



# School of Law

UNIVERSITY OF LIMERICK

**Invited Submission to the Minister for Justice on the Discussion Paper on Sexual Offences Against Vulnerable Persons, particularly in respect of the proposal to replace section 5 of the Criminal Law (Sexual Offences) Act 1993.**

*By Prof. Shane Kilcommins,  
Dr. Susan Leahy and  
Dr. Eimear Spain*

Centre for Criminal Justice



School of Law

2/9/14

## 1. Context

Victims with disabilities have largely been ignored in Ireland. A recent study undertaken on victims of crime with disabilities found, for example, that people with disabilities ‘are not being strategically identified as a victim group, either by victim support organisations, or those engaged at a central government policy level in dealing with victims’ issues’ (Edwards, Harold, Kilcommins 2012: 100). This is evident across most, if not all, of the Irish criminal justice agencies. In particular, the lack of data collection on people with disabilities as victims of crime is striking. Unlike other jurisdictions, statistical data on crime prevalence rates experienced by people with disabilities, based on crime type or impairment type, simply does not exist. Irish national crime surveys do not include people with disabilities as a sub-group. It is also not apparent that agencies involved in the criminal justice system are monitoring or keeping records of people with disabilities. As that study pointed out (2012: 123), ‘[t]hese data absences need to be acknowledged as serious gaps which undermine our knowledge of people with disabilities’ experiences, and render them invisible as a group within the broader victim constituency’.

Though empirical data is sparse in the area, the failure of the legal profession in Ireland to understand the difficulties posed by the criminal justice system for victims with disabilities has also been noted. In 1996, the *Report of the Commission on the Status of People with Disabilities* recommended that there needed to be a ‘general raising of awareness amongst the legal professions towards disability issues’ and proposed that it should be part of their legal training (1996: para 15.2; 15.15). There is no evidence that training programmes have been introduced for solicitors or barristers in Ireland on advising, examining, and cross examining witnesses with disabilities in the intervening period. This provides further support for the view that the politics of neglect is deeply embedded in Irish legal culture. In England and Wales, the Advocacy Training Council recently noted that the manner ‘in which the vulnerable are treated in our court system is a mark of how civilised a society we are’. In noting ‘the paucity of understanding’ of some advocates as regards the conditions and needs of vulnerable people, and the inconsistencies in approach to questioning such witnesses, it recommended, *inter alia*, that a ‘comprehensive modular programme of training in handling vulnerable witnesses, victims and defendants should be put in place for all criminal and family practitioners, both new and experienced’, and the provision of ‘toolkits’ for advocates setting out common problems and solutions. These kinds of mechanisms are not available to Irish legal professionals and, more significantly, at present, there would seem to be no momentum in developing such mechanisms.

The marginality of victims of crime with disabilities at a policy level is of concern given that the interaction between criminal justice agencies and such witnesses can also reinforce traditional constructions of subordination and inferiority. Bartlett and Mears (2011), for example, recently analysed Rape Crisis Network Ireland data on incidents of sexual abuse, disclosed by people with disabilities between 2008 and 2010. They also conducted an online survey of people with disabilities. They identified a number of problems including dissatisfaction with professional services such as the Gardaí and difficulties of accessing general services. Some of the comments were as follows (2011, 68-69):

*“The police let me down in some regards by not investigating more fully and the saddest thing is rape, mutilation and attempted murder is not exactly a grey area. There was a lack of information from the police and constant worry of being murdered.”...*

*“I was sexually abused for seven years of my life. I did go to the Gardaí but they handled it very, very badly and I had to go to the papers so that they would take the situation I was in seriously. The Gardaí eventually put me in touch with the rape crisis centre in my area. They said I didn't have a case and I wasn't raped so they said they weren't the people to help me because they were dealing with people who had it worse than me...”*

*“I went to the Rape Crisis Centre and they knew all about rape, but they did not understand about the disability element of the situation.”*

It should be noted that there is an onus on criminal justice agencies to put in place mechanisms to identify victims of crime with disabilities under Article 22 of the new EU Directive (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime (it should also be noted that there is currently a window of one year before compliance is required in November 2015). It provides that Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and

to what extent they would benefit from special measures in the course of criminal proceedings.

