ibid.
[28] See Chapter 4, Part I.
[29] The Evidence (Children) Act 1997 has since been repealed by the Criminal Procedure Amendment (Vulnerable Persons) Act 2007.
[30] NSW Law Reform Commission (n 3) 69.
[31] Evidence (Children) Act 1997 (NSW) s. 28 (3A) (since repealed).
[32] The Department of Women, now "Women NSW", is a branch of the NSW Department of Health.

> include the judicial officer's assistant or associate, a court officer or a person employed by the Attorney General's Department.[33]

However, despite the standing of the proponents of this option, the Commission chose to reject this approach. It was submitted that the necessary degree of flexibility that is required when cross-examining a witness is lost through such an approach and replaced with an ineffective and stilted process. The Commission reasoned that:

> Effective cross-examination requires responsive questioning, the line of questioning being moulded to the witness' previous answer. Having to rely on a prepared list of questions means that the necessary flexibility is lost and the accused's right to confront the prosecution witness compromised.[34]

Furthermore, it was also noted that appointing a NI could render the intended purpose of enacting a prohibition against personal cross-examination redundant. Given that an intermediary would act as a mere mouthpiece, there is nothing to prevent the accused from posing humiliating and intimidating questions to the complainant through the NI. Hence, such an approach would do little to distance the complainant from the accused or to minimise the trauma which she could be exposed to.[35]

Therefore, after reviewing the various submissions and balancing the advantages and disadvantages of the options available, the Commission concluded that the most desirable course of action was to appoint a legal practitioner to cross-examine the complainant. Similar to the argument outlined by the Home Office in England and Wales, it was deduced that a legal practitioner was best placed to conduct such a cross-examination.[36] The LRC stated that:

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[33] NSW Legislative Assembly Deb (n 3) 2958.
[34] NSW Law Reform Commission (n 3) 69.
[35] Ibid. 70.
[36] Ibid. 66.

> A legal practitioner brings the necessary skills, knowledge and experience to enable the complainant's evidence to be tested effectively. He or she is also bound by the rules of professional probity... Attacks on the complainant's credibility will be professional.[37]

The Commission added that the accused should be advised at the earliest opportunity that representation will be necessary for the cross-examination of the complainant to take place. Consequently, he should be given the opportunity to appoint counsel for that purpose.[38]

The Commission then considered the procedure to be adopted when the accused fails or refuses to appoint a legal representative. Drawing on guidance from other jurisdictions, the LRC recommended the court appoint a legal representative for that purpose. While the Commission acknowledged that the role of the court-appointed counsel should not involve providing general legal advice or conducting the defence's case[39], they concluded that the court-appointed legal representative should have the "same authority as if he or she were engaged by the accused". [40] Their recommendation stated that:

> [t]he legal representative has a duty to ascertain, advise concerning and act upon the accused instructions. Where the accused gives no instructions, or where the instructions given are inadequate or perverse, the duty of the legal representative is to act in the best interests of the accused in the same way as if there were a conventional retainer.[41]

Interestingly, this recommendation stands at odds with the approach adopted in England and Wales, where the legal representative owes a duty to the court as opposed to the accused.[42] While the Commission recognised the benefits of such an option, namely that it

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[37] NSW Law Reform Commission (n 3) 70-71.
[38] Ibid. 72.
[39] Ibid. 73.
[40] Ibid. 78.
[41] Ibid.
[42] For further detail see Chapter 4, Part I.

protects the immunity of the court-appointed legal representative[43] , they ultimately rejected the English approach. In doing so, they acknowledged the shortcomings of their recommended approach, particularly where the client-practitioner relationship was non-consensual. For example, where an accused person refuses to engage with the legal representative, the representative might be faced with difficulties in terms of fulfilling the normal duties owed to a client.[44] However, despite the potential disadvantages, the LRC concluded that "the terms of engagement should be, as far as possible, those governing the ordinary lawyer-client relationship, thereby preserving (as far as possible) the practitioner's legal, professional and ethical obligations to both the client and the court".[45] While there is merit to the principles underpinning this approach, it is submitted that imposing such obligations on a lawyer faced with an uncooperative accused is potentially unduly onerous. Expecting a legal representative to fulfil such duties while attempting to deal with an uncooperative, or even hostile, client seems impractical. However, referring back to the point outlined in Part I of this Chapter, it is also possible that concern in this regard is of a more academic nature, as in reality it seems issues have rarely arisen in this respect.

In June 2003 the LRC published their report. A mere three months later, on 3 September, the NWS Government enacted the Criminal Procedure Amendment (Sexual Offences Evidence) Act 2003. The Act gave effect to some of the recommendations proposed by the Commission. However, there were also a number of notable deviations from them, which will now be considered.

iii. Legislation - Criminal Procedure Amendment (Sexual Offences Evidence) Act 2003

On 3 September 2003 s. 3 of the Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003[46] was commenced, inserting a new section, s. 294A, in to the Criminal Procedure

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[43] NSW Law Reform Commission (n 3) 77.
[44] Ibid.
[45] Ibid.
[46] This act has since been repealed, however, the amendment still stands. It appears that there is a somewhat confusing process in NSW where once amending legislation is given effect, the amending act is repealed while the amendment itself remains enacted. As was explained to me by the Faculty Liaison Law Librarian at the University of Sydney, Frances Stark, this is a practice designed as a pre-emptive 'tidying up' of legislation. I would like to extend my appreciation and gratitude to Frances for her patience and help in explaining this practice to me.

Act 1986.[47] The section, entitled "Arrangements for complainant in sexual offence proceedings giving evidence when accused person is unrepresented", prohibited a defendant from personally cross-examining a complainant. The provision reads as follows:

> Section 294A
>
> (1) This section applies to sexual offence proceedings during which the accused person is not represented by counsel.
>
> (2) The complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be examined instead by a person appointed by the court.
>
> (3) The person appointed by the court is to ask the complainant only the questions that the accused person requests that person to put to the complainant.
>
> (4) Any such person, when acting in the course of an appointment under this section, must not independently give the accused person legal or other advice.
>
> (5) The court does not have a discretion to decline to appoint a person under this section...

While aspects of the Commission's recommendations were adopted, others appear to have been largely ignored. In particular, the procedural approach recommended by the LRC was not adopted. The legislation does not extend an invitation to the accused to appoint a legal representative for the purpose of cross-examination and instead, s. 294A (2) requires that a person (not necessarily a lawyer) automatically appointed by the court asks only the questions posed by the defendant.[48]

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[47] Subsequently amended by the Criminal Procedure Further Amendment (Evidence) Act 2005, Criminal Procedure Amendment (Sexual and Other Offences) Act 2006, Statute Law (Miscellaneous Provisions) Act (No 2) 2006 and Criminal Procedure Amendment (Vulnerable Persons) Act 2007. Most of these amendments were minor, with any substantial amendments outlined below. However, for the sake of thoroughness, note ss. (1) now states: "This section applies to proceedings in respect of a prescribed sexual offence during which the accused person is not represented by an Australian legal practitioner."
Also, see s. 294D which makes s. 294A applicable to other "sexual offences witnesses" in such trials (witnesses against whom it is alleged the accused has committed a sexual offence, but who are not complainants in the case).

[48] In rejecting the Commission's recommendation regarding the legal representative, they also rejected the recommendation that the representative owes a duty to the accused. Given that the court-appointed person did not necessarily have to be a legal representative, imposing a practitioner-client duty was not possible.

The reasoning behind the decision not to extend an invitation to the accused to appoint counsel for the purpose of cross-examining the complainant (prior to the court appointing a person upon the accused's failure or refusal to do so) is unclear. After all, an accused may be more than willing to appoint a legal representative for the purpose of cross-examination of the complainant. If so willing, it is unlikely that issues in relation to cooperation will emerge between the legal representative and his client given that the accused will have appointed the representative himself. Consequently, there would be no need for a court-appointed person to conduct the cross-examination and the court need only intervene to appoint a person when an accused fails or refuses to do so.

Moreover, it is submitted that failing to provide such an opportunity to the defendant unnecessarily deprives him of a degree of autonomy. While an invitation to appoint counsel for the purpose of cross-examining the complainant may in fact be hollow in theory (given that upon refusal or failure the court will appoint a person), such an invitation demonstrates respect for the autonomy of the accused and for his ability to maintain control over the proceedings of his trial. Nonetheless, the drafters of the 2003 Act decided against including such an invitation. It is possible that its exclusion was informed by the decision not to adopt the LRC's recommendation to use a court-appointed legal representative to conduct the cross-examination where necessary. Perhaps it was opined that a legal representative, whether appointed by the accused or the court, was not a suitable approach given the issues which can arise in relation to duties and responsibilities and consequently, the legislation does not offer the opportunity to the accused to do so. However, this reasoning appears flawed, particularly given that many of the problems which could potentially emerge in relation to the duties of a legal representative appointed by a court are avoided where the legal representative is willingly engaged by the accused for the purpose of cross-examining the complainant. It is also possible that the decision was motivated by financial concerns as a legal representative appointed by the accused would presumably be provided for by legal aid.[49] Nonetheless, given that the actual motivations to exclude an invitation to the accused to appoint a legal representative are unknown, the above is merely conjecture.

[49] See Paul Lynch's comments during the second reading of the bill (quoted below). (NSW Legislative Assembly Deb (n 3) 2964).

Furthermore, the decision to reject the LRC's recommendation that a court-appointed legal representative should conduct the cross-examination (as opposed to a neutral intermediary) seems strange, particularly in light of the strong criticisms which were directed at the neutral intermediary approach. This decision was heavily criticised by opposition parties at the time, leading one opposition member to state:

> The only thing that the bill has in common with the Law Reform Commission report is that it agrees the law should be changed to prevent people accused of, for example, rape from cross-examining the alleged victim.[50]

One possible justification for adopting this approach is that it mirrored pre-existing legislation. As explained in the NSW Parliamentary Library Research paper, the act "essentially extends the current requirements in New South Wales concerning a child witness in any criminal proceedings, or in civil proceedings involving a personal assault offence, to include adult sexual offence complainants".[51] Introduced by the Evidence (Children) Act 1997[52], a number of aspects of the prohibition under the 1997 Act against the personal cross-examination of children were reflected in s. 294A. Thus, the simplicity of merely expanding existing legislation may have appealed to the legislature. Another possible motivation was voiced by Paul Lynch MP during the second reading of the bill:

> The...point on which I seek clarification relates to recommendations by the Law Reform Commission that a legal representative, rather than a non legally qualified person, is to be appointed solely for the purpose of cross-examination. If the recommendations of the Law Reform Commission were to be adopted, I assume that would be a legally aided solicitor or advocate. I seek an assurance that the reason for not adopting the recommendation of the Law Reform Commission is not simply that that measure is cheaper than the provision of legal aid representation.[53]

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[50] NSW Legislative Assembly Deb (n 3) 2959 (Andrew Tink, MP).
[51] Library Research Service (n 20) 30.
[52] The Evidence (Children) Act 1997 has since been repealed by the Criminal Procedure Amendment (Vulnerable Persons) Act 2007. The provision is now provided for under s. 306ZL of the Criminal Procedure Act 1986 and also includes witnesses with a cognitive impairment. However, the prohibition under this provision is qualified by an 'interests of justice' exception.
[53] NSW Legislative Assembly Deb (n 3) 2964.

It is also noteworthy that despite the LRC's strong recommendation of the legal representative option, the approach ultimately provided for in the 2003 Act did in fact have a number of influential proponents, including the Director of Public Prosecutions, the Department of Women and the Violence Against Women Specialist Unit. In supporting the DPP's submission on the matter (as quoted previously) and noting the implementation of similar provisions in the Northern Territory and Western Australia, the Attorney General, Mr Bob Debus[54], stated:

> The role of the court-appointed intermediary is simply to repeat the questions sought to be put by the accused to the complainant. The intermediary is not to give the accused any legal or other advice. No specific benefit would therefore be achieved by requiring the intermediary to be a legal practitioner.[55]

Therefore, this comment seems to suggest the motivations behind the rejection of the Commission's legal representative recommendation. The Attorney General went on to note that the intermediary would be appointed by the court, and therefore the accused person could not insist on a particular individual being appointed.[56] Furthermore, it was noted that in appointing a suitable intermediary "the judge may even decide to appoint themselves to ask the questions".[57]

The almost passing manner in which this comment was made by the Attorney General seems rather ill-considered, particularly when the LRC strongly recommended against this potential approach. The NSW Parliamentary Library Research Service also outlined the many disadvantages to such an approach.[58] Furthermore, when this comment was made during the second reading of the bill, it proved an issue of particular contention for various members of the opposition parties. For example, Mr Andrew Tink, MP of the Liberal Party of Australia and Shadow Attorney General, noted:

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[54] Of the Australian Labour Party.
[55] NSW Legislative Assembly Deb (n 3) 2957.
[56] Ibid.
[57] Ibid. 2958.
[58] Library Research Service (n 20) 28.

> Some people believe that the trial judge should be able to do the questioning himself. Indeed, some believe that this legislation would allow the trial judge to do so. I make it clear for whoever might be interested in this debate that I reject that interpretation. In jurisdictions in which a judge has the power to ask questions on behalf of an unrepresented accused, the legislation makes specific reference to a judge carrying out that role...If this Parliament wishes to sanction a judge asking questions on behalf of an accused it must spell it out in words of one syllable. This bill does not contain that instruction to judges and they will not have that power.[59]

Nonetheless, this criticism did not appear to deter the legislature and no clarifications were provided in this regard.

Apart from the criticism voiced by opposition parties, the procedural method of reform chosen by the legislature to replace personal cross-examination has also been questioned by a number of other sources. The Victoria Law Reform Commission quoted extensively from the NSW Commission's report regarding the advantages of appointing a legal representative for the purpose of cross-examination before noting the NSW government's rejection of this recommendation.[60] The Victorian LRC went on to indicate that their recommendations would not be in line with NSW legislation in this regard.[61] Furthermore, the approach has been questioned by members of the NSW judiciary. Shortly after the enactment of the provision, Sully J. of the Supreme Court queried the functionality of the provision. In particular he "criticised the fact that the court-appointed person was not required to be a lawyer...and suggested there were difficulties in working out how the projected cross-examination should actually be conducted".[62] However, an amendment to the provision in 2006 would seem to indicate that in practice the person appointed by the court to conduct the cross-examination of the complainant is in fact a legal representative.

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[59] NSW Legislative Assembly Deb (n 3) 2961 - 2962.
[60] Victorian Law Reform Commission, *Sexual Offences: Final Report* (LRC 78 - 2004) 243.
[61] Ibid.
[62] As quoted in ibid. (See *R v MRK, R v MMK* (unreported NSW Supreme Court, Sully J. 12 September 2003) For a critical analysis of s 294A, see the paper by the Honourable Justice Sully, "Section 294A Criminal Procedure Act — Unrepresented Accused in Sexual Offence Proceedings" (Judicial Commission of New South Wales, Twilight Seminar, Sydney, 8 March 2006).

The Criminal Procedure Amendment (Sexual and Other Offences) Act 2006 amended s. 294A by inserting ss. (9), which reads as follows:

> (9) Anything done or omitted to be done by a person who:
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> (a) is appointed under this section, and
>
> (b) is an Australian lawyer,
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> when acting in the course of the appointment or otherwise in accordance with this section does not, if the thing was done or omitted to be done in good faith, subject the person personally to any action, liability, claim or demand.

This subsection would appear to indicate that the use of legal representatives as persons appointed for the purpose of conducting the cross-examination of the complainant is a common occurrence, so much so that the legislature thought it necessary to amend the provision to include a subsection limiting the liability of a lawyer placed in such a situation.[63] Consequently, it appears that while the provision does not explicitly provide for the appointment of a legal representative, in reality it seems that the appointment of a lawyer to conduct such cross-examinations is the common practice.

In addition to the above, the constitutionality of the provision has been confirmed. The Supreme Court of New South Wales, in declaring s. 294A constitutional, held that:

> The use by [the self-represented accused] of the opportunity to confront and to challenge his alleged victim personally and directly risks diverting the integrity of the judicial process, insofar as it is likely to intimidate the complainant to the point where he or she is unable to give a coherent and rational account of what truthfully occurred. The threat of its occurrence may also discourage a victim of sexual assault from giving evidence or even from making an initial complaint.[64]

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[63] This provision seems odd given that Australia is one of the few common law jurisdictions to retain Advocates' Immunity. However, under the NSW Legal Profession Act the Bar Council may conduct investigations into complaints against counsel. Therefore, it is possible that it is as a consequence of this that the subsection was inserted.

[64] *R v MSK and MAK* (2004) 61 NSWLR 204 at para 69.

Special leave to appeal to the High Court of Australia was subsequently refused.[65] Thus, the fact that the prohibition remains unchanged and has been found constitutionally valid potentially speaks to its workability despite doubts voiced by some commentators. Evidence of this is apparent in relation to the case of the *"K brothers"* as discussed earlier. Caruso and Cross note that in 2003 the two brothers dismissed counsel during the course of their trial in an attempt to personally cross examine the complainants.[66] However, "they were thwarted by the 2003 legislation".[67]

Nonetheless, the workability of a provision does not necessarily equate with its suitability, particularly when assessing its appropriateness as a potential model for reform in Ireland. Therefore, it is worthwhile to contrast the method of reform adopted in NSW with that in the other Australian jurisdiction under review, Victoria.