The vignettes alluded to above relate to intermediate or advanced stages in the reporting process. What limited research exists in relation to earlier reporting stages by victims with disabilities relates to sexual offences. The findings point to very high attrition rates. Hanly et al (2009), in a study of rape files received by the DPP between 2000 and 2004, found that 13.1% (78) of the sample involved a complainant with a history of mental illness. Of these 78 specific cases, only two were prosecuted. Research has also been undertaken by the Prosecution Policy Unit of the DPP's Office in relation to cases labelled as 'rape' in the period between 2005 and 2007. The analysis found that 3.7% of cases (11) involved complainants with a history of mental illness, none of which were prosecuted (Hamilton 2011). It also found that in the 5.8% (17) of cases involving someone with a learning disability, only four were prosecuted whilst another one was withdrawn (ibid).

## **2. Phraseology**

Initially it can be said that it is not appropriate to use the term 'mentally impaired' to describe persons with disabilities (Law Reform Commission 2006), as is currently employed under the 1993 legislation. By the same reasoning, the use of the phrase 'mental handicap' in the Criminal Evidence Act 1992 is also inappropriate.

**We therefore welcome the use of the term 'vulnerable persons'.**

## **3. Section 5 and over criminalisation**

The definition of 'mentally impaired', as provided for in Section 5 is overly broad. 'Mentally impaired' is defined as 'suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation'. These factors are irrelevant to the fundamental question of whether or not the person with disabilities can consent/has consented to the sexual activity. The effect, as described by the Law Reform Commission, is that 'outside a marriage context, a sexual relationship between two 'mentally impaired' persons may constitute a criminal offence because there is no provision for consent as a defence in respect of a

relationship between adults who were both capable of giving a real consent to sexual intercourse’ (2005: 141). This criminalization of consensual sexual activity fails to recognise the sexual autonomy of people with intellectual disabilities or mental illnesses who fall within the statutory definition. This ‘all-or-nothing’ approach does not account for the situation where an individual with an intellectual disability is capable of exercising sexual choice (Leahy, 2013). The position is clearly in breach of the Convention on the Rights of Persons with Disabilities (CRPD) which, in Art. 23, expressly requires States Parties to take ‘appropriate measures’ to eliminate discrimination against persons with disabilities in all matters relating to ‘marriage, family, parenthood, and relationships.’ In addition, the provision may breach Article 8 of the European Convention on Human Rights in relation to respect for private life (LRC, 2005: 143).

**We therefore welcome the proposal to respect the rights of those with intellectual disability or mental illness to enter into loving sexual relationships.**

#### **4. Section 5 and under criminalisation**

Section 5 under protects some people with disabilities in that it covers buggery, intercourse and acts of gross indecency between males, but not unwanted sexual contact more generally. Such an obvious gap in the criminal law calendar jeopardizes the sexual autonomy of persons with disabilities and falls short of establishing a process that punishes all forms of serious sexual abuse against such persons.

In a recent Irish case, *The People (DPP) v XY* (Central Criminal Court, 15 November 2010, *The Irish Times*, 16 November 2010), the accused was charged with section 4 of the Criminal Law (Rape) (Amendment) Act 1990 after it was alleged that he forced a woman with an intellectual disability into performing the act of oral sex with him. Such a sexual act did not come within the scope of section 5 of the 1993 Act. On this issue, White J in the case noted that “[i]t seems to me that the Oireachtas when they introduced the 1993 Act did not fully appreciate the range of offences needed to give protection to the vulnerable” (as quoted in Law Reform Commission 2011: 191). Given the lack of evidence of an assault or hostile act on the part of the accused, the trial judge directed the jury to acquit the defendant, stating that that the judiciary could not fill a ‘lacuna in the law’ (ibid: 192).

This under-protection of such victims in Ireland can be contrasted with the criminal law protections available in England and Wales. Part One of the *Sexual Offences Act 2003* (SOA) provides for a wide range of offences specific to victims with a mental disorder or an intellectual disability. Sections 30-33 of the SOA prohibit offences ‘against persons with a mental disorder impeding choice’. These include offences such as sexual activity with a person with a mental disorder impeding choice (section 30); causing or inciting a person with a mental disorder impeding choice to engage in sexual activity (section 31); engaging in sexual activity in the presence of a person with a mental disorder impeding choice (section 32); and causing a person with a mental disorder impeding choice to watch a sexual act (section 33).

Sections 34-37 provide for four further offences against a person with a mental disorder. However, such provisions do not require that the choice of the person concerned has been impeded, rather that their agreement in each case has been obtained by threat, inducement or deception. They include the offences of inducement, threat or deception to procure sexual activity with a person with a mental disorder (section 34); causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception (section 35); engaging in sexual activity in the presence of a person with a mental disorder, procured by inducement, threat or deception of a person with a mental disorder (section 36); and causing a person with a mental disorder to watch a sexual act by inducement, threat or deception (section 37).

The offences created in Sections 38-41 specifically relate to cases where the defendant concerned is a care worker. They include sexual activity with a person with a mental disorder (section 38); causing or inciting sexual activity with a person with a mental disorder (section 39); engaging in sexual activity in the presence of a person with a mental disorder (section 40); and causing a person with a mental disorder to watch a sexual act (section 41).

The lacunae identified in Ireland in fact breaches the European Convention on Human Rights. Though the Convention does not explicitly refer to victims of crime, the jurisprudence of the Court has placed obligations on member states to criminalise wrongdoing, ‘to take preventive operational measures’, to investigate and give reasons, and to adequately protect victims and witnesses at various stages in the criminal process. These obligations arise under Articles 2 (right to life), 3 (degrading treatment), 6 (fair trial) and 8 (private life) and have been analysed in cases such as *Osman v The United Kingdom* [1998] EHRLR

228, *X and Y v The Netherlands* [1985] 8 EHRR 2350, *A v UK* [1999] 27 EHRR 611, and *KU v Finland* [2008] 48 EHRR 1237, and *MC v Bulgaria* [2003] ECHR 3927/98).

The latter case is of particular relevance. In her complaint before the ECHR, MC alleged that she was raped by two male acquaintances when she was fourteen years old. Under Bulgarian law, threats or the use of force are necessary elements of rape. Following the prosecutor's inquiry into the incident, it was determined that neither threats nor the use of force were established beyond a reasonable doubt, with the consequences that proceedings were terminated. MC argued, *inter alia*, that under the European Convention, Bulgaria has a positive obligation to protect an individual's physical integrity and private life, as well as to provide an effective remedy for breaches of those rights. In its judgment of December 4, 2003, the ECHR unanimously found violations of articles 3 and 8 of the European Convention. The court maintained that under these articles, state parties to the European Convention have *positive obligations* (our emphasis) to enact criminal legislation to effectively punish serious sexual violence.

**We therefore welcome the proposal to provide increased protection for vulnerable persons against sexual exploitation and not just limit protection to acts involving sexual intercourse or buggery.**

## **5. Reverse Onus Provisions and the Presumption of Innocence**

It is likely that the proposal as outlined will be challenged in the courts as it relates to the onus of proof. What is proposed is that the prosecution will have to prove, beyond all reasonable doubt, that the sexual act took place and that the victim did not consent but if it is proven that the victim was vulnerable, the onus of proof regarding the defendant's belief as to consent will shift to the defendant. The defendant will be required to prove that he (or she) took reasonable steps to ascertain that the vulnerable person had the understanding to consent and to form a reasonable belief that the vulnerable person did consent to the sexual act. The justification for such an approach is that it is reasonable to afford special protection to such persons and that any person dealing with a vulnerable person should be under a duty to specifically address the question of understanding and consent before engaging in a sexual act with such a person. The basic offence remains the same. The only difference is that the procedure to prove such an offence is slightly different.