[65] R v *MSK and MAK* [2005] HCA Trans 22. The High Court of Australia is the superior court of the country and the court of final appeal.
[66] Caruso and Cross (n 7) 375.
[67] Ibid.

IV. Victoria

Victoria is the second Australian jurisdiction to be examined in this comparative chapter. As noted, a number of Australian jurisdictions have tackled the issue of personal cross-examination by the defendant of the complainant in sexual offence trials. Therefore, while the prohibition implemented is not unique, it is particularly worthy of consideration due to aspects of the procedural provisions accommodating the prohibition.

i. Background

The enactment of a Victorian legislative prohibition on personal cross-examination in sexual offence trials appears to have been encouraged by the reform implemented in NSW. Similar to the situation in NSW, there was very little evidence in Victoria of personal cross-examination occurring in sexual offence trials. In fact, when the issue was first addressed by the Victorian Law Reform Commission ("VLRC") in their Discussion Paper in 2001, the Commission stated "as far as we are aware, a person accused of a sexual offence has not cross-examined the complainant in Victoria...".[1] However, in the course of their research, evidence of two cases involving personal cross-examination emerged.[2] Nonetheless, while it remained clear that such cases were quite rare, the Commission, and ultimately the legislature, were of the view that pre-emptive reform was needed to ensure this situation did not occur in the future.

ii. Path to Reform

While the issue was addressed by the NSW Law Reform Commission in a separate report specifically examining self-represented defendants in sexual offence trials, in Victoria the matter was addressed as part of a larger assessment of sexual offence law and procedure. Two reports by the Victorian Law Reform Commission refer to the issue, the *Sexual Offences: Interim Report*, published in May 2003 and the *Sexual Offences: Final Report*, published in August 2004.

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[1] Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Discussion Paper* (LRC October 2001) 129.

[2] Victorian Law Reform Commission, *Sexual Offences: Final Report* (LRC 78 - 2004) 233. See *R v Cremmen* (unreported, County Court of Victoria, 1987) and *R v Kerbatieh* (unreported, County Court of Victoria, 17 February 2003) (Duggan J.).

In their Final Report the VLRC drew substantially from the NSW Commission's report when referring to the various justifications for prohibiting personal cross-examination by the accused. The Victorian Commission directly cited and endorsed the three main justifications advanced in the NSW report, namely: the public interest in ensuring that witnesses are protected from unnecessary trauma; the manner in which certain questions put to the complainant by the accused can be inherently offensive to the administration of justice; and the unfair and inappropriate advantage such cross-examination can confer on an accused.[3] Having endorsed these justifications, the Commission came to the view that they offered "compelling reasons for prohibiting the accused from personally cross-examining the complainant and certain other protected witnesses, provided there is an alternative method by which the evidence against the accused can be tested".[4]

Once prohibition was decided upon, the Victorian Commission began to consider what procedural replacement was most appropriate in order to ensure that the accused's right to test the evidence against him was protected. Like the NSW Commission, the VLRC excluded the appointment of the trial judge or a neutral intermediary as appropriate options, referring to the same disadvantages outlined in the NSW report.[5] The VLRC concluded that the most suitable option available was to invite the accused to appoint a lawyer for the purpose of cross-examining the complainant.[6] Where the accused refuses or fails to do so, similar to the approach endorsed by the NSW LRC, the Victorian Commission recommended that a legal representative be appointed by the court to conduct the cross-examination. However, interestingly, despite the extensive similarities between the reports, the NSW and Victorian Law Reform Commissions differed initially with regard to their views on the precise nature of the court-appointed lawyer's role.

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[3] Victorian LRC, *Final Report* (n 2) 239-240.

[4] Ibid. 240. The VLRC defined "protected witness" at Recommendation 101 of the Final Report as a child under 18, a person with impaired mental functioning and a person declared by the court to be a protected witness. However, given that this is beyond the scope of this thesis, it will not be considered.

[5] Ibid. 240 – 241.

[6] Ibid. 245.

In the Interim Report the Commission outlined the advantages of limiting the court-appointed legal representative's role to that of a "friend of the court". The Commission noted that:

> It is intended that the lawyer should act as a friend of the court in putting the questions, rather than the accused's person legal representative...The lawyer's legal and professional responsibilities would be owed solely to the court, and not to the accused as well... If the accused wishes the lawyer to put questions which were inadmissible in the opinion of the lawyer, the lawyer's obligation would be to seek a ruling from the court. This would mean that the lawyer would not be placed in a situation where a conflict arose between the instructions from the client as to the questions which should be asked, and the lawyer's professional and ethical judgement that the question should not be asked.[7]

Conversely, as highlighted in the previous section, the NSW Law Reform Commission was of the opinion that the court-appointed legal representative should act in the best interests of the accused. However, despite the Victorian Commission's initial support for the above proposition, by the time the Final Report was published a year later a different approach was advocated.

In their Final Report the Commission referred to a number of criticisms received in relation to the lawyer's role as a friend of the court, as was recommended in the Interim Report. For example, the Criminal Bar Association "raised a number of questions about the role that a lawyer acting as a friend of the court would play, when putting questions on behalf of the accused" and questioned how the continuity and flow of cross-examination could be sustained under such circumstances.[8] Similarly, a number of members of the judiciary also criticised the approach, indicating that it would not sufficiently address the "gravity of the denial" inflicted upon the accused by refusing him the opportunity to personally cross-examine the complainant.[9] Such criticisms led the Commission to re-examine their position in this respect. In doing so, it once again relied upon the LRC's report in NSW.

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[7] Victorian Law Reform Commission, *Sexual Offences: Interim Report* (LRC IR May 2003) 230.
[8] Victorian LRC, *Final Report* (n 2) 237.
[9] Ibid. 238.

The Commission referred to the recommendation advanced in NSW which proposed that "the role of the court appointed lawyer should extend beyond simply putting the questions to the complainant on behalf of the accused" and instead should involve "the same obligations to act on the instructions of the accused as if [the lawyer] were engaged by the accused".[10] The Victorian Commission attempted to balance the competing advantages and disadvantages of both approaches, noting the various justifications which were advanced in the Interim Report in favour of the "friend of the court" approach (as outlined above). In particular, the VLRC noted the lack of clear parameters in relation to the role of a court appointed lawyer who owes a duty to the accused. In such situations it may prove problematic for a lawyer appointed solely for the purpose of cross-examining the complainant to decide "where their responsibility to the accused begins and ends".[11] However, ultimately the Commission ended up agreeing with the findings of the NSW LRC and concluded that:

> Although the competing arguments about the role of the court-appointed lawyer are difficult to resolve, the Commission now takes the view that barristers appointed by the court for the purpose of cross-examining the complainant should owe the same legal obligations and ethical duties to the accused as if the accused had engaged them.[12]

The Commission went on to note that lawyers in such a position "should not be obliged to advise the accused about aspects of the trial outside the context of cross-examination of the complainant".[13] However, the Commission did not offer any further guidance in this respect, despite the fact that previously they had acknowledged that drawing such distinctions could prove difficult in reality.[14]

iii. Legislation - Crimes (Sexual Offences) Act 2006

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[10] Victorian LRC, *Final Report* (n 2) 242.
[11] Ibid. 244.
[12] Ibid.
[13] Ibid.
[14] Ibid.

The Victorian government did not appear deterred by the potentially problematic parameters of the lawyer's role under the proposed recommendation. Therefore, unlike their counterparts in New South Wales, the government of Victoria adopted the vast majority of recommendations made by the VLRC regarding unrepresented defendants.

During the second reading of the Crimes (Sexual Offences) Bill in November 2005 the then Attorney-General, Rob Hulls MP, of the Australian Labour Party, stated that the bill "represented one component of a broader policy initiative to make the criminal justice system respond to sexual assault in a fairer way and in a way that does not re-traumatise victims".[15] Another member of government, Benedict Hardman, stated:

> The bill aims to provide a better balance of fairness between accused persons and sexual assault victims. The current practice of allowing self-represented accused to further intimidate victims of alleged abuse by personally cross-examining them will be prohibited. This is a positive move which will ensure that power relationships cannot be used to further intimidate victims.[16]

The bill was also welcomed by opposition parties, including the National and Liberal Parties. The then leader of the National Party, Peter Ryan MP, described the bill as:

> [A] better step along the way of making certain that those people, who are amongst the most vulnerable in our community, are afforded appropriate protections under our system of justice. It will strike that important balance between on the one hand ensuring that that happens and on the other hand ensuring that there is a fair trial for the person who is charged...We support the bill.[17]

In August 2006 s. 35 of the Crimes (Sexual Offences) Act 2006 inserted a new section, s. 37CA, in to the Evidence Act 1958. Entitled "Special rules for cross-examination of protected witnesses", the relevant subsections of the provision reads as follows:

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[15]Victorian Legislative Assembly Deb 16 November 2005, 2183-2184.
[16] Victorian Legislative Assembly Deb 7 February 2006, 35.
[17] Ibid. 29.

37CA

(1) This section applies to a legal proceeding that relates (wholly or partly) to a charge for a sexual offence.

(4) A protected witness must not be personally cross-examined by the accused person.

Subsection (2) of the provision defines "protected witnesses" as a complainant, a family member of the complainant, a family member of the defendant, or any other witness in a sexual offence trial whom the court declares to be a protected witness. Subsection (3) states that "the court may at any time declare a witness to be a protected witness". Thus, while explicitly protecting sexual offence complainants, the provision is also potentially applicable to a wider range of witnesses in sexual offence trials.[18]

Subsection (5) obliges the court to inform the accused and the jury that he will not be permitted to personally cross-examine a protected witness and invite the accused to obtain legal representation for that purpose. Subsection (6) and (8) then provide:

(6) If the accused does not obtain legal representation for the cross-examination of a protected witness (after being given a reasonable opportunity to do so), the court must order Victoria Legal Aid to provide legal representation for the accused person for that purpose.

(8) A legal practitioner provided by Victoria Legal Aid must act in the best interests of the accused person if the accused person does not give any instructions to that legal practitioner.

The Victorian legislature's decision to reject the approach adopted in England and Wales in relation to the nature of the role of the legal practitioner, as highlighted in s. 37CA (8), is noteworthy and of particular interest when assessing an appropriate method of reform for

[18] Moreover, in 2008 the section was extended to apply to an offence of family violence as provided for under the Family Violence Protection Act 2008. Thus, while the provision provides explicit protection for sexual offence complainants, it is also applicable to other witnesses in sexual offence trials who the court declare to be "protected witnesses". However, as previously stated, for the purpose of this thesis attention will be focused on the protection provided for sexual offence complainants.

Ireland. It is important to note that the VLRC attached a proviso when making the recommendation that the legal practitioner's duty should be to act in the best interests of the accused. At the time the recommendation was issued, barristers in Victoria were not legally liable for negligent representation of clients in court. However, this rule was being challenged in the Australian High Court.[19] The Commission was aware that if the legal profession were to lose immunity from negligent representation, imposing a duty on its members to act in the best interests of the accused where the accused refused to give instructions might be too burdensome. Therefore, the Commission concluded:

> The court-appointed lawyer should also be bound by the normal ethical obligations that lawyers owe to the court. If barristers become legally liable for negligent representation of clients in court, it may be necessary to re-examine the recommended approach.[20]

Prior to the enactment of the relevant legislation in 2006, the Australian High Court returned their decision in relation to the above challenge, with a 6-1 majority preserving the immunity against negligence liability.[21] Thus, under such circumstances it appears that the Victorian legislature was satisfied to proceed with the VLRC's recommendation. However, given that there is only vague judicial guidance in relation to the position of advocates' immunity in Ireland[22], this is a matter which will be of particular importance when considering whether a similar method of reform would be appropriate in this jurisdiction.

Finally, ss. (10) provides for a number of safeguards, in the form of warnings to the jury, against drawing any adverse inferences from the fact that the accused has been prohibited from personally cross-examining the complainant. The court must inform the jury that it is "routine practice" for an unrepresented accused to obtain or be provided with a legal representative for the purpose of conducting a cross-examination of a protected witness. The

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[19] Victorian LRC, *Final Report* (n 2) 244. As stated previously, the Australian High Court is the highest court in Australia and it is the court of final appeal from all superior state/territory courts.
[20] Ibid. 244.
[21] See *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1. Also, for a critical analysis of this decision see Scott Lang, "Deconstructing D'Orta-Ekenaike: A Critique of Justifications Provided for Advocates' Immunity by the High Court" (2011) 4(1) *Queensland Law Student Review* 48.
[22] For further detail see Desmond Ryan and Raymond Ryan 'A Bar to Recovery? Barristers, Public Policy, and Immunity from Suit' (2005) 10 *Bar Review* 209.

jury must be warned not to draw any adverse inferences as a result of this and that the evidence given under cross-examination must not be given greater or lesser weight as a consequence.

In 2009 the above provision was repealed by the Criminal Procedure Amendment (Consequential and Transitional Provision) Act 2009 and incorporated into the Criminal Procedure Act 2009 ("2009"). Section 37CA of the Evidence Act 1958 is now provided for in Division 3 of Part 8.2 of the Criminal Procedure Act 2009, s. 353 – s. 358. As explained in the Legislative Guide to the 2009 Act, the purpose of the Act was to consolidate criminal procedural law previously contained in four separate acts, including the Evidence Act 1958.[23] In relation to Division 3, the Legislative Guide goes on to explain that "No substantive changes have been made to this section [section 37CA], except to divide what was previously one section into separate sections and to simplify the language, where necessary".[24] Therefore, the provision, as it was enacted in 2006, remains effectively unchanged.

Thus, while aspects of the reform implemented in Victoria mirror that in NSW and England, other elements of the reform model chosen differ. In particular, the approach adopted in relation to the role of the court-appointed lawyer offers a different perspective from that of England, Scotland and NSW.

[23] Department of Justice, *Criminal Procedure Act 2009: Legislative Guide* (February 2010) 14.
[24] Ibid. 315.

V. New Zealand

The legal history of New Zealand is closely linked to that of Australia and consequently, to the British Empire. Originally part of New South Wales, in 1841 New Zealand became a separate colony under British control. Similar to its neighbouring Australian jurisdictions, New Zealand's legal system developed in line with the British common law system.

This section will begin by considering the development of reform of this issue in New Zealand. The examination of this issue in both the Law Commission's Preliminary Paper[1] and Report[2] will then be analysed. The various options and procedural methods of reform recommended will be examined. These recommendations will then be compared to the legislation which was enacted, before considering their reception and evaluating the implementation of this reform.

i. Background

Like the other jurisdictions considered, in New Zealand personal cross-examination by the defendant in sexual offence cases was a rare occurrence.[3] Nonetheless, despite the small number of cases, when they did occur they generated a high level of public concern. One of the first high profile cases in this respect was that of *R v M*.[4] The accused was a middle aged business man who had previously been in a relationship with the complainant. By arrangement the complainant had been staying in a flat owned by the accused which was not occupied by him. The accused arrived at the flat one morning where he raped the complainant, an attack which lasted more than an hour. The defendant was initially found guilty of rape; however, a retrial was granted on the basis that the trial judge had erred by excluding cross-examination in relation to the complainant's previous sexual history with

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[1] Law Commission, *The Evidence of Children and Other Vulnerable Witnesses: A Discussion Paper* (LC PP 26 – 1996).

[2] Law Commission, *Evidence: Reform of the Law* (LC 55 (1) – 1999).

[3] Law Commission, *Discussion Paper* (n 1) 46.

[4] *R v M* (unreported, 28 July 1993, T 173/91). See Edmund W Thomas, "Was Eve Merely Framed; or was she Forsaken" (1994) *New Zealand Law Journal* 368. This article was sourced through the Alexander Turnbell Library, The National Library of New Zealand, where the librarians very kindly forwarded the article to me free of charge, despite there generally being a fee per page. This was greatly appreciated.

another man.[5] During the course of the retrial the accused dispensed with his legal representation and proceeded to represent himself. In a later article written by the trial judge, Thomas J., he described the ordeal endured by the complainant during cross-examination at the hands of the accused:

> The complainant was cross-examined by *M*, her assailant, for approximately five hours extending over two days. It was the most insensitive cross-examination of a complainant which a Judge is ever likely to witness. It was cruel and inhumane. The victim was required to relive and retell her ordeal in minute detail sitting within metres of her alleged rapist. When the cross-examination was finished she was exhausted and distressed. She was unable to leave the witness box without assistance.[6]

During cross-examination Thomas J. intervened on a number of occasions in an attempt to protect the complainant. However, this proved futile and he noted that "any further intervention on my part would have resulted in a claim that the accused had been denied his right to a fair trial and run the risk that there would have been yet a further retrial".[7]

Unfortunately, the above case was not an isolated incident. For example, a similar cross-examination occurred in 2002 in the case of John Jason Cumming.[8] Cumming was charged with eight separate offences, including the rape of the sixteen-year-old complainant who was his girlfriend at the time of the attack. It was alleged that the accused imprisoned the complainant in his home in October 2001 after developing paranoiac concern that she was having several affairs with other men.[9] Cumming was said to have taken the woman to his flat where she was stripped of her clothes. The complainant stated that the defendant then

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[5] Later this evidence was described by the presiding judge of the retrial as "almost farcically irrelevant". (Thomas (n 4) 370).