The presumption of innocence is well established in Ireland and is protected under Article 38 of our Constitution. In *The People (at the suit of the Director of Public Prosecutions) v DO'T* [2003] 4 IR 286, Hardiman J noted:

“The presumption of innocence, thus so securely entrenched nationally and internationally, is not only a right in itself: it is the basis of other aspects of a trial in due course of law at common law. The rule that, generally speaking, the prosecution bears the burden of proving all the elements of the offence necessary to establish guilt is a corollary of the presumption.”

The presumption of innocence is also reinforced by Article 6 of the European Convention on Human Rights and has been considered in cases such as *Salabiaku v France* [1988] ECHR 10589/83 and *Janosevic v Sweden* [2002] ECHR 34619/97. In interpreting Article 6, the Court in *Barbera, Messegue and Jabardo v Spain* ([1988] ECHR 10588/83 at para 77) noted:

“Paragraph 2 embodies the principle of the presumption of innocence. 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. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.”

There are of course exceptions which permit ‘reverse onus’ provisions in certain circumstances. These include statutory exceptions (relevant here), the defence of insanity (arising from the common law but now thought to be codified through the Criminal Law (Insanity) Act 2006, and the peculiar knowledge principle (now thought to be redundant in criminal law)). In relation to statutory exceptions, *O’Leary v. AG* [1991] ILRM 454 is the first important case. Here the plaintiff was convicted in the SCC of membership of an unlawful organisation contrary to section 21 of the Offences against the State Act, 1939, as amended, and possession of incriminating documents contrary to section 12 of the same Act. Section 24 of the Offences against the State Act 1939 provided

that *proof of possession of incriminating documents shall without more until the contrary is proven be evidence* that such a person was a member of the said organisation at the time alleged in the said charge. The plaintiff argued that shifting the burden of proof onto the accused unconstitutionally deprived him of the protection of the presumption of innocence. It was held that if the statute could be construed as merely shifting the evidential burden of proof then no constitutional invalidity occurred. If the effect of the statute is that the court must convict should the accused fail to produce rebuttal evidence, then its effect was to shift a legal burden of proof (and possibly breach constitutional rights). If, on the other hand, the effect of the provision was such that an accused might produce no rebuttal evidence, and still not be convicted because the statute had not alleviated the obligation on the prosecution to prove the case beyond reasonable doubt, then the issue of constitutional invalidity could not arise. The Court adopted this latter interpretation so that the effect of section 24 was that evidence of possession amounted to evidence only – its probative value could be reduced though cross examination, by reference to the mental capacity of the accused, or by adducing evidence of the manner in which the accused came into possession of the document. In effect, therefore, the Court held that the only burden that shifted to the accused was an evidential one; the legal burden remained at all times on the prosecution.

In *Hardy v. Ireland* [1994] 2 IR 550 it was section 4(1) of the Explosive Substances Act 1883 which was under scrutiny. It provided that it is an offence for any person to make explosive substances under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, *unless he can show that he made it or had it in his possession or under his control for a lawful object*. Hederman J (with whom O’Flaherty and Blayney JJ concurred) held that the legal burden of proof remained at all times on the State. The effect of the provision was merely to shift an evidential burden on to the accused which could be rebutted in a number of ways.

These judgments have been considered unsatisfactory by academic commentators and have been described by Campbell, Kilcommins and O’Sullivan as an exercise in ‘extreme interpretive construction’ having regards to the words under consideration. More recently the Courts have begun to look at such reverse onus provisions in a more satisfactory way. In *The People (at the suit of The Director of Public Prosecutions) v. Egan* [2010] IECCA 28, the accused was charged with Section 3 of the Criminal Law (Sexual Offences) Act 2006, which provides, *inter alia*, that:-

"(1) Any person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall, subject to subsection (3), be liable on conviction on indictment ... "

...

(5) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.

(6) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances."

The accused was convicted of the offence and sentenced to 15 months imprisonment. The complainant in question was 14. The accused applied to the Court of Criminal Appeal for leave to appeal against his conviction on the ground that the trial judge misdirected the jury with regard to the burden of proof concerning the defence of honest belief as provided in s. 3(5) of the Act of 2006. At the trial, the accused did not advance evidence in support of the defence of honest belief that the girl was 17 years or more. The trial judge raised the issue of his own motion and he directed the jury that the burden was on the accused to show on some evidence that he honestly believed the girl to be 17 years or over and to ascertain from the evidence whether there was a reasonable doubt that the accused could have held such a belief. It was submitted on behalf of the accused that he merely had to raise the defence of honest belief as in the case of the defence of provocation in a murder trial and the burden of proof then lay on the prosecutor to negative that defence beyond reasonable doubt.

The prosecutor claimed that there was no evidence upon which the jury could conclude that the accused had an honest belief that the complainant was over the age of 17 years. Three possible approaches to the interpretation of s. 3(5) of the Act of 2006, were propounded by the prosecutor, namely:

(1) that the defence of honest belief need only be raised on the whole of the evidence and the prosecution must rebut this defence (evidential burden);

(2) that the defence of honest belief must be proved by the accused by reference to some evidence in the case which would establish a reasonable doubt in the mind of the jury; this was the approach adopted by the trial judge in this case, namely that s. 3(5) of the Act of 2006 casts a persuasive burden of proof on the accused person. He must prove the defence of honest belief by reference to some evidence in the case, whether by cross-examination or otherwise, but not necessarily by giving evidence himself. The burden upon him is no higher than to establish a reasonable doubt in the mind of the jury (the burden to raise a reasonable doubt in the mind of the jury);

or (3) that the accused must show by way of proof on the balance of probabilities that he had an honest belief that the child was more than 17 years of age (legal burden).

The Court of Criminal Appeal held that s. 3(5) of the Act of 2006 explicitly placed a burden of proof on the accused to prove the defence of honest belief but it interpreted it according to approach 2.

The Court went on to note:

“The court must clearly give effect to the provision. It cannot ignore the fact that the Oireachtas requires the accused person to prove the state of his honest belief. The trial judge gave effect to that statutory requirement. He did not go so far as to adopt the submission of the prosecutor to the effect that the burden must be discharged on the balance of probabilities. He held that the accused must show that there is a reasonable doubt as to whether he had the required honest belief. This, as he described it, is "a reversed burden of proof". As such, it is a novelty in our criminal law. It proceeds, however, from an interpretation of the statutory provision

which goes no further than to require the accused to prove that there is a reasonable doubt as to whether he had an honest belief that the complainant was 17 years of age or more. In the view of the court, the trial judge was correct to require that the accused discharge at least that burden. It may be that the section, correctly interpreted, places a heavier burden on the accused person, namely to prove, on the balance of probabilities, that he had the requisite honest belief... The jury convicted the accused on the basis of a ruling more favourable to him than the burden of proof on the balance of probabilities, even assuming that to be the correct interpretation. In these circumstances, it is neither necessary nor appropriate for the court to decide whether the section requires proof to that higher standard. The court expresses no view on that question.”

In *DPP v Smyth* (Unreported, 18<sup>th</sup> May, CCA, 2010), the provisions of 29(2) of Misuse of Drugs Act, 1977 were challenged. The section provides:

“In any such proceedings in which it is proved that the defendant had in his possession a controlled drug it shall be a defence to prove that he did not know and had no reasonable grounds for suspecting that what he had in his possession was a controlled drug or that he was in possession of a controlled drug.”

The applicants were convicted following a trial of possession of drugs for sale or supply pursuant to ss. 15 and 15A of the Misuse of Drugs Act, 1977 as amended and also of simple possession. The applicants argued that the learned trial judge misdirected the jury in their consideration of the defence to possession which is set out in s. 29(2) of the 1977 Act. The learned trial judge informed the jury that the burden of proving the guilt of the accused rested with the prosecution, and that burden, notwithstanding the relevant statutory provision never shifted to the defence. The judge went on to state;

"If you believe, for example, that Mr. Smyth Senior, in your opinion knew nothing about this, if you're satisfied about that beyond reasonable doubt, or if you have a doubt, then you must give him the benefit of that and, similarly, you must look at Mr. Smyth Junior and apply the same principles".