[6] Thomas (n 4) 371. A presiding judge writing an account of a trial over which he presided, particularly so soon after the event is an unusual occurrence. However Justice Thomas had a well-established record of doing so and was a strong proponent of judicial activism. (For example, see Edmund W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2008)).

[7] Ibid.

[8] *John Jason Cumming v The Queen* (unreported, HC, November 2002).

[9] "Rape Appeal Sparks Anger" *The New Zealand Herald* (Auckland, 18 April 2006).

"sexually violated her repeatedly, chained her, beat her, and burned her with a cigarette".[10] At trial the defendant dispensed with counsel and spent hours questioning the victim.[11] One newspaper report attempted to outline the extent of the cross-examination:

> [The complainant] told what happened without embellishments, and her story stayed basically unshaken. Cumming kept repeating questions, covering old ground, until told by Justice Panckhurst to move on. The result was that the jury heard the victim's story not once, but three or four times. There were long pauses while he thought of questions, and shuffled papers.[12]

At the end of cross-examination the complainant collapsed and was given medical treatment.[13] The defendant was sentenced to preventative detention with a minimum non-parole period of seven and a half years.[14]

Similar to the situation in other jurisdictions, the trauma suffered by the victims in these cases at the hands of their assailants highlighted the plight of complainants forced to endure personal cross-examination and caused widespread public concern. Unfortunately, while the issue was eventually legislated for it proved to be an extremely lengthy process.

ii. Path to Reform

Personal cross-examination by the accused in sexual offence cases was considered as part of a wider examination of the law of evidence in New Zealand. In 1989 the Law Commission was given the task of reviewing the law in order "to make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes".[15] In preparation for the final report the Commission published a number of

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[10] "Retrial for Rape Accused who Cross-Examined Victim" *The New Zealand Herald* (Auckland, 15 May 2008).
[11] Ibid.
[12] "Jury Impressed by Victim's Story", *The Press* (Christchurch, 15 November 2002).
[13] "Retrial for Rape Accused who Cross-Examined Victim" *The New Zealand Herald* (15 May 2008).
[14] Subsequently, a retrial was later granted by the Supreme Court who found that Cumming was suffering from a severe mental disorder and therefore had been unfit to stand trial. (*Jason John Cumming v The Queen* [2008] NZSC 39).
[15] Law Commission, *Evidence* (n 2) *xviii.*

discussion papers with a view to receiving feedback from "community groups, academics, officials, and members of the legal profession and the judiciary".[16] The first paper to address the issue of personal cross-examination was published in 1996, entitled *The Evidence of Children and Other Vulnerable Witnesses: A Discussion Paper*.[17]

The paper began by considering the pre-existing s. 23F of the Evidence Act 1908 as inserted by s. 3 of the Evidence Amendment Act 1989. This section prohibited a defendant in sexual offence cases from personally cross-examining a child or a person with a mental disability. Where such a situation did arise, s. 23F (3) stated that:

> Where the accused is not represented by counsel, the accused may put questions to the complainant (whether by means of an appropriate audio link or otherwise as the Judge may direct) by stating the questions to a person, approved by the Judge, who shall repeat the questions to the complainant.

No further guidance was provided and no provisions were enacted for the payment of a person so appointed.

The Commission attributed the rationale for this provision to an attempt to avoid the distress and trauma caused to a child or person with mental disability by personal cross-examination.[18] In doing so, they also acknowledged that a similar rationale could be applied to other situations, such as cases involving sexual complainants.[19] Reference was also made to the distress which can be caused to a witness who is cross-examined personally by an unrepresented party where there has been a previously "intimate relationship", including cases involving custody, domestic protection and family proceedings where there has been emotional, physical and sexual abuse.[20] However, despite this acknowledgement, the Commission went on to express the view that "a complete bar on personal cross-examination

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[16] Parliamentary Deb, *Evidence Bill – First Reading*, 10 May 2005 (Phil Goff).
[17] Law Commission, *Discussion Paper* (n 1).
[18] Ibid. 46.
[19] Ibid.
[20] Ibid.

can be expensive and provides inadequate protection".[21] The Commission pointed to inadequacies in the current law and questioned how useful such a prohibition was if, for example, the defendant was still present in the court or if the person appointed to put the questions to the complainant was a friend of the accused. As a result the Commission was of the opinion that alternative arrangements for giving evidence in court, such as CCTV links, would be more beneficial in such cases.[22] The Commission proposed that while the prohibition should still apply to child complainants in sexual cases, the bar should not be extended to adults. Furthermore, it was recommended that people with mental disabilities be removed as a category of complainant entitled to benefit from such protection. The paper states:

> We propose to continue the absolute bar on personal cross-examination by defendants of child complainants in sexual cases but that bar will not be extended to adults. All other witnesses, including the intellectually disabled, may apply to the court to declare an unrepresented party ineligible to personally cross-examine them.[23]

Thus, essentially the Commission recommended the retention of the prohibition in respect of child sexual offence complainants and the introduction of a discretionary prohibition on such cross-examination in respect of all other witnesses.[24]

This aspect of the Commission's proposal appears curious. First, the removal of persons with intellectual disabilities from the prohibition, without a clear explanation as to why, seems rash and ill-considered. Second, and more concerning from the perspective of this thesis, the decision not to recommend the extension of an absolute prohibition to adult sexual complainants is disappointing, particularly given the Commission's recognition that the rationale for the existing prohibition also applied to adult complainants. It appears that the Commission was of the view that s. 23F was in need of refinement. However, instead of advancing recommendations in this respect, they decided to promote the use of alternative

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[21] Law Commission, *Discussion Paper* (n 1) 47.
[22] Ibid.
[23] Ibid. 47.
[24] It is unclear whether the "all other witnesses" referred to by the Commission included all witnesses of criminal offences generally, or witnesses in sexual offence cases.

arrangements for the giving of evidence. As is highlighted from the above passage, it is also clear that the Commission favoured a discretionary means of prohibition, yet no reference is made to the issues and inconsistencies to which such an approach can give rise. Nonetheless, regardless of these flaws, it is important to bear in mind that these proposals were made during the course of a preliminary paper and did not represent the Commission's final recommendations. The Commission concluded the section by asking for submissions on when a bar on personal cross-examination should apply.[25]

Three years after this preliminary paper was published, the accumulation of what was by then a decade of research resulted in the publication of the *Evidence: Reform of the Law*[26] and *Evidence: Evidence Code and Commentary* [27] report in 1999. Unfortunately, only a very short section of the report was dedicated to the possibility of restricting cross-examination by an unrepresented accused. Nonetheless, a number of interesting observations can be gleaned from this brief section.

Despite the view expressed by the Commission in the preliminary paper, the report begins by stating that "all of the submissions received support the operation of the current section [section 23F] and favoured extending it to all sexual complainants regardless of age".[28] This appears to be directly contrary to the proposal put forward in the preliminary paper. However, despite the unanimous support for the extension of the prohibition to sexual complainants, the various submissions differed with regard to how far the extension should reach beyond that, and in relation to the most appropriate and practical method of implementing such a prohibition. As is highlighted in the report: "One commentator, for example, recommended appointing an amicus when there is an unrepresented defendant and a child complainant. Other practitioners favoured a discretionary rather than an absolute bar in the case of complainants".[29] The Commission went on to refer to two other submissions (without revealing the identity of the individuals who made them) expressing similar views before proposing, rather abruptly, the following recommendation:

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[25] Law Commission, *Discussion Paper* (n 1) 47.
[26] Law Commission, *Evidence* (n 2).
[27] Law Commission, *Evidence: Evidence Code and Commentary* (LC 55 (2) – 1999).
[28] Law Commission, *Evidence* (n 2) 109.
[29] Ibid.

The Law Commission recommends an absolute bar on personal cross-examination by unrepresented defendants in the case of:

- All complainants in sexual cases;
- All complainants in cases of domestic violence (as defined in the Domestic Violence Act 1995); or harassment (as defined in the Harassment Act 1997); and
- All child witnesses in sexual and domestic violence cases.

All other witnesses should be able to apply not to be personally cross-examined, or the court should be able to make an order of its own initiative.[30]

This recommendation represents a considerable change from the proposal advanced in the preliminary paper. While the preliminary paper did refer to the distress which could arise as a result of personal cross-examination by the defendant in domestic protection cases, it did not recommend expanding the prohibition. In fact, as outlined, the Commission instead suggested that the prohibition be narrowed. The change presented in the final report is not commented upon, and no explanation is given for the decision. However, it is possible that the Commission was influenced by the number of submissions received in support of the extension of the prohibition to include sexual complainants.[31] Furthermore, it appears the Commission was also prompted by developments overseas, particularly in England and Wales.[32]

In relation to procedural matters, in a manner equally abrupt to how the above recommendation was made, the Commission agreed that appointing an amicus to put the questions to the complainant on behalf of the accused was the most appropriate option. However, it was also considered to be imperative that the rule in this regard remain flexible in order to deal with differing circumstances. Therefore, the Commission recommended that the trial judge be permitted to "ask the questions on behalf of the unrepresented party, or to

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[30] Law Commission, *Evidence* (n 2) 110.

[31] For example, one submission from a community group (whose identity is not revealed) stated that "The [current] cut-off of 17 years in sexual cases is inappropriate. Women who have been raped should not be cross-examined by their attacker". (Law Commission, *Evidence* (n 2) 109).

[32] Reference is made to the Home Office report, *Speaking up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System*. (London, June 1998). (See Chapter 4, Part I, where this report is examined in detail).

appoint an appropriate person for the purpose".[33] The relatively hasty manner in which these recommendations were advanced, without any meaningful consideration of alternative procedural approaches, is arguably short-sighted and ill-considered. Undoubtedly, the previous provisions in place under s. 23F of the Evidence Act 1908 were influential to the Commission in reaching their recommendations. Indeed, this much is admitted in the *Evidence Code and Commentary* report where it is noted that allowing an unrepresented party to put questions to the witness through the judge or through a person appointed by the judge carries forward the provisions already in place under the 1908 Act as they relate to child sexual complainants.[34] However, the wisdom of carrying forward such provisions is questionable, particularly in light of the fact that the Commission itself criticised aspects of the s. 23F of the 1908 Act as inadequate and unclear.[35] Furthermore, the many issues relating to the prejudicial effects of allowing the trial judge to put questions to the complainant on behalf of the accused (as discussed in previous sections of this Chapter) is a topic on which the Commission remained mute. Similarly, the potential benefits of appointing a legal representative as opposed to an amicus were not explored.

In any respect, by the time the 2006 Evidence Act[36] was eventually enacted, a number of the Commission's more concerning recommendations were ignored. It remains unclear whether this was as a result of subsequent influential developments in other common law jurisdictions or due to an independent recognition of the potential flaws in the Commission's report. Whatever the reason, the relevant section of the Evidence Act 2006 lacks reference to a number of significant recommendations made by the Commission in the *Evidence* report.

iii. Legislation - Evidence Act 2006

The reform of the law of evidence in New Zealand, from when investigation first commenced in 1989 to the enactment of the Evidence Act 2006, was a particularly lengthy process. The length is perhaps somewhat explained when one considers that the bill was intended to produce a "comprehensive scheme" which "brings together in one place the common law

[33] Law Commission, *Evidence* (n 2) 110 - 111.
[34] Law Commission, *Evidence Code* (n 27) 223.
[35] Law Commission, *Discussion Paper* (n 1) 47.
[36] The Evidence Act 2006 replaced the Evidence Act 1908.

and statutory provisions relating to evidence".[37] Nonetheless, the length of the process was repeatedly commented upon during the first reading of the 2005 Evidence Bill in parliament. Unsurprisingly, the Minister for Justice, Philip Goff, attempted to apply a positive interpretation to the lengthy process, describing the Law Commission's work as "thorough". He went on to note:

> The need for reform in this area is long standing. The terms of reference were given to the Law Commission in 1989. In 1999 the commission published its report. Following from the report, this bill, which generally follows the recommendations of the commission, is being introduced. I look forward to...the ultimate passage of this bill as the culmination of a long process of consideration of a complex, but important area of law.[38]

Naturally, members of the opposition parties were not so positive. Wayne Mapp MP, of the National Party stated:

> One of the other things that comes to mind is the rather unusual reference by the Minister of Justice to the careful deliberations of the Law Commission...this bill has had an extraordinarily long gestation. In 1989 the Law Commission started work on it. I recall reading its numerous briefing papers and preliminary reports as they came out. The final report was in 1999 – 10 years later. It is one of those situations that we have become used to with the Minister – he announced things some years ago and then they were announced again, he issued press releases saying that he was getting around to it... Finally, just a couple of months out from the election, he introduces the bill.[39]

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[37] Parliamentary Deb (n 16).
[38] Ibid.
[39] Ibid. (Wayne Mapp).

Unfortunately, there was to be yet another delay of over a year and a half after Mapp delivered the above address until 4 December 2006, when the bill was finally enacted.[40]

Entitled 'Restrictions on Cross-examination by Parties in Person', s. 95(1) of the Evidence Act 2006[41] provides as follows:

> (1) A defendant in a criminal proceeding that is a sexual case or a proceeding concerning domestic violence or harassment is not entitled to personally cross-examine—
>
> (a) a complainant:
>
> (b) a child (other than a complainant) who is a witness, unless the Judge gives permission.

Aspects of this provision are admirable. The expansion of the prohibition to include all sexual offence complainants, regardless of age, is to be commended. Such a reform clearly responds to the concerns highlighted by submitters to the Law Commission and addresses the calls for reform in the wake of certain cases involving personal cross-examination outlined at the beginning of this section. Moreover, while beyond the remit of this thesis, the inclusion of complainants of domestic violence and harassment and the presumptive prohibition in relation to child witnesses is also to be commended and appears reflective of an appreciation that complainants of other forms of violent offences can also be intimidated by the prospect of personal cross-examination at the hands of the defendant. Furthermore, following on from the recommendations contained in both the preliminary and final report, subsection (2) provides for a wider prohibition, imposing a discretionary restriction on the personal cross-

[40] No specific mention appears to have been made in relation to the issue of prohibiting personal cross-examination during the various readings of the bill or during the parliamentary debates. This is perhaps due to the extensive nature of the bill which attempted to codify the entirety of the law of evidence.

[41] Subsequently amended by s. 5 of the Evidence Amendment Act 2011, however, no substantial change was made to the provision.

examination of any witness in civil or criminal proceedings under a number of grounds.[42] Therefore, it appears that the prohibition on personal cross-examination introduced in New Zealand is hierarchal in nature. A mandatory prohibition on personal cross-examination applies to complainants in sexual, domestic violence and harassment cases, a presumptive prohibition protects child witnesses (who are not complainants) in such cases and a discretionary prohibition on personal cross-examination is potentially applicable to all other witnesses in civil or criminal proceedings.

In terms of the procedure to be employed where an accused is unrepresented, ss. 5 states:

> (5) A defendant or party to a proceeding who, under this section, is precluded from personally cross-examining a witness may have his or her questions put to the witness by—
>
> (a) a lawyer engaged by the defendant; or
>
> (b) if the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the Judge, a person appointed by the Judge for the purpose.

There are a number of interesting aspects to this provision. First, the decision in ss. 5 (a) to extend to an unrepresented defendant the opportunity to engage a lawyer for the purpose of cross-examining the witness is noteworthy. Such a recommendation was not made by the Law Commission. Instead they simply recommended that an amicus be engaged to conduct such cross-examination. It is possible that developments overseas influenced the drafter in this respect. For example, since the publication of the *Evidence* report in 1999,

[42] Subsection (3) provides that an order under ss. (2) may be made on a number of grounds, including the age or maturity of the witness, the relationship of the witness to the unrepresented party and any other grounds likely to promote the purpose of the Act. Moreover, ss. (4) outlines a number of factors which the judge must have regard for when making an order prohibiting personal cross-examination under ss. (2). These include the need to ensure the fairness of proceedings, the need to minimise the stress of the witness and any other factors that might be relevant to the just determination of the proceedings.

both New South Wales[43] and Victoria[44] had published separate law reform reports recommending that a legal representative put the questions to the complainant where the defendant is prohibited from personal cross-examination. Similarly, legislation in England and Wales had been enacted providing for an invitation to be issued to an accused to appoint a lawyer for the purpose of conducting such a cross-examination.[45] Consequently, it is possible that these developments impacted upon the legislature's reasoning in this regard.

Nonetheless, it appears that the amicus recommendation made by the Commission was followed in s. 95 (5)(b). Thus, where an accused fails or refuses to appoint a lawyer, a person appointed by the court will undertake the cross-examination. It appears that what was envisioned when appointing this 'person' was indeed an amicus, as both terms are used interchangeably by the Commission in the final report.[46] Second, the decision to exclude the Commission's recommendation that the trial judge be entitled to put the questions to the complainant is noteworthy. This recommendation was, in fact, present in the first draft of the government bill. However, when the bill passed its second reading and went before the Committee of the Whole House, it was unanimously agreed that the possibility of the trial judge putting the questions to the complainant should be removed.[47] No elaboration is provided on the rationale underpinning this amendment. However, it submitted that the many negative aspects associated with placing a trial judge in such a position were presumably influential. [48]

Finally, it is noteworthy that the provision does not provide any guidance on the role which the court-appointed person should assume. This stands at odds with the provision's counterparts in the other jurisdictions considered so far. However, another subsection of

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[43] New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* (LRC 101 – 2003).
[44] Victorian Law Reform Commission, *Sexual Offences: Final Report* (LRC 78 - 2004).
[45] Youth Justice and Criminal Evidence Act 1999, s. 38.
[46] Law Commission, *Evidence* (n 2) 110 – 111.
[47] See Evidence Bill 2006.
[48] See Part I and Part III of this Chapter where these issues are discussed by the Home Office of England and Wales and the New South Wales Law Reform Commission.

s. 95 of the 2006 Evidence Act is worthy of closer consideration. Subsection 6 states as follows:

> (6) In respect of each such question, the Judge may—
>
> > (a) allow the question to be put to the witness; or
> >
> > (b) require the question to be put to the witness in a form rephrased by the Judge; or
> >
> > (c) refuse to allow the question to be put to the witness.

While empowering the trial judge in such a manner is not an unusual element of the law of evidence, the addition of such a subsection within a provision prohibiting personal cross-examination is somewhat novel. The corresponding provisions in England, Scotland, New South Wales and Victoria do not contain a similar subsection. The potential benefits of such a provision are self-evident, reinforcing the capacity of the trial judge to control proceedings where necessary. Nonetheless, given that cross-examination will not necessarily be conducted by a legal representative (as there is no requirement in the legislation that the appointed person be a legal representative, as there is in England and Wales) then perhaps it is fitting that there is a provision which explicitly allows for the closer supervision of the questions posed, if necessary. Nonetheless, it is a sub-provision worthy of consideration when examining an appropriate method of reform in Ireland.

However, other than the above provision, the advantages which can be drawn from the New Zealand legislation are limited. In fact, there are a number of obvious gaps in the legislation. For example, there is no indication in the legislation of the parameters of the role and duties of the court-appointed person. Furthermore, unlike its counterparts in England[49], New South Wales[50] and Victoria[51], the legislation does not provide for safeguards with respect to avoiding any prejudicial effect which an imposed representation

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[49] Youth Justice and Criminal Evidence Act 1999, s. 39.
[50] Criminal Procedure Act 1986, s. 294A (7) as inserted by Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003, s. 1.
[51] Evidence Act 1958, s 37CA (10) as inserted by Crimes (Sexual Offences) Act 2006, s. 35.

may have on the accused. There is no subsection which provides for a warning to be issued to the jury not to prejudice the accused by drawing inferences from the fact that he was prevented from cross-examining the witness in person or that the questions were put to the witness by a person appointed by the court.

Furthermore, some confusion appears to have arisen in relation to the extent of the prohibition provided for under s. 95(1); although whether this confusion is merited is questionable. In 2007 the then Labour government established a taskforce, entitled *Taskforce for Action on Sexual Violence*.[52] The establishment of the Taskforce followed the formation of a Commission of Inquiry which investigated a number of allegations of sexual misconduct within the police force.[53] The Taskforce comprised ten chief executives and four representatives from the community organisation, *Te Ohaakii a Hine National Network Ending Sexual Violence Together*. The Taskforce was asked to "identify the actions required to better prevent and respond to sexual violence in Aotearoa New Zealand and where investment could be made".[54] In their report, published in July 2009, the Taskforce identified personal cross-examination of the complainant as an issue in need of legislative reform. They recommended 'an absolute prohibition against an accused cross-examining in person the complainant in a sexual violence case'.[55] However, they did not expand on this issue and other than the brief recommendation, no further comment was expressed in this regard. Upon reading the relevant provision, it is unclear what exactly the Taskforce meant when making this recommendation.

As previously stated, s. 95(1) of the 2006 Act provides as follows:

> (1) A defendant in a criminal proceeding that is a sexual case or a proceeding concerning domestic violence or harassment is not entitled to personally cross-examine—

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[52] Ministry for Justice, *Report of the Taskforce for Action on Sexual Violence: Incorporating the views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (2009).
[53] For further detail see Commission of Inquiry into Police Conduct (Department of Internal Affairs), *Report of the Commission of Inquiry into Police Conduct* (2007).
[54] Ministry for Justice (n 52) 4.
[55] Ministry for Justice (n 52) 60.

(a) a complainant:

(b) a child (other than a complainant) who is a witness, unless the Judge gives permission.

From an objective perspective, the interpretation of this provision appears plain and explicit – the defendant is prohibited from personally cross-examining a complainant in a sexual, domestic violence or harassment case. The discretionary element of this provision (where the judge's permission is required) only applies to ss. (b) – i.e. child witnesses who are not complainants in such cases. Therefore, contrary to the Taskforce's assertion, an absolute prohibition does in fact appear to exist in respect of complainants in sexual cases.

The taskforce's confusion in this regard is in itself confusing. There is a remote possibility that the Taskforce was referring to s. 9 of the 2006 Act[56] which appears to provide a formal means for a complainant in such circumstances to be personally cross-examined if she specifically requests that such a cross-examination occur. However, it appears unlikely that the Taskforce was referring to such a situation.[57] It appears that what in fact occurred was a misinterpretation of the provision on the part of the Taskforce. If this is in fact the case, the question of whether the responsibility for this misinterpretation can be laid at the door of the legislation is debatable. A plain reading of the provision would point to one obvious interpretation. Furthermore, the wording or structure of the provision could not be characterised as ambiguous or vague. Therefore, it is submitted that the misinterpretation was an error incurred by the Taskforce. This view can be supported by reference to the Law Commission's report, entitled *The 2013 Review of the Evidence Act 2006*.[58] This review was the first of a five yearly review provided for under s. 202 of the 2006 Act. Without directly referring to or addressing the Taskforce's report, the Commission examined the issue of personal cross-examination and outlined what it deemed the correct interpretation of the provision. As a result, it is an extract worthy of quotation:

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[56] Section 9 of the 2006 Act provides as follows: (1) In any proceeding, the Judge may,—

(a) with the written or oral agreement of all parties, admit evidence that is not otherwise admissible; and

(b) admit evidence offered in any form or way agreed by all parties.

[57] No reference was made to s. 9 in the Taskforce's report.

[58] Law Commission, *The 2013 Review of the Evidence Act 2006* (LC 127 – 2013).

> A submitter has commented to us that s 95(1) appears to be an absolute bar which may prevent a complainant from being cross-examined in person should they wish to be. The fact that the judge may permit personal cross-examination of a child witness, but not a complainant, does suggest that subs (1) may operate as a complete bar. However, it seems to us that s 9 provides a formal means for parties to agree to cross-examination in person should the complainant request this occur. A member of the advisory group pointed out that amending s 95 to allow personal cross-examination of a complainant gives rise to concern that a complainant may face undue pressure to allow personal cross-examination. We agree that this is a risk. Accordingly, in the absence of evidence that this provision is causing problems in practice, we recommend no amendment.[59]

Although admittedly not the most comprehensive consideration of the issue, it would appear that from the Law Commission's perspective, and despite the existence of s. 9, for all intents and purposes s. 95 (1) provides sexual complainants with absolute protection from personal cross-examination by the accused.

It is arguable that the approach adopted in New Zealand is less attractive than some of its counterparts in Australia and other common law jurisdictions. Despite the length of the process which culminated in the introduction of the Evidence Act 2006, it is submitted that the research conducted prior to the introduction of the relevant provision is limited in nature and superficial in depth. Furthermore, the lack of explanation or further analysis with regard to some of the more unusual aspects of the prohibition is problematic. It is possible to attribute some of the shortcomings in relation to the reform process to the wide-ranging scope of the reform bill, which attempted to codify the entirety of the law of evidence in New Zealand. It appears that in the midst of such a weighty task the issue of the prohibition of personal cross-examination was somewhat neglected.

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[59] Law Commission, *The 2013 Review* (n 58) 222.

VI. Canada

The final jurisdiction to be considered is Canada. Like Australia, Canada is a federal state, consisting of ten provinces and three territories. However, while much of Australian criminal law is under the legislative jurisdiction of the individual states, in Canada most of the criminal law is under the legislative jurisdiction of the federal government. Therefore, it will not be necessary to examine the individual jurisdictions within Canada. Instead, the relevant provision of the Criminal Code of Canada[1] will be subject to consideration.

The approach adopted in Canada towards personal cross-examination in sexual offence trials contrasts with that adopted in the other jurisdictions under consideration in this Chapter. While the other jurisdictions generally provided specific protection for sexual offence complainants, until very recently the Canadian provision did not single out sexual offence complainants as a distinct category of witnesses. Moreover, the prohibition in Canada is presumptive in nature, as opposed to mandatory.

Given its broad nature, certain aspects of the provision are beyond the scope of this thesis and consequently, will not be considered in detail. However, other elements are particularly relevant from an Irish law perspective. First, perhaps due to the strong influence of its constitutional law, there is a tradition of Irish law reform agencies and legislative drafters drawing upon developments in Canada when considering law reform in Ireland. In relation to the particular issue of personal cross-examination, constitutional considerations are of significant concern. Therefore, insight and guidance may be gleaned from an examination of constitutional considerations which have arisen in Canada in relation to this topic. Second, s. 35 (14C) of the recently published Irish Criminal Law (Sexual Offences) Bill 2015 appears to draw on aspects of the Canadian legislation. Consequently, inclusion of this jurisdiction in the comparative Chapter is particularly important in order to understand and appreciate recent legislative developments in Ireland.

[1] Criminal Code, RSC 1985 C-46.

i. Background

The relevant provision offering protection against personal cross-examination has been subject to various amendments and extensions since enactment. The origins of this prohibition can be traced to the 1993 Bill C-126: *An Act to Amend the Criminal Code and the Young Offenders Act.* The Bill introduced a presumptive prohibition against personal cross-examination by the accused of a minor under the age of 14 years in cases involving sexual and violent offences. Section 486 (2.3) read as follows:

> (2.3) In proceedings referred to in subsection (1.1)[2], the accused shall not personally cross-examine a witness who at the time of the proceedings is under the age of fourteen years, unless the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination and, where the accused is not personally conducting the cross-examination, the presiding judge, provincial court judge or justice shall appoint counsel for the purpose of conducting the cross-examination.

Unfortunately, there is limited information available on the motivations for and the intentions behind the introduction of this provision. A number of possible explanations exist for this lack of information.

First, surprisingly, there is no longer a Canadian Law Reform Commission. It was initially disbanded in 1993 by the federal government in an attempt to reduce spending. It was revived in 1997 in the form of the Law Commission of Canada. However, it was subsequently disbanded once again in 2006. While the reports and papers published by the now dissolved 1997 Law Commission are accessible, any materials predating the establishment of the second Commission are not available.[3] Hence, given that any relevant research on the initial

[2] Subsection (1.1) referred to sexual offences, an offence against any of sections 271 (sexual assault), 272(sexual assault with a weapon, threats to a third party or causing bodily harm) and 273(aggravated sexual assault) or an offence in which violence against the person is alleged to have been used, threatened or attempted.

[3] Contact was made with "Government of Canada Publications" in an attempt to locate any relevant Law Commission papers but while a response via email was received, no relevant Law Reform Commission material could be located.

provision reforming personal cross-examination in sexual offence trials would have been conducted prior to 1997, such material is unattainable.

A second explanation for the deficit of information on the origins of the provision can be attributed to the additional number of reforms which were introduced at the same time as the provision prohibiting personal cross-examination. As Bala explains, in 1993 the Canadian parliament enacted two pieces of legislation amending the Criminal Code.[4] These amendments were introduced to help increase the protection afforded to children and women. They covered a variety of scenarios and situations and included provisions relating to child abduction by parents, criminal harassment (anti-stalking law) and child pornography.[5] As is often the case where a significant number of reforms are introduced simultaneously, the more high-profile amendments relating to child pornography and stalking received greater attention, while others, including the amendment relating to personal cross-examination, were somewhat neglected. This is evident by reference to the parliamentary debates addressing the introduction of 1993 Bill C-126.

During the second reading of the Bill, much time was dedicated to a discussion of the criminal harassment amendment, which appears to be reflective of the concern which had emerged at the time in relation to increased incidents of stalking. During the second reading of the Bill the then Minister for Justice, Pierre Blais (of the Progressive Conservative Party), stated:

> Bill C-126 will introduce a new criminal harassment section to the Criminal Code. The new section is called criminal harassment because we believe this best describes the nature of the crime although the acts are more commonly known as stalking. More and more cases are being reported of women being stalked by men they used to be involved with and from whom they may be trying to escape. There have been several cases in Canada recently in which women have been stalked and seriously injured or killed. These cases made it clear that a new provision in the Criminal Code was urgently needed to explicitly criminalize these types of acts.[6]

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[4] Nicholas Bala, "Criminal Code Amendments to Increase Protection to Children & Women: Bills C-126 & C-128" (1993) 21 (4) *Criminal Reports* 365.
[5] See Ibid.
[6] House of Commons Deb 6 May 1993, vol 15, 19015.

This issue continued to attract significant discussion and debate during the third reading of the Bill, with many Members of Parliament raising concerns over the efficiency of the anti-stalking amendment and its potential to be misused in labour disputes.[7] Similarly, amendments relating to child pornography[8] and the restriction of sexual offenders in the community[9] also received significant attention during the parliamentary debates.

Conversely, there is extremely limited reference made to the amendment concerning personal cross-examination. During the second reading, the Minister for Justice briefly referred to the provision, stating:

> Child abuse occurs in part because of the inequalities between the child and adult in size, knowledge and power. I believe that cross-examination of a child victim by the accused in the adversarial system of criminal law results in a court-sanctioned continuation of that imbalance and abuse and therefore is wrong. The bill responds to this problem by proposing to permit a judge to appoint counsel for the accused for the sole purpose of conducting the cross-examination of the victim. The accused would remain free to represent himself during the rest of the trial. The bill would prevent the accused revictimizing the child through a personally conducted cross-examination.[10]

It was also referred to by Russell MacLellan MP of the Liberal Party, who raised a number of important issues:

> I want to rediscuss a situation in which the accused represents himself in cases of child sexual assault. Now the judge would be allowed to appoint counsel for the accused to conduct a cross-examination of the child witness... Should we put some qualifying interests here because of the interests of the accused and on the basic principle of our law that a person is innocent until proven guilty? Should it be a

[7] For example, see House of Commons Deb 10 June 1993, vol 16 20663.
[8] Ibid. 20328.
[9] House of Commons Deb (n 6) 19016.
[10] Ibid. 19018.

> counsel who comes in cold without knowing the case or without knowing the child, without having any feeling for the legal process of what is transpiring in this case and just ask the questions? How is this to be done? If the counsel does this, while it safeguards the child which is certainly what we want psychologically, is the accused jettisoning his or her fundamental right in the case before this court? Will the Supreme Court of Canada allow this if we do not modify it in some way? These are concerns that I have and I think these are questions which need to be looked at before the legislative committee.[11]

The issues raised by MacLellan represent valid concerns in relation to the implementation of such a prohibition. However, the above is the only reference made to these concerns in the debate. The additional parliamentary debates dealing with Bill C-126 appear to remain silent on the issue of personal cross-examination. Furthermore, it seems that the concerns expressed by MacLellan were not addressed in a manner which resulted in any substantial changes occurring in relation to the relevant provision.

ii. Path to Reform

In June 1993, Bill C-126 was enacted. As previously outlined, it introduced a number of new measures, including s. 486 (2.3) which stated:

> [T]he accused shall not personally cross-examine a witness who at the time of the proceedings is under the age of fourteen years, unless the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination and, where the accused is not personally conducting the cross-examination, the presiding judge, provincial court judge or justice shall appoint counsel for the purpose of conducting the cross-examination.

[11] House of Commons Deb (n 6) 19021.

As mentioned in Chapter 3, it is clear that aspects of s. 35 (14C) of the Irish 2015 Bill are informed by the above provision. Similar to s. 35 (14C)(1)[12] of the Irish provision, the Canadian prohibition applied only to children under the age of 14. As per the provision, these children did not have to be complainants in the case, but merely witnesses, although it may be assumed that in the vast majority of situations the child witness would also be a complainant. Like the proposed Irish legislation, the prohibition is a presumptive one. However, the court may grant the defendant leave to cross-examine the witness in person if they are "of the opinion that the proper administration of justice" requires such cross-examination. Similar wording exists in the equivalent Irish provision. The scope of offences to which the protection from personal cross-examination may be applied is noteworthy. The provision includes protection for complainants of violent offences, as well as sexual offences. This is an admirable aspect of the provision and recognises the possibility that complainants of violent offences may also suffer trauma if subjected to personal cross-examination.