The Court of Criminal Appeal ordered a retrial on the basis that it was no part of the reversed burden carried by either of the applicants for them to prove beyond reasonable doubt that they did not know and had no reasonable grounds for suspecting that what was in their possession was a controlled drug. In criminal proceedings, the burden of proving the charge was on the prosecution and that burden must be discharged by proof beyond a reasonable doubt. Where any element of proof was reversed, the accused did not bear the burden of proving the non-existence of the relevant element of the offence beyond a reasonable doubt –only to raise a reasonable doubt as to the absence of an element of the offence. Therefore, the direction of the learned trial judge was in error.

“The Court considers that an evidential burden of proof is cast on the accused by s. 29 of the Misuse of Drugs Act 1977, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. This is not a burden merely of adducing evidence. It is legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt. This has consequences for the trial of charges based on possession of a controlled drug. The prosecution must prove possession as against the accused. They must also prove that the substance in question was a controlled drug as defined in the Misuse of Drugs Act 1977, as amended...A burden is then cast on the accused to make out a reasonable doubt in accordance with s. 29. This may be done by pointing to a weakness in the prosecution case, by reference to a statement made to the garda, or by the accused himself giving evidence. Because this is a legal burden of proof, the decisions as to what evidence on that issue will be sufficient so as to raise a reasonable doubt are for the accused. He must decide if he has put sufficient evidence by way of proof to raise a reasonable doubt before the jury. This carries practical consequences. Once the prosecution have proved possession of a controlled drug, the accused cannot make an application of no case to answer at the close of the prosecution case based upon any failure on their part to prove that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. In terms of making out the defence on the standard of showing a reasonable doubt, it is a decision for the accused as to whether he gives evidence or not.”

In *PJ Carey Contractors Limited v DPP* [2012] IR 234, section 6 of the Safety, Health and Welfare at Work Act 1989 was at issue. This section provides, *inter alia*, that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees and, at s. 6(2)(d), the provision of systems of work that are planned, organised, performed and maintained so as to be, so far as is reasonably practicable, safe and without risk to health. Section 50 of that Act provides that in any proceedings for an offence consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, ‘it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.’

The applicant was charged with certain offences contrary to the Act of 1989, in particular under s. 6, following the collapse of a trench on a building site which had resulted in the death of an employee. During the trial uncontroverted evidence was adduced that the system of work adopted was, as far as was reasonably practicable, safe and without risk. An application was made by the applicant to withdraw the entire case from the jury on the basis that there was no case to answer given that all the evidence called from persons who were present at the time of the accident favoured the accused. Some of the charges were withdrawn. However, the applicant was convicted of offences contrary to s. 6 of the Act of 1989 regarding the alleged failure of the accused to provide a safe system of work. The prosecutor relied on the doctrine of *res ipsa loquitur* and on s. 50 of the Act of 1989 submitting that the provision reversed the legal burden of proof onto the applicant requiring it to prove that it had adopted a safe system of work. The applicant appealed against the conviction. It was held by the Court of Criminal Appeal in allowing the appeal and setting aside the conviction, that the offence under s. 6 (2)(d) of the Act of 1989 was not complete merely on proof that the trench had collapsed. It required proof of a failure to provide a safe system of work. It was also held that s. 50 of the Act of 1989 created a reversed burden of proof which cast an evidential burden only on the accused to raise a reasonable doubt (upholding *Smyth* and *Egan*), and not a

substantive onus of legal proof, and that that evidential burden had been discharged by the accused.

Hardiman J stated:

“It appears to me that, having referred to s. 50 of the Act of 1989, the trial judge then misinterpreted its purport so as to cast a substantive onus of legal proof upon the defendant. Thus, at p. 28 of the transcript for the 6th day of the trial, having referred to s. 50 of the Act of 1989, he said:-

*It has not been adequately explained or explored in the evidence as to why a box of 5.1 metres in length was opted for, with a height, or