However, procedurally the Canadian provision fails to address many of the concerns highlighted by MacLellan during the parliamentary debate. Other than stating that the court will appoint counsel for the purpose of cross-examination where the accused is self-represented, no other procedural measures are addressed. No reference is made to the role of the appointed counsel, whether counsel is to be remunerated through legal aid or whether warnings should be issued by the trial judge to avoid the jury drawing any prejudicial inferences from an unrepresented accused who is prohibited from conducting a cross-examination in person. As highlighted by reference to the previous jurisdictions examined during the course of this Chapter, these omissions stand at odds with the approach adopted elsewhere. Nonetheless, despite its scant procedural measures, upon enactment the provision was applauded for protecting victims of abuse while simultaneously protecting "the accused's constitutionally guaranteed right to a fair trial". [13]

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[12] 14C. (1) "Where— (a) a person is accused of an offence to which this Part applies, and (b) a person under the age of 14 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".

[13] Bala (n 4) 369.

Subsequently, the provision has been subject to a number of amendments. These amendments have resulted in an expansion of the provision to accommodate a larger category of witnesses, including adult sexual offence complainants. However, initially not all of these attempts at expansion were successful.

In 1996 a Private Member's Bill was introduced proposing the elimination of the age restriction under s. 486 (2.3) and, consequently, expanding the protection against personal cross-examination to all complainants of sexual and violent offences.[14] The catalyst for this proposed amendment appears to have stemmed from the case of *R v Fabrikant*.[15] The accused, a professor of mechanical engineering in Concordia University in Montreal, arrived at the university with several weapons and attacked a number of colleagues, killing four and leaving another severely injured. He also took two other individuals hostage.[16] From the outset of the trial the defendant chose to represent himself and in doing so, subjected several witnesses to "drawn-out, abusive and irrelevant cross-examination".[17] The Bill, entitled Bill C-217, *An Act to Amend the Criminal Code (Protection of Witnesses)*, was introduced by Pierrette Venne of the Bloc Quebecois party. Upon its tabling, Venne stated:

> I have the pleasure of tabling today this bill to amend the Criminal Code so that every person who testifies in proceedings relating to a sexual offence or assault, or in which the offender allegedly used, attempted to use or threatened to use violence, is afforded the same protection as witnesses under 14 years of age are currently afforded under the Criminal Code.
>
> During this kind of proceedings, the accused will not be able to question the victim. In such cases, the judge will appoint counsel to conduct the cross-examination.[18]

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[14] Bill C-217, *An Act to Amend the Criminal Code (Protection of Witnesses),* House of Commons 2nd Session, 35th Parliament, 1996.
[15] *R v Fabrikant* (1995) 39 CR (4th) 1, 97 CCC (3d) 544, 67 QAC 268 (Que CA).
[16] Ibid. The jury returned with a verdict of guilty on each of the seven counts: four verdicts of first degree murder, one of attempted murder and two of hostage taking.
[17] Lynn A Iding, "Crossing the Line: The Case for Limiting Personal Cross-Examination by an Accused in Sexual Assault Trials" (2004 - 2005) 49 *Criminal Law Quarterly* 69, 70.
[18] House of Commons Deb, 4 March 1996, 1520.

The Bill did not survive the first reading. However, three years later in 1999, following the recommendation of the Standing Committee on Justice and Human Rights[19], another amendment was proposed and successfully enacted, extending the age limit of witnesses from 14 to 18 years.[20] While the extension was welcomed, the provision was criticised for leaving "obvious gaps", including the "failure to provide protection to adult vulnerable witnesses, in particular victims of sexual or domestic violence".[21] This criticism came to a head in 2003 following a sexual assault trial in Halifax where the defendant personally cross-examined the complainant for six and a half hours.[22] The case sparked public outcry and further calls for reform which would offer protection from personal cross-examination to complainants in sexual offence trials.[23] These calls were responded to in 2005 when s. 486 (2.3) was amended for a second time by *Bill C-2: An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons)*.

iii. Legislation – Section 486. 3 of the Criminal Code of Canada: Bill C – 2 and Bill C–32, Victims Bill of Rights

Section 486.3: Bill C – 2

Like Bill C-126 (the Bill which introduced the initial limited prohibition on personal cross-examination), Bill C-2 introduced a wide range of reforms, including an extension of the prohibition in relation to personal cross-examination. The Bill represented the Government's response to "a wide variety of...articulated public concerns".[24] These concerns were to be addressed in a three-fold manner, as outlined in the Legislative Summary accompanying Bill C-2, published by the Law and Government Division:

> First, the bill will expand the scope of some existing offences, narrow the availability of statutory defences and/or increase penalties available following conviction. Second, the bill proposes the creation of new offences relating to "voyeurism."

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[19] Fourteenth Report of the Standing Committee on Justice and Human Rights, *Victim's Rights – A Voice, Not a Veto* (Parliament of Canada, October 1998).
[20] Bill C-79: *An Act to Amend the Criminal Code.*
[21] Mary T Ainslie, *Testimonial Support for Vulnerable Adults (Bill C-2): Case Law Review* (Department of Justice Canada, 2013) 9.
[22] See Ian Fairclough, "Sexual Assault Defendant Grills Alleged Victim in Court for 6 ½ hours", The Halifax Herald (Halifax, January 15 2003) as cited in Iding (n 17).
[23] Iding (n 17).
[24] Robin MacKay, *Legislative Summary: Bill C-2: An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act* (Law and Government Division, Library of Parliament, 2004) 2.

> Finally, Bill C-2 proposes a variety of procedural reforms intended to facilitate testimony by young persons and broaden the courts' ability to accommodate the needs of children and other vulnerable witnesses in a variety of criminal justice proceedings.[25]

The Bill made a number of significant alterations to s. 486 (2.3). It was renamed s. 486. 3 and expanded to included five subsections. Section 486. 3(1) contained the original s. 486 (2.3) provision restricting personal cross-examination in respect of witnesses under the age of 18. However, the provision was extended to apply to "any proceedings against an accused", not just those concerning sexual offences and offences where violence is threatened, attempted or used. The presumptive protection under s. 486. 3(1) was also extended to complainants of criminal harassment (regardless of age) by virtue of s. 486. 3(4).[26]

However, the Bill failed to introduce a specific protection against personal cross-examination by the accused for sexual offence complainants. Instead, s. 486. 3(2) was introduced, which stated:

> (2) In any proceedings against an accused, on application of the prosecutor or a witness, the accused shall not personally cross-examine the witness if the judge or justice is of the opinion that, in order to obtain a full and candid account from the witness of the acts complained of, the accused should not personally cross-examine the witness. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination.[27]

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[25] MacKay (n 24).

[26] Section 486. 3(4) – "In any proceedings in respect of an offence under section 264, on application of the prosecutor or the victim of the offence, the accused shall not personally cross-examine the victim unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination".

[27] Note, as will be outlined in the following paragraphs, s. 486. 3(2) has since been amended. It is now named s. 486. 3(3), and 486. 3(4) now provides the list of factors to assist a judge in his determination (previously contained under s. 486. 3(3)). However, despite these amendments, for the most part, the nature of the provision, including the application of the 'full and candid' test, remains the same.

This was a particularly wide provision. The prohibition was not presumptive, like that contained in s. 486. 3(1). Instead it was discretionary and required the applicant to establish sufficient justifications for making such an application.[28] However, unlike ss. (1), the provision had the potential to offer protection from personal cross-examination to any witness in any proceedings where the "full and candid" requirement was deemed satisfied. In making such a determination, s. 486. 3(3) of the provision provided that the judge shall take into consideration a number of factors, including the age of the witness, whether the witness has a mental or physical disability, the nature of the offence and the relationship between the witness and the accused.[29] While the ability of the provision to offer protection to a wide range of witnesses in a wide range of cases was admirable, due to its discretionary nature it could not offer sexual offence complainants (or indeed, witnesses of any other offences) complete reassurance that they would not be subjected to a personal cross-examination by the accused.

Nonetheless, initial support for the introduction of s. 486. 3(2) can be found in a 2004 research survey published by the Department of Justice Canada, entitled *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada.* In their findings they established that:

> There was considerable support for expanding section 486 (2.3) to other offences and/or other witnesses. Three-quarters of victim services providers and advocacy groups favoured expansion, compared to half of Crown Attorneys and one-quarter of defence counsel. Across all categories of criminal justice professionals surveyed, support was most widespread for expanding the section to adult witnesses in the category of offences to which it currently applies.[30]

Thus, while there was some divergence in respect of a general expansion of the prohibition to other offences and witnesses, there was widespread support amongst the professionals in the criminal justice system for the removal of the age limit of 18 years in order to extend the

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[28] Nicolas Bala, Katherine Duvall-Antonacouplos, RCL Lindsay, Kang Lee and Victoria Talwar "Bill C-2: A New Law for Canada's Child Witnesses" (2006), 32 (6) *Criminal Reports* 48, 58

[29] See s. 486.3 (4) (renamed and amended by Bill C – 32, 2015, discussed below).

[30] Prairie Research Associates Inc., *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada* (Department of Justice Canada, 2004) 96-67.

protection against personal cross-examination to adult witnesses in sexual and violent offences. However, as highlighted above, this did not occur. Instead, ss. (2) was introduced, offering a much broader discretionary protection. Due to its expansive nature, it was criticised in a number of submissions received by the Department of Justice concerning Bill C-2. For example, while the National Criminal Justice Section of the Canadian Bar Association welcomed the expansion under ss. (1) to cover all proceedings where the witness is a minor, they criticised ss. (2) as "casting the net too wide".[31] They went on to state that such a provision could:

> [U]nfairly prejudice an accused left to conduct some aspects of the case alone, but not others. It also raises issues for legal counsel. What about disclosure? What about the lawyers' obligations? Will such a cross-examination be fair to the accused? What about the accused who refuses assistance, or who seeks it haphazardly and here-and-there during the trial?[32]

As a result of these criticisms, the Canadian Bar Association recommended that s. 486. 3(2) be "restricted to complainants where the offence involves violence, or the threat of violence, physical or psychological injury, and the test should remain the same as for section (1)".[33] They further recommended that s. 486. 3(4) (the provision relating to criminal harassment) be deleted, claiming that it was illogical.[34] It did indeed seem odd to have a separate section which applied only to cases involving criminal harassment, yet no specific section which protected sexual offence complainants (particularly given that specific protections for sexual offence complainants were adopted in the other jurisdictions considered in this Chapter). As highlighted by the Bar Association, complainants of sexual, domestic or physical violence may be just as vulnerable as witnesses in criminal harassment cases. Therefore, they argued that by amending ss. (1) it could offer protection to vulnerable witnesses, (e.g. complainants of criminal harassment, sexual, domestic and physical violence) while at the same time retaining

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[31] National Criminal Justice Section of the Canadian Bar Association, *Submission on Bill C-2: Criminal Code Amendments (Protection of Children and Other Vulnerable Persons)* (Canadian Bar Association, August 2003) 8.
[32] Ibid.
[33] Ibid.
[34] Ibid.

a sufficiently tight scope on the prohibition so as not to jeopardise the fair trial rights of the accused.[35]

Procedurally, the reform failed to address any of the shortcomings of its predecessor. The legislation merely provided for the appointment of a legal representative by the court. No invitation is extended to the accused to appoint his own counsel for the purpose of conducting such a cross-examination, as is the practice in other jurisdictions. No reference is made to the role of the appointed counsel and no guidance is provided as to the manner in which he/she is to be remunerated. Unsurprisingly, this lack of direction has attracted criticism from practitioners and academics alike. Hughes has described the provision as creating a "legislative lacuna" due to its "extremely sparse" procedural guidance[36], while Berg has drawn attention to the approach adopted in other jurisdictions where, unlike in Canada, the relationship between the court-appointed counsel and the self-represented accused is statutorily defined.[37]

However, a subsection was included in the Bill to address the deficit of safeguards offering protection against prejudicial inferences. Section 486. 3(5) states:

> No adverse inference may be drawn from the fact that counsel is, or is not, appointed under the section.

This subsection was a necessary addition and is in line with safeguards accompanying similar prohibitions in the other jurisdictions under comparative research in this Chapter. Nonetheless, there is perhaps room for expansion and clarity here. For example, as previously seen, the equivalent English provision is considerably more detailed, stating that the judge "must give the jury such warning...as the judge considers necessary to ensure that the accused is not prejudiced" by any inference drawn from the fact that he is not permitted to cross-

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[35] Canadian Bar Association (n 31).

[36] Jula Hughes, "Peetooloot: Who Pays the Cost of Appointed Counsel to Cross-examine Complainants" (2006) 42 *Criminal Reports* (6) 57, 59.

[37] David Berg, "A Status Precarious and Perilous: The Lawyer, The Self-Represented Accused, and Section 486.3 Appointments" (2013) 34(1) *For the Defence: Criminal Lawyers' Association Newsletter* 27, 28.

examine the witness in person or from the fact that cross-examination is carried out by a court-appointed legal representative.[38] Nonetheless, despite its lack of clarity, presumably the Canadian legislation places a similar onus on the judge to issue such warnings to the jury in order for ss. (5) to be satisfied.

Bill C – 32, Victims Bill of Rights

For almost a decade the above provision represented the law in relation to personal cross-examination by the accused. However, s. 486. 3 was once again subject to amendment under *Bill C - 32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts, 2015*. This amendment finally extended the provision to provide specific protection to sexual offence complainants against personal cross-examination by the accused.

In July 2015 Bill C – 32 was enacted. The primary purpose of the Bill was to give "victims of crime a more effective voice in the criminal justice system" and to give effect to the Canadian Victims Bill of Rights in order to "provide clear statutory rights at the federal level for victims of crime".[39] However, the Bill also introduced a number of amendments to the Criminal Code of Canada, including an amendment of s. 486.3. While the Bill renamed and repositioned some of the subsections, and made a number of alterations to the phrasing of the sub-provisions, for the most part the amendments are minor. Moreover, the reforms once again failed to address the procedural deficits under the provision.

Nevertheless, despite this shortcoming, the Bill did make a significant alteration to s. 486. 3 (4) which is of particular note in relation to this thesis. As stated above, this subsection provided for a presumptive prohibition on personal cross-examination by the accused of criminal harassment complainants. As noted, at the time the subsection was criticised by the Canadian Bar Association. It argued that it was illogical to have a separate provision protecting complainants of criminal harassment, without extending that protection to other vulnerable witnesses, such as sexual offence complainants. The Bill rectifies this position. It

[38] Youth Justice and Criminal Evidence Act 1999, s. 39.
[39] Government of Canada, *Overview of Canadian Victims Bill of Rights* (Department of Justice Canada, 15 July 2015) < http://news.gc.ca/web/article-en.do?nid=1006529> accessed 10 January 2016.

renamed the subsection as s. 486. 3(2) and expanded its parameters so as to provide specific protection to sexual offence complainants. The provision now states that in relation to any proceedings for an offence to which the section applies (i.e. criminal harassment and sexual assault offences):

> [T]he judge or justice shall, on application of the prosecutor in respect of a witness who is a victim, or on application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

This is a positive development. While the protection offered to complainants remains presumptive (the accused shall "not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination"), providing specific protection to sexual offence complainants against personal cross-examination by the accused is commendable. Furthermore, it brings the provision in line with developments in other common law jurisdictions where such specific protections already exist.

Post-Legislative Research

Finally, a unique aspect of this comparative section which differentiates it from the other jurisdictions under consideration relates to the volume of post-legislative material available on the operation of s. 486.3. Undoubtedly, the primary reason for this can be attributed to the presumptive/discretionary characteristic of the prohibition. Given the nature of the provision, it is necessary (and indeed practical) to conduct regular reviews of the application and operation of s. 486.3.[40] Moreover, criticism of the gaping procedural omissions in s. 486.3 has also added to the volume of material relating to the provision. Consequently, there is ample research reviewing, monitoring and critiquing s. 486. 3. Unsurprisingly, much of this research relates to s. 483. 3 prior to its amendment by Bill C - 32. Nevertheless, given that the

[40] In jurisdictions where mandatory prohibitions have been introduced, conducting regular reviews of the operation of these provisions would not be particularly practical or beneficial. Due to the mandatory nature of such prohibitions there will be no variation in the case law.

amendments introduced by Bill C - 32 did not substantially alter the nature of the provision, the research remains relevant.

In 2010 the Canadian Department of Justice contracted the Canadian Research Institute for Law and Family to undertake a research project reviewing judicial experiences and opinions of the various testimonial supports introduced by Bill C-2, including s. 486. 3. Entitled *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary*[41], one of the purposes of the review was to ascertain the regularity with which applications under s. 486. 3 were made and how often they were successful or unsuccessful. In order to address such questions, a review of case law and a survey of judges across four jurisdictions was undertaken.[42] An additional review supplementing the 2010 publication, entitled *Testimonial Support for Vulnerable Adults (Bill C-2): Case Law Review (2009 – 2012)*[43], was also commissioned by the Department of Justice and published in 2013. The findings of both reviews represent a thorough and comprehensive examination of the operation of s. 486. 3, and trace the varying ways in which the provision has been interpreted by the courts.

In respect of s. 486. 3(1) (prohibition on personal cross-examination of minors[44]), the reviews confirmed that where an application is made under this provision counsel is appointed presumptively.[45] Therefore, the onus is placed on the accused to establish why the proper administration of justice requires personal cross-examination to take place. It was noted that this appears to represent a difficult threshold for the accused to meet, a proposition which was supported by the lack of any reported case law in which an accused met this

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[41] Nicholas Bala, Joanna J Paetsch, Lorne D Bertrand and Meaghan Thomas, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary* (Department of Justice Canada, 2010).

[42] Ibid. viii.

[43] Ainslie (n 21) 11. Also see the companion report to this, Pamala M Hurly, *Vulnerable Adult Witnesses: The Perceptions and Experiences of Crown Prosecutors and Victim Service Providers in the use of Testimonial Support Provisions* (Department of Justice Canada 2013).

[44] As highlighted, since the introduction of the Bill C - 32, a similar prohibition now applies to sexual offence complainants under s. 486. 3(2).

[45] Section 486. 3(1) as amended – "[T]he judge or justice shall ... order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination".

requirement.[46] Given the presumptive nature of the prohibition under s. 35 (14C) of the Criminal Law (Sexual Offences) Bill 2015 and its similarities to s. 486. 3(1), this research is of particular interest from an Irish perspective. Although the Irish provision is not nearly as broad as s. 486. 3 (1) of the Criminal Code of Canada (it is only applicable to sexual and non-sexual violent offences), a similar presumptive prohibition applies to ss. (1) of s. 35 (14C). Employing similar wording to that of the Canadian s. 486. 3(1), s. 35 (14C)(1) of the Irish Criminal Law (Sexual Offences) Bill 2015 states "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".[47] Thus, it appears that the threshold which the accused must meet under Irish law in order to rebut the presumption against personal cross-examination is similar to the threshold which an accused must meet under Canadian law. Consequently, if such a threshold has proven difficult to meet in Canada, it is likely that a similar situation will arise under the Irish 2015 Bill.

Conversely, s. 486. 3(2) (now s. 486. 3(3)) is discretionary in nature. The results of the research highlighted that if the application to appoint counsel is opposed, the prosecution is required to establish that prohibiting personal cross-examination would facilitate the giving of a full and candid account of the witness' evidence.[48] Due to the differences between the two tests, it is not surprising that there was considerably more variation, and at times confusion, in the court's interpretation of the requirements which needed to be established to satisfy the "full and candid" test, than the presumptive test under ss. (1).[49]

Unsurprisingly, the lack of guidance as to how the process should proceed once an application is granted arose as a major issue of contention in the reviews. It was noted in the 2010 review that as a consequence of the absence of legislative direction there were "some significant

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[46] Ainslie (n 21) 11.

[47] Notes, in the General Scheme of the Bill, the wording of s. 35 (14C)(1) was almost a duplicate of the Canadian provision, stating "the accused may not personally cross-examine the witness unless the judge is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination". However, the "administration of justice" was changed to the "interests of justice" upon the publication of the 2015 Bill.

[48] Ainslie (n 21) 11.

[49] For example, see *R v Canning* [2010] NSJ No. 497 (PC) and *R v Jones* [2011] NSPC 3 as cited in Bala et al, *Testimonial Support Provisions for Children and Vulnerable Adults* (n 41).

variations in the case law about the process for retaining and paying counsel".[50] As highlighted previously, this "legislative lacuna"[51] has attracted criticism from stakeholders across the criminal justice field. For example, in *R v S (PN)*[52] Wakefield J identified a number of the procedural deficits in the provision which lead him to ask a series of questions, the majority of which went unanswered. Included among these questions were: does the accused have a choice of counsel; what role does the court have in appointing counsel; is counsel to act as a mere mouth piece for the accused or does he/she have a role beyond this; and how is the appointed counsel to be remunerated?[53]

In particular, where a legal representative is appointed by the court, the accused/appointed counsel relationship proved an issue which the court identified as problematic, with the trial judge questioning: "[w]hat is the relationship between the appointed counsel and the Accused [sic]; should the counsel give legal advice to the accused, can the accused instruct the appointed counsel, is there solicitor-client confidentiality...".[54] Unfortunately these questions were not resolved by the court. Since *R v S (PN)* there has been mounting criticism of the dilemma created by the deficit of legislative guidance on s. 486.3.[55]

Fortunately, when drawing up the procedural requirements under s. 35 (14C) of the 2015 Bill, it appears the Irish drafters chose not to follow in the footsteps of their Canadian counterparts. Instead it appears guidance was sought from aspects of the English legislation, as provided for under s. 38 of the Youth Justice and Criminal Evidence Act 1999.[56] In an attempt to offer a remedy for the current Canadian situation, Berg suggests that the Scottish model offers a potential solution.[57] He compares and contrasts the English and Scottish approach to the solicitor/client relationship and concludes that to adopt the English

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[50] Bala et al, *Testimonial Support Provisions for Children and Vulnerable Adults* (n 41) 32. For an overview of variations in the case law mentioned above see Bala et al, *Testimonial Support Provisions for Children and Vulnerable Adults* (n 41) 32 - 34.
[51] Hughes (n 36).
[52] *R v S (PN)* [2010] ONCJ 244
[53] Ibid. para 15 - 24.
[54] Ibid. para 14.
[55] For example, see Berg (n 37).
[56] As highlighted in Part I of this Chapter, the procedural aspects of the English legislation prohibiting personal cross-examination by the defendant of sexual offence complainants is quite comprehensive and detailed.
[57] Ibid. For example, see Berg (n 37) 34.

approach, which provides that a legal representative appointed by the court shall not be responsible to the accused,[58] could potentially lead to a finding of unconstitutionality under Canadian law. Berg argues that the English legislation, which provides for a "statutorily mandated absence of responsibility to the accused", results in counsel foregoing direction from an uncooperative, self-represented accused.[59]

If this is in fact the case, this raises particularly relevant constitutional compatibility questions from an Irish perspective, given that the applicable draft provision of the Criminal Law (Sexual Offences) Bill 2015 closely follows the English model. In the context of Canada, Berg concludes that following an approach similar to that adopted in Scotland could offer a more viable and constitutionally sound solution to the accused/appointed counsel relationship dilemma. As was highlighted previously in Part II of this Chapter, the Scottish legislation provides very clear directions with regard to the duty of a court-appointed solicitor.[60] The provision requires the appointed counsel to communicate with and receive instructions from the accused and where none are given, to act in the accused's best interest. Thus, Berg concludes:

> The English model would not be a good fit for the Canadian statute as the appointed counsel would need to have the ability to seek and accept instruction from the accused in order to be charter compliant... It is submitted, therefore, that the Scottish model is a better fit for Canadian courts.[61]

Thus, the proposition that the English model of the accused/appointed counsel relationship would not be a "good fit" for the Canadian statute is interesting from an Irish perspective and consequently, will be considered in more detail in the concluding Chapter.

From a more general context, it is noteworthy that despite the continued criticism of aspects of s. 486. 3, the provision has yet to face constitutional challenge.[62] Nonetheless, a

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[58] Youth Justice and Criminal Evidence Act 1999, s. 38(5).
[59] Berg (n 37) 34.
[60] As per s. 288D (4) of the Criminal Procedure (Scotland) Act 1995.
[61] Berg (n 37) 34-35.
[62] As will be highlighted further in the following Chapter, this is particularly interesting and potentially informative from an Irish perspective.

consideration of the potential constitutional infringement to which the Canadian legislation could give rise is particularly relevant from an Irish perspective.

The relevant constitutional protections afforded to the accused which could potentially be infringed by s. 486. 3 are to be found under s. 7 and s. 11(d) of the *Canadian Charter of Rights and Freedoms*. Section 7 of the Charter states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 11 governs proceedings in criminal matters, with ss. 11(d) stating:

> Any person charged with an offence has the right... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Like constitutional protections in other jurisdictions, including Ireland, these provisions guarantee the accused the right to a fair trial and enshrine certain rights (such as the right to make full answer and defence[63] and the right to cross-examine) as essential principles of fundamental justice. However, as Iding notes, it is also well-established under Canadian constitutional law that the right to a fair trial does not entitle the accused to avail of every possible advantage at trial.[64] In *R v Mills* the Supreme Court confirmed that the principles of fundamental justice do not entitle the accused to the "most favourable procedures that could possibly be imagined"[65], while in *R v Darrach* a unanimous Supreme Court held that "the fair trial protected by s. 11 is one that does justice to all parties".[66] More recently in *R v JZS*[67], the Supreme Court upheld the constitutionality of the presumptive scheme for providing testimonial accommodations to children by upholding the decision of the British Columbia

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[63] See *Dersch v Canada (Attorney General)* [1990] 2 SCR 1505, 60 CCC (3d) 132, 80 CR (3d) 299.
[64] Iding (n 17) 84. For a more detailed, if now somewhat dated, consideration of the constitutional considerations at play see Iding (n 17) 79 – 94.
[65] *R v Mills* [1999] 3 SCR 668, para 7.
[66] *R v Darrach* [2000] 2 SCR 443, para 70.
[67] *R v JZS* [2010] SCC 1.

Court of Appeal. Here the court referred to the truth-seeking objective of the judicial process as identified by L'Heureux-Dube J in *R v Levogiannis* where it was noted:

> One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time...the recent trend in courts has been to remove barriers to the truth-seeking process...by relaxing certain rules of evidence, such as the hearsay rules, the use of videotaped evidence and out of court statements, have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth.[68]

Therefore, while the constitutional right to a fair trial and all of its ensuing rights remain essential elements of fundamental justice under the Canadian Charter, the above case law appears indicative of the Supreme Court's support for legislative provisions which assist in the truth-seeking objective of the trial process by accommodating vulnerable witnesses.

As previously stated, while s. 486.3 has not been challenged on constitutional grounds, in *R v Fazekas*[69] a noteworthy reference was made by the Ontario Superior Court of Justice to the provision. While acknowledging that s. 486.3 does not appear to have been constitutionally challenged, Poupore J. goes on to refer to the constitutional validity of s. 486.2[70] as confirmed in *R v S(J)*.[71] Here it was held that the presumption for testimonial aids created in s. 486.2 of the *Criminal Code* is:

> [M]erely the next step in the evolution of the rules of evidence. These rules seek to facilitate the admissibility of relevant and probative evidence from children and vulnerable witnesses while maintaining the traditional safeguards for challenging the reliability of their evidence. [72]

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[68] *R v Levogiannis*, [1993] 4 SCR 475, 1993 CanLII 47 (SCC) as cited in *R v JZS* 2008 BCCA 401, para 35. *Levogiannis* concerned a constitutional challenge of the old s. 486 (2.1) provision which permitted children to testify from behind a screen.

[69] *R v Fazekas* 2010 ONSC 6603. This case involved a motion brought by the prosecution to have counsel appointed for the purposes of cross-examination under s. 486. 3(4).

[70] Section 486.2 provides for certain testimonial aids for vulnerable witnesses, such as giving evidence behind a screen.

[71] *R v Fazekas* (n 69) para 18. See *R. v. S. (J.)* (2010) 251 CCC (3d) 1 (SCC).

[72] *R. v. S. (J.)* (2010) 251 CCC (3d) 1 (SCC) 43 as cited in *R v Fazekas* (n 69) para 21.

Poupore J. concluded that this analysis could prove useful when considering the constitutionality of s. 486. 3, given that a similar rebuttable presumption to that contained in s. 486. 2 is created by the provision with the intention to protect vulnerable witnesses.[73] Hence, it appears that s. 486. 3 would survive a constitutional challenge. From an Irish perspective this point is particularly interesting and will be considered and expanded upon in the following Chapter.

The enactment, subsequent reform and continued operation of s. 486. 3 of the Criminal Code of Canada adds a new dimension to the comparative aspect of this thesis. As highlighted at the beginning of this section, the legislation on personal cross-examination in Canada stands at odds with the models enacted in the other jurisdictions under consideration in that the protection offered to sexual offence complainants is presumptive, as opposed to mandatory. Furthermore, s. 35 (14C) of the Irish 2015 Bill, which appears to draw on aspects of the Canadian approach, makes an analysis of s. 486. 3 particularly relevant.

[73] *R v Fazekas* (n 69) para 21.

Conclusion

The comparative research conducted in this Chapter has produced a number of considerations in relation to the various models of reform adopted in the six jurisdictions considered. The merits and weaknesses of each approach were assessed within the context of the jurisdiction in which they operate. As is the limitation associated with comparative legal methodology, the appropriateness of any legislative reform is very much dependant on the jurisdiction in which it operates. Nonetheless, it was possible to draw a number of provisional conclusions regarding the suitability of the various models examined from an Irish law perspective.

In the subsequent Chapter more tangible conclusions will be drawn regarding the advantages and disadvantages of the various models. From these conclusions, an assessment of an appropriate method of reform in Ireland will be considered.

5. Conclusions – An Appropriate Model of Reform for Ireland

Introduction

In Chapter 1, the framework for considering the central research topic of this thesis was set out. A number of issues were identified which arise in the course of rape and sexual offence trials. The distinct nature of these issues was assessed and the challenges which can arise as a result were considered. Chapter 2 examined the potential constitutional and human rights considerations to which a prohibition on personally cross-examining a witness could give rise. These issues were considered within the context of the Irish Constitution, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. In Chapter 3, the central issue of this thesis was examined: personal cross-examination of the complainant by the accused in rape and sexual offence trials. The specific issues which emerge where such cross-examination takes place, the current situation in this jurisdiction and the arguments for reform were outlined and discussed. Finally, Chapter 4 considered the various approaches adopted by six common law jurisdictions towards the issue of personal cross-examination by the defendant in rape and sexual offence trials. The method of prohibition employed and the various safeguards accompanying these prohibitions were considered and evaluated. The weaknesses and strengths of the various reform methods were identified and tentative conclusions were drawn as to whether similar approaches would be appropriate within an Irish law context.

The discussions and examinations undertaken in the previous chapters lead to an identification of the primary themes which arise when considering the topic of personal cross-examination in rape trials and the possibility of prohibiting such cross-examination. The distinct nature of sexual offences and potential for secondary victimisation faced by complainants of such offences were considered in Chapter 1 and Chapter 3. In particular, Chapter 3 identified a number of problematic issues which arise in rape trials during cross-examination and the propensity for secondary victimisation to occur during such examination. Chapter 2 focused on the fundamental concept of a right to a fair trial and the various rights which accompany this concept. However, the Chapter also considered the parameters of these rights and the extent to which they can be restricted without infringing the accused's right to a fair trial. Thus, the final chapter will be constructed in light of these central themes.

The aim of this Chapter is to develop conclusions as to the most suitable approach to prohibiting personal cross-examination of rape complainants by defendants in this jurisdiction. A suitable starting point is to consider the proposed prohibition contained under s. 35 (14C) of the Criminal Law (Sexual Offences) Bill 2015 in light of the research conducted herein. Consequently, an analysis of s. 35 (14C) will occupy a central role during the development of such conclusions.

Moreover, in assessing the most appropriate model of reform for personal cross-examination in rape and sexual offence trials, guidance can be gleaned from the multi-jurisdictional comparative analysis conducted in Chapter 4. However, simply transplanting a model of reform from one common law jurisdiction to another would not be appropriate. As previously noted, the strengths and weaknesses of any reform model must be assessed within the legal sphere in which they were proposed, implemented and developed. Consequently, the appropriateness of any proposed reform must be considered within an Irish law context and any conclusions drawn must be duly influenced by various considerations, such as those outlined in Chapter 2 during the examination of constitutional and human rights concerns.

Part I of this Chapter will consider the degree of scope which a prohibition on personal cross-examination in rape and sexual offence trials should take. Part II will draw conclusions in respect of the preferred nature of any prohibition, while Part III will address procedural issues and considerations. Finally, Part IV will examine various safeguards which should accompany a prohibition on personal cross-examination. As stated, all observations and conclusions will be considered in light of s. 35 (14C) of the 2015 Bill and will take into account the various considerations outlined throughout the course of this thesis.

I. Scope of the Prohibition

i. A Prohibition Offering Protection to Adult Rape Complainants

As discussed in Chapter 3, the prohibition against personal cross-examination provided for in s. 35 (14C) of the Criminal Law (Sexual Offences) Bill 2015 is limited to witnesses who are minors. Section 35 (14C)(1) concerns the personal cross-examination of witnesses under 14 years by defendants, while s. 35 (14C)(2) relates to witnesses under the age of 18. The age-limited nature of the provision lies in its origins. As outlined in Chapter 3, s. 35 (14C) was introduced as one of a range of child specific protection measures recommended by two Joint Oireachtas Committees.

Nonetheless, despite the protection which s. 35 (14C) offers to minors, it is submitted that a provision should also be introduced to offer explicit protection to adult complainants of rape and sexual offences against personal cross-examination by the defendant. As outlined throughout this thesis, it is argued that complainants in such cases warrant recognition as a distinct category of witness to whom special measures should be afforded in this respect.

From the comparative analysis conducted in Chapter 4, the adoption of a prohibition explicitly protecting sexual offence complainants has been favoured in a number of jurisdictions. In every jurisdiction examined, with the exception of Scotland, a specific prohibition on the cross-examination of adult sexual offence complainants was introduced. In England and New South Wales, separate provisions exist protecting sexual offence complainants, while in Victoria, New Zealand and Canada the relevant provisions refer to sexual offence complainants (but also refer to other witnesses such as family members of complainants, domestic violence victims and harassment complainants). In Scotland, the scope of persons entitled to avail of the legislative protection is significantly wider. The accused is prohibited from self-representation for the entirety of the trial and consequently, is not entitled to personally conduct the cross-examination of any witness. [1]

[1] Nonetheless, it is clear from the evidence available (as discussed in Chapter 4, Part II) that the motivation to introduce the prohibition was to protect sexual offence complainants specifically.

The benefits of offering specific protection to sexual offence complainants have been recognised in a number of jurisdictions and have been argued for throughout this thesis. As detailed in Chapters 1 and 3,[2] complainants in sexual offence trials face a distinct set of issues. As a result, special measures in certain cases are justifiable. Prohibiting personal cross-examination of the complainant by the defendant is such a measure.

As highlighted in Chapter 4, in a number of the jurisdictions considered, provisions were in place prohibiting the personal cross-examination of child witnesses prior to the introduction of a prohibition in relation to sexual offence complainants. England, New South Wales, New Zealand and Canada all had age-limited protections against personal cross-examination prior to implementing further expansive reforms. In some jurisdictions, the lack of protection for adult sexual offence complainants was brought to the attention of the legislators by the plight of rape victims forced to endure personal cross-examination at the hands of their rapists. In England, the case of Julia Mason and the brutal cross-examination to which she was subjected by the accused, Randal Edwards, caused media outrage and subsequently spurred the legislature to initiate reform proceedings, culminating in the introduction of the Youth Justice and Criminal Evidence Act 1999.[3] In New South Wales the *Skaf* case first brought this issue to the attention of the mainstream media and general public, while the *'K Brothers'* cases hastened reformative action in order to prevent the personal cross-examination of the complainants by the defendants.[4] In both England and New South Wales a prohibition against personal cross-examination by the defendant had already existed for the protection of children prior to those cases. In the wake of these rape cases, it was recognised that the relevant provisions would need to be extended if sexual offence complainants were to be protected. In other jurisdictions, this recognition was reached without any prominent rape or sexual offence trials drawing attention to the issue.

It seems probable that a similar recognition and realisation of the need to expand the protection against personal cross-examination will occur in Ireland in the future. While rape cases involving personal cross-examination have occurred in this jurisdiction, no significant

[2] In particular, refer back to Part I and Part II of Chapter 3.
[3] See Chapter 4, Part I.
[4] See Chapter 4, Part III.

public outcry has been generated in this regard. This is perhaps surprising. While an examination of the origins of s. 35 (14C) of the Irish 2015 Bill shows the provision represents a response to concerns about the protection of child witnesses, experience elsewhere indicates similar protections should also be offered to adult complainants in sexual offence cases. Therefore, in light of the manner in which this issue has developed in other jurisdictions, it is submitted that the necessity to offer protection to sexual offence complainants will eventually be recognised in Ireland. Of course, it is hoped that this recognition will occur sooner rather than later.

ii. The Range of Offences and Witnesses

As was discussed in Part IV of Chapter 3, despite being limited to minors, the range of offences and witnesses which s. 35 (14C) aims to cover is nonetheless admirable. As per the wording of the provision, to avail of the protection offered, minors do not have to be complainants but merely witnesses. This is a commendable element of the provision as it recognises that the need to offer protection against personal cross-examination may extend beyond complainants to other witnesses under the age of 18 in such trials. The scope of offences which the draft provision proposes to cover is also significant. It includes offences of both sexual and non-sexual violence within the category of scenarios where personal cross-examination can potentially be prohibited. Such an inclusion acknowledges that cross-examination by the accused in person may also be problematic in cases involving non-sexual violence as in sexual offence cases.

The purpose of this thesis was to consider the issue of personal cross-examination of rape and sexual offence complainants by the defendant, and to examine the possibility of reforming this issue. The case was made that sexual offences and the complainants in such cases occupy a distinct and unique position within the criminal justice system. As a consequence of this, it is submitted that personal cross-examination of complainants by the defendant in rape and sexual offence cases should be explicitly restricted.

Nevertheless, while this thesis specifically advocates a prohibition on personal cross-examination of sexual offence complainants, such a prohibition does not need to operate to

the exclusion of extending similar protections to other potentially vulnerable witnesses. As seen from the developments in other jurisdictions, the introduction of a prohibition on personal cross-examination of complainants in sexual offence trials can pave the way for a recognition of the plight which may be faced by witnesses in trials for other types of offences.

As emphasised throughout this thesis, a number of the arguments advanced to justify the prohibition of personal cross-examination of rape and sexual offence complainants can be applied to complainants in a variety of other serious and violent offences. Evidence of this can be seen by reference to some of the comparative legislation considered in Chapter 4, whereby a prohibition on personal cross-examination in other serious offences such as domestic violence and harassment was also introduced.[5] In fact, as outlined in the comparative Chapter, every jurisdiction examined has not confined the protection to sexual offence complainants and has also implemented additional reforms to offer protection to other categories of vulnerable witnesses. Generally, these reforms have accompanied or have been implemented in the wake of the introduction of prohibitions on the personal cross-examination of sexual offence complainants. As highlighted in Chapter 4, they have often come in the form of discretionary, as opposed to mandatory, prohibitions on personal cross-examination. In England and Wales, s. 36 of the Youth Justice and Criminal Evidence Act 1999 provides for a discretionary prohibition on the cross-examination of any witness subject to certain conditions and qualifications. In New Zealand a similar prohibition was introduced via s. 95 (2) of the Evidence Act 2006. Both these prohibitions were enacted along with the mandatory prohibition on the cross-examination of sexual offence complainants. In Victoria and Scotland, the prohibitions against personal cross-examination were also extended to include other witnesses a number of years after the initial introduction of the prohibition in relation to sexual offence trials. In Victoria, the relevant provision was extended in 2008 to include protected witnesses of offences of family violence.[6] The Scottish provision is applicable to a wide category of vulnerable witnesses in a range of cases where the court is satisfied that this is in the interests of the witness and not prejudicial to the fairness of the trial.[7] A similarly wide provision exists in Canada.[8]

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[5] For example, Evidence Act 2006, s. 95 (NZ), as amended by the Evidence Amendment Act 2011.
[6] Evidence Act 1958, s. 37CA (Vic). As previously discussed, this Act has now been consolidated into the Criminal Procedure Act 2009 (Vic).
[7] Evidence Act 1995, s. 288F, as inserted by the Vulnerable Witnesses (Scotland) Act 2004.
[8] Criminal Code of Canada, s. 486. 3(3).

Thus, there is a strong argument to be made for a similar approach to be adopted in this jurisdiction. Further detailed consideration of this issue would be outside the ambit of this thesis, as it is focused on the trial of rape and sexual offences. Nonetheless, it is submitted that, in addition to the s. 35 (14C) protection, the implementation of a prohibition on the personal cross-examination of sexual offence complainants by the accused would facilitate the introduction of a similar yet broader protection for other categories of vulnerable witnesses.

iii. Limit the Prohibition to Cross-Examination

Under s. 35 (14C), the prohibition on the defendant's right to self-representation is limited to cross-examination. Therefore, the defendant is still entitled to represent himself for the duration of the trial, including during the cross-examination of witnesses who fall outside the protection of the provision. Limiting the prohibition to cross-examination is commendable and it is submitted that any reform enacted to cater for the protection of sexual offence complainants should contain a similar limitation.

Every jurisdiction considered in Chapter 4 (except for Scotland) limited the prohibition imposed to cross-examination alone. In Scotland, the prohibition applies for the duration of the trial, as opposed to merely for the cross-examination of the complainant. There are a number of justifications for limiting any potential prohibition to cross-examination. As was highlighted in Chapter 2, while many of the defendant's rights potentially affected by a prohibition on personal cross-examination are not absolute and may be subject to various limitations, ultimately any encroachment should be minor and should not result in an unacceptable infringement upon the defendant's paramount right to a fair trial. While a wider prohibition may be viable in Scotland due to the hybrid system of common and civil law in operation there, such an infringement would be unlikely to pass constitutional muster in Ireland. It is contended that limiting the encroachment on the defendant's right to self-representation to prohibiting cross-examination of the complainant in sexual offence trials is sufficiently narrow a prohibition as to withstand a claim of incompatibility with the defendant's constitutional right to a fair trial in this jurisdiction. Moreover, it is submitted that a wider prohibition, while offering a number of benefits, is not necessary for the purpose of

achieving the objectives of preventing the harms and negative effects of personal cross-examination.

II. Nature of the Prohibition

As discussed in Part IV of Chapter 3, the prohibition provided for under s. 35 (14C) is hybrid in nature. Section 35 (14C)(1) provides for a presumptive prohibition in respect of witnesses under 14 years of age (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" requires such cross-examination), while ss. (2) of s. 35 proposes a discretionary prohibition in relation to witnesses under the age of 18 (the court "may direct that the accused shall not personally cross-examine the witness").[9]

It is submitted that the research conducted in Chapter 3, and in particular in Chapter 4, indicate that a mandatory prohibition would be the most suitable approach if a reform was to be enacted to protect rape complainants. Nevertheless, given the research conducted in Chapter 2, it is also acknowledged that a purely mandatory prohibition may give rise to constitutional concerns. Therefore, it may be that a prohibition which is qualified with an 'interests of justice' exception, similar to that in s. 35 (14C)(1), would be more suitable within an Irish law context, and more likely to be found compatible with the due process clause in Art. 38 of the Constitution.

As highlighted, in every jurisdiction examined in Chapter 4 (with the exception of Canada), a mandatory prohibition in relation to personal cross-examination of rape and sexual offence complainants by defendants has been adopted.[10] As outlined in Chapter 4, it appears a mandatory prohibition was favoured in these jurisdictions over a discretionary or presumptive one due to the consistency and reassurance that such a prohibition can offer. Nevertheless, before favouring a mandatory prohibition on cross-examination, many of the individual law reform agencies explored a number of alternative approaches.[11] In practice there are four viable options: the prohibition can take on a mandatory, presumptive, discretionary or hybrid form. Many of the advantages and disadvantages outlined by the law

[9] Refer back to Chapter 3, where the somewhat arbitrary nature of these ages was discussed.
[10] Note, as discussed, in Scotland the prohibition is also mandatory but applies for the duration of the trial, as opposed to merely the cross-examination of the complainant. See Chapter 4, Part II.
[11] For example, the Home Office in England and Wales and the Law Reform Commission in New South Wales. See Chapter 4, Part I and Part II, where these options were outlined.

reform agencies in relation to these various approaches are also applicable when assessing the most appropriate option within an Irish law context.

The problems with a presumptive, discretionary or hybrid prohibition were outlined in the preceding Chapter. For example, it can lead to inconsistency in decisions. This is particularly so where a discretionary prohibition is concerned. A discretionary prohibition, unlike a presumptive one, extends to the trial judge a wide degree of latitude when deciding whether to impose a prohibition. Often such provisions offer little if any guidance and merely require that the decision-maker call upon his/her own volition when considering the issue at hand.[12] Conversely, a presumptive prohibition significantly fetters the discretion extended to the trial judge by directing that they allow the exercise of the prohibition unless the "interests of justice' or the 'administration of justice' requires otherwise.[13] Consequently, it is understandable why greater inconsistencies can emerge where discretionary prohibitions are concerned. Although it was not solely related to sexual offence complainants, the confusion that may be caused by a discretionary prohibition on personal cross-examination is evident by reference to the varied interpretations and tests employed by the Canadian courts in respect of s. 486.3 (2) (now s. 486. 3(3)) of the Criminal Code of Canada, prior to its amendment.[14] As a result, it is considered advisable to avoid the potential for such confusion. Furthermore, where the prohibition is discretionary, judges may be reluctant to exercise this discretion and restrict personal cross-examination in cases where a prohibition would be appropriate, due to fear that grounds for an appeal could be established as a result.

In addition to this, a presumptive/discretionary prohibition will not offer complainants complete reassurance that they will not be subjected to personal cross-examination by the accused. This is so even where the threshold to breach the presumptive prohibition is set

[12] As is the case in relation to s. 35 (14C) (2) of the 2015 Bill

[13] The 'interests of justice' is the phrase employed in the Irish 2015 Bill (s. 35 (14C) (1)), while the 'administration of justice' is the wording used in the Canadian Criminal Code (s. 486. 3(1)), as discussed in Chapter 4, Part VI.

[14] See Chapter 4, Part VI. Initially, prior to the amendment introduced by the Victims Bill of Rights Act 2015, this discretionary prohibition was the only protection potentially available to sexual offence complainants against personal cross-examination by the accused.

quite high, as is the case in Canada.[15] This issue was addressed by the Home Office in England, where they noted that only a mandatory ban could provide the greatest reassurance to complainants.[16] A compulsory prohibition also eliminates the prospect that personal cross-examination by the accused may act as a deterrent to victims contemplating making a report of sexual abuse.

Nonetheless, endorsing a prohibition which is mandatory in nature could potentially give rise to constitutional concerns. Interestingly, while not referring directly to the Constitution, O'Malley comments that in Ireland "a reasonable provision such as that introduced in English law in 1999 is unlikely to violate the right to a fair trial under the European Convention on Human Rights".[17] Indeed, this proposition is supported by the research conducted in this thesis, in so far as it relates to the *European Convention on Human Rights*. However, from a strictly Irish constitutional perspective, a mandatory prohibition may present problems.

Introducing a prohibition which is void of an 'interests of justice' exception and hence, excludes any possibility of latitude in its application, could be constitutionally problematic. A consideration of existing Irish legislation which attempts to impose restrictions on trial procedures or judicial discretion highlights the legislature's tendency to avoid blanket prohibitions.[18] Such a tendency primarily relates to the constitutional necessity to protect the defendant's rights under Art. 38.1 of the Constitution, as discussed in Chapter 2. It is possible that if legislation which imposes a restriction upon the trial rights of an accused is drafted in a manner which allows no margin for flexibility it may be viewed as creating an excessive conflict with the defendant's right to a fair trial. Consequently, such a provision could be

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[15] It should be noted that while in Canada the courts, which have a tradition of closely adhering to precedent, have established that the threshold for breaching the presumptive prohibition on personal cross-examination is high, it is possible that similar jurisprudence may not emerge from the Irish courts. This in turn may temper any comparative analysis drawn between the situation in Canada and the difficulty which may be faced by a defendant in this jurisdiction who seeks to breach the threshold created by a presumptive prohibition.

[16] Home Office, *Speaking up for Justice*: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (London, June 1998) 65, as discussed in Chapter 4, Part I of this thesis.

[17] Thomas O'Malley, Sexual Offences (2nd edn, Round Hall 2013) 415.

[18] For example, see s. 3 of the Criminal Law (Rape) Act 1981 and s. 7 of the Criminal Law (Rape) (Amendment) act 1990, as outlined in Chapter 1.

deemed to fall foul of fair trial guarantees under the Constitution.[19] Furthermore, oftentimes the legislature is slow to draft provisions which fully suppresses judicial discretion. Without a degree of discretion the fear is that trial judges will not be in a position to deal with unforeseen cases that may come before the court which the legislation has not accounted for, which in turn could lead to claims of unconstitutionality.[20] It is likely such constitutional considerations influenced the decision to construct the prohibition under s. 35 (14C) of the 2015 Bill in a presumptive/discretionary manner. Moreover, given the strength of Canada's constitutional law (and the extent to which the drafters of Irish legislation draw upon Canadian law), the fact that Canada is the only jurisdiction considered that did not introduce a mandatory prohibition is also of significance when considering reform in Ireland.

However, it is arguable that the most effective way of avoiding any presumptions of victimhood or vulnerability in relation to the complainant or perceptions of guilt in regard to the accused (which could subsequently interfere with his constitutional rights) is by implementing a mandatory provision in relation to personal cross-examination in sexual offence cases.[21] Where the prohibition is mandatory, the trial judge can explain to the jury that due to the compulsory prohibition it is routine practice for a legal representative to cross-examine the complainant. The trial judge can then warn that no adverse inferences should be drawn as a result. Arguably the same warning can be issued where a presumptive or discretionary prohibition is in operation. However, it is possible that such a warning, when devoid of the explanation that the prohibition is obligatory, does not carry the same weight.

Nonetheless, while it is submitted that the weight of this thesis indicates that a mandatory prohibition is the most suitable approach from a complainant protection perspective, it is also

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[19] Refer back to Chapter 2. Furthermore, Leahy makes a similar point in relation to rule-bound schemes, such as that which applies in England and Wales in respect of sexual experience evidence, and explains why such schemes may not be appropriate in this jurisdiction. See Susan Leahy, "Whether Rules or Discretion? Developing a Best Practice Model for Controlling the Admissibility of Sexual Experience Evidence in Sexual Offence Trials" (2014) 4(1) *Irish Journal of Legal Studies* 65, 73 – 77.

[20] Also see ibid. 78.

[21] For example, the New South Wales Law Reform Commission noted that a mandatory prohibition is "less prejudicial to accused persons because the procedure is routine". (New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* (LRC 101 – 2003) 55).

acknowledged that given the constitutional considerations at play in this jurisdiction, it may not be the most appropriate model within the context of Irish law. Therefore, in the absence of a mandatory prohibition, a presumptive prohibition containing an 'interests of justice' exception which allows a degree of latitude in its application (similar to s. 486. 3(2) of the Criminal Code of Canada and to that under s. 35 (14C)(1)) is more likely to be found compatible with the Constitution. Such an exception grants a requisite degree of latitude to trial judges, while also maintaining the integrity of the prohibition in the vast majority of cases.

III. Procedural Issues

Identifying suitable procedural provisions to accompany a reform of the type discussed above offers a particular challenge within an Irish context. As highlighted in Chapter 4, while in general a similar approach was adopted by those jurisdictions reviewed in relation to the parameters and nature of the prohibition, there was more variation with regards to the procedural provisions chosen to give effect to such a prohibition. Consequently, no one approach emerged as clearly favoured.

From an Irish law perspective, it is submitted that the proposal advanced by the relevant subsections of s. 35 (14C) of the 2015 Bill offers a viable approach to addressing any procedural issues related to implementing a prohibition on personal cross-examination of the complainant in sexual offence trials by the defendant. Consequently, it is suggested that if a prohibition against personal cross-examination was to be introduced to cater for adult sexual offence complainants, the procedural structure provided for under the relevant provisions of the 2015 Bill offers a laudable approach. As outlined in Chapter 3, the relevant provisions appear to draw extensively on the procedural provisions in place in England and Wales under the Youth Justice and Criminal Evidence Act 1999.

i. Invitation to Accused to Appoint a Legal Representative

Under the provision in the Irish 2015 Bill, where an accused is prohibited from personally cross-examining a complainant, he will be invited to arrange for a legal representative to conduct the cross-examination on his behalf.[22] Similar invitations are extended to accused persons under the relevant legislation in England, Scotland, Victoria and New Zealand. If the accused refuses or fails to do so, then as per s. 30 (14C)(5), the court will appoint a qualified legal representative to conduct the cross-examination.[23]

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[22] Subsection (3) provides: "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...".

[23] Subsection (5) provides: "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".

The potential implications of extending to the accused the opportunity to appoint a legal representative himself, prior to the court doing so as a result of his refusal or failure, was previously discussed in Part III of Chapter 4 in relation to New South Wales. A disadvantage of providing the accused with such an opportunity is the potential for delay. For example, an accused may agree to appoint a legal representative himself, in which case the court will allow him a specified period within which to do so (section 35(14C)(3)(b)). Yet, at the end of this specified period, the accused may have failed or subsequently refused to make such an appointment. Therefore, a delay akin to this may be avoided where the court automatically appoints a person to conduct the cross-examination in such cases. However, it is submitted that the inclusion of a procedure requiring that such an invitation be extended is necessary to protect the constitutional due process rights of the accused. While in reality, if the defendant refuses or fails to appoint a legal representative, the court will do so, this provision can at least be described as an attempt to accommodate the accused's constitutional rights within the parameters of the prohibition.

ii. Court-Appointed Legal Representative vs Court-Appointed Person

If s. 35 (14C) is enacted, and an invitation is issued to the accused to appoint a legal representative, the next issue is the strategy to be employed where the invitation is refused. As referred to above, if the accused refuses or fails to do so, then as per s. 35 (14C)(5), the court shall consider if 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" (section 35(14C)(4)). If the court considers it is necessary, then the court must appoint a legal representative, chosen by the court, to conduct the cross-examination "on behalf of the accused" (section 35(14C)(5)) .[24]

This procedure is similar to the approach adopted in England, Scotland, Victoria and Canada. However, in New South Wales and New Zealand there is no requirement for the court-

[24] "(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."

appointed person to be a legal representative. Therefore, given the difference in approaches, it is necessary to consider the potential advantages and disadvantages of each method.

Looking first at the court-appointed legal representative model, there are some clear benefits to this approach. Instinctively, it appears the most obvious option when deciding who should conduct the cross-examination of a complainant in place of the accused. A legal representative will have the necessary training and skills required to fulfil such a role. An experienced legal representative will also possess the requisite expertise to facilitate the smooth 'parachuting' of themselves into the legal proceedings.[25] Of course, it is possible that this approach could present problems. For example, it could place a legal representative in a difficult position if he/she is forced to represent an uncooperative defendant. Moreover, the 'parachuting' of a legal representative into proceedings after they have commenced could also give rise to issues. However, Hanly comments that the notion that 'parachuting' a lawyer into proceedings could be problematic is not necessarily reflective of past experiences.[26] He notes that where this is done in respect of separate legal representation for complainants in rape trials, there is no evidence that it causes particular difficulties.[27] Nonetheless, as highlighted in Chapter 4, where the legislation does not provide sufficient guidance as to the role of the court-appointed legal representative, this approach may give rise to problems. This is the case in Canada, where no guidance is provided by the legislation. As outlined in the Part VI of Chapter 4, the problems which have emerged in Canada as a result of this deficit of legislative direction have resulted in confusion, leading to calls for reform.

By comparison, in England there is more detail in the legislation in relation to the role of the legal representative. However, this has not necessarily eliminated the problems associated with this approach.[28] Section 38 (4) of the Youth Justice and Criminal Evidence Act 1999 states that the court-appointed legal representative will examine the witness "in the interests of the accused". Section 38 (5) goes on to state that "a person so appointed shall not be responsible

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[25] Conor Hanly, "Aspects of the General Scheme of the Sexual Offences Bill 2014" (Rape Crisis Network Ireland, Public Information Seminar on the Criminal Law (Sexual Offences) Bill 2015, Dublin 2, April 2015).
[26] Ibid.
[27] Ibid.
[28] Refer to the criticism of the approach from a Canadian law perspective as outlined in Chapter 4, Part VI.

to the accused". These two subsections seem to stand at odds with one another. Directing the legal representative to cross-examine a witness in the interests of the accused while at the same time stating that he/she is not responsible to them is indeed confusing. This confusion perhaps explains the omission from the Irish 2015 Bill of a subsection similar to that of s. 38 (5) of the English 1999 Act. As outlined in Part I of Chapter 4, it is possible that its inclusion in the 1999 Act was motivated by a desire to ensure that a legal representative who is forced upon an uncooperative defendant is not subsequently open to liability for negligent representation. This appeared to be the justification arrived at by the Victoria Law Reform Commission upon consideration of the approach adopted in England. By contrast, in Victoria, where advocate's immunity still exists and legal representatives are not held liable for the negligent representation of a client, the relevant subsection states that the legal practitioners must "act in the best interests of the accused person if the accused person does not give any instructions to the legal practitioner". In Ireland, the legal situation in relation to advocate's immunity is unclear. Moreover, Ryan and Ryan comment, given the conflicting opinions voiced in other common law jurisdictions in relation to the immunity, and considering that Irish jurisprudence to date has refrained from adopting the approach endorsed in England and Wales, predicting likely future developments in this jurisdiction in relation to advocate's immunity is challenging.[29] Nevertheless, regardless of the difficulty in relation to predicting future developments in this regard, the authors go on to note that, "one can say with confidence that the traditional policy justifications for retaining the immunity appear increasingly unconvincing".[30] Consequently, adopting an approach similar to that in Victoria may not be advisable. Moreover, given the uncertainty which has been caused in England, the alternative may not represent the most suitable course of action either.

Therefore, if there are problems inherent in the legal representative approach, does appointing a person who is not a legal representative offer a more appropriate solution? As stated, this is the approach employed in New South Wales and New Zealand; in these jurisdictions it appears that the role of such a person is merely to act as a mouthpiece for the defendant. For example, in New South Wales, the legislation states that the person is to ask "only the questions that the accused person requests...to put to the complainant" and is not

[29] See Desmond Ryan and Raymond Ryan 'A Bar to Recovery? Barristers, Public Policy, and Immunity from Suit' (2005) 10(6) *Bar Review* 209, 212 – 213.
[30] Ibid. 213.

to "independently give the accused person legal or other advice".[31] In such a scenario there is no confusion in relation to the duty owed by the court-appointed person. It is clear that their role is simply to repeat the questions posed by the accused to the complainant. Consequently, it is not necessary to consider any duty beyond competently fulfilling that role.

While this may present itself as a satisfactory way of avoiding the issues raised when a legal representative is appointed, it is not without its flaws. Such an approach could appear forced and inauthentic, hindering the flow of the cross-examination. Furthermore, it is possible that the person appointed by the court may not possess the same skill-set as a legal representative who is trained and experienced in conducting cross-examinations. Moreover, as was highlighted by the New South Wales Law Reform Commission, a person appointed by the court to act as a mere mouth piece will not necessarily stop the accused posing inappropriate, humiliating or intimidating questions to the complainant via the court-appointed person.[32] Therefore, given that both options are not without defects, the issue remaining to be addressed is which approach is the most appropriate from an Irish law perspective.

Ultimately, it is submitted that the method advanced under the 2015 Bill offers the preferred approach to this issue. As outlined above, this approach offers a number of benefits, including the fact that a legal representative will have the necessary training and skills to fulfil such a role. Furthermore, the omission from the Irish legislation of s. 38 (5) of the 1999 Act, which relieves the court-appointed legal representative of responsibility to the accused, is also a positive development in that it avoids the confusion caused by this provision in England. Therefore, it is submitted that the s. 35 (14C)(5) of the 2015 Bill represents an appropriate approach. Consequently, if a provision were to be introduced to cater for adult sexual offence complainants, implementing a procedural approach similar to that under s. 35 (14C)(5) would also be desirable.

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[31] Criminal Procedure Act 1986, s. 294A (3) and s. 294A (4) (NSW), as amended.
[32] NSW Law Reform Commission (n 15) 70, as discussed in Chapter 4, Part III.

iii. Payment of the Legal Representative

Finally, if employing a legal representative to conduct the cross-examination of the complainant is the favoured approach, the final issue to be addressed in this context is payment of that legal representative. Needless to say, if a statutory provision prevents an accused from personally cross-examining a complainant and instead requires that such cross-examination is conducted by a legal representative, the legislation should also ensure that the accused avoids incurring any costs as a result. As was highlighted in Chapter 4, this very point was identified by the Home Office in England and Wales.[33] Moreover, the approach adopted in Canada, as discussed in Chapter 4, Part VI, illustrated the issues which can emerge when no direction is provided in respect to the remuneration of such a legal representative (or indeed, direction in relation to any other procedural aspect). Again, the relevant provisions of the 2015 Bill offer a viable approach to providing for the payment of a legal representative employed for the purpose of cross-examining a complainant on behalf of a defendant who is prevented from doing so personally. As outlined in Part IV of Chapter 3, s. 35 (14C)(7) and s. 39 of the 2015 Bill provide for the payment of a legal representative employed for the purpose of cross-examining a witness under the provision. Section 35 (14C)(7) states:

> (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).

Moreover, the relevant part of s. 39 inserts a new subsection in the Civil Legal Aid Act 1995 which provides for the granting of a legal aid certificate in respect of a legal representative for an accused who is prohibited from conducting a cross-examination in proceedings referred to under s. 35 (14C). Specifically it states:

> Section 28 of the Civil Legal Aid Act 1995 is amended by the insertion of the following subsections after subsection (5A):

[33] As highlighted in Chapter 4, Part I, the Home Office Working Group recommended that "where an unrepresented defendant is prohibited from personal cross-examination he should be granted legal aid, without means testing, to obtain legal representation for cross-examination purposes only". (Home Office, *Speaking up for Justice*: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (London, June 1998) para 9.43).

> (5B) Notwithstanding any other provisions of this Act, where an accused person is prevented from conducting a cross-examination referred to in section 14C of the Criminal Evidence Act 1992, the Board shall grant a legal aid certificate to the accused for the purpose of his being represented in relation to such cross-examination.

As discussed in Chapter 3, Part IV, while this subsection could provide further clarification by explicitly stating that the sub-provision applies whether the legal representative is appointed by the accused or by the court, it nonetheless ensures that a statutory procedure is in place for the remuneration of a legal representative employed under s. 35 (14C). Consequently, it is a commendable provision, and furthermore, it is submitted that it, along with the other procedural provisions contained under s. 35 (14C), offers constructive guidance in relation to the implementation of a further prohibition against the personal cross-examination of adult sexual offence complainants.

IV. Safeguarding the Rights of the Accused

The importance of incorporating safeguards to protect the defendant's right to due process into any provision which prohibits personal cross-examination has been highlighted at various stages throughout this thesis. Safeguards protect the defendant's rights and temper the prohibition, strengthening its compatibility from a fair trial perspective. Every jurisdiction examined in Chapter 4 (with the exception of Scotland[34]) has incorporated safeguard provisions in the legislation prohibiting personal cross-examination. Generally these safeguards came in the form of warnings to the jury not to draw any adverse inferences from the fact that the accused is being prevented from cross-examining the witness in person, and where a legal representative is appointed by the court, not to draw any adverse inferences from the fact that the cross-examination was carried out by such a legal representative as opposed to a person acting as the accused's own legal representative. This is the structure of the warning contained under English law and it was incorporated into the Irish 2015 Bill under s. 35 (14C)(6).[35] It is a commendable provision. Therefore, any further reform prohibiting personal cross-examination of sexual offence complainants should contain a similar warning. Moreover, it is also contended that additional safeguards could be added to any subsequent prohibition.

As outlined in Chapter 4, a number of jurisdictions have drawn on the safeguards in place under the English 1999 Act but have also further expanded upon them. For example, in New South Wales the judge must "inform the jury that it is standard procedure in such cases to appoint the person to put the questions to the complainant". He/she must also warn the jury not to "give the evidence any greater or lesser weight because of the use of that arrangement".[36] Similarly, in Victoria the court must warn the jury that it is "routine practice for the accused person to obtain or be provided with legal representation" for the purposes of cross-examining the witnesses in such situations and that the evidence given under such

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[34] Given that representation is imposed on defendants for the duration of the trials, and not merely for the cross-examination of the complainant, there is arguably no need for a safeguard in the form of a warning to the jury.

[35] "(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."

[36] Criminal Procedure Act 1986, s. 294A (7) (NSW), as amended.

cross-examination "is not to be given any greater or lesser weight as a result of the cross-examination not being conducted by the accused personally".[37] These are important inclusions, which reemphasise the warning to the jury not to draw inferences. Consequently, if a further prohibition was to be introduced offering protection to adult sexual offence complainants, it might be preferable to adopt a warning similar to that in s.30 (14C)(6), while also expanding upon it. For example, it might be advisable to require the trial judge, if he/she considers it necessary, to warn the jury in more specific terms. That said, where existing Irish legislation directs a trial judge to issue a warning, it generally does not require that warning to be issued in specific terms.[38] Nevertheless, while a specific warning may be unusual from an Irish perspective, it is still worthy of consideration given the advantages it can bestow.

[37] Evidence Act 1958, s. 37CA (10) (Vic), as amended.

[38] For example, in relation to the corroboration warning, as discussed in Chapter 1, Part IV, s. 7 (2) of the Criminal Law (Rape) (Amendment) Act 1990 states "If a judge decides, in his discretion, to give such a warning...it shall not be necessary to use any particular form of words to do so".

V. Final Conclusions

The central aim of this thesis was to consider the issue of personal cross-examination of the complainant by the defendant in rape and sexual offence trials, and to examine the possibility of addressing and reforming this issue through the introduction of a statutory prohibition on such personal cross-examination. It was contended that rape and sexual offences, and complainants of such offences, occupy a distinct position within the criminal justice system. As a consequence, a case was made for providing a specific protection against personal cross-examination for complainants in such cases.

After considering the recent developments under the Criminal Law (Sexual Offences) Bill 2015, examining the constitutional and human rights considerations, and conducting a comparative analysis of the reforms implemented in six other common law jurisdictions, conclusions were reached as to the most appropriate model of reform for Ireland. It is submitted that introducing a mandatory prohibition on personal cross-examination of adult complainants by the defendant in rape and sexual offence cases, alongside the prohibition provided in relation to child witnesses by s.35 (14C) of the 2015 Bill, is the preferred reform approach. However, in order to ensure that this provision does not breach the constitutional due process rights of the accused, such a prohibition would likely have to be qualified by an 'interests of justice' exception, such as that currently provided in s. 35 (14C)(1) of the 2015 Bill as it relates to witnesses under 14 years of age. As highlighted above, such a prohibition should be limited to cross-examination of the adult complainant alone, rather than to other witnesses more generally; and where the prohibition applies, the cross-examination should be conducted by a legal representative. As this thesis has highlighted, reforms similar to those advanced here have been introduced in a number of other common law jurisdiction, yet Irish law still lags behind. The enactment of such a prohibition would help bring this aspect of the law in Ireland in line with our common law counterparts, while also offering protection against personal cross-examination of adult complainants by the defendant in rape and sexual offence cases.

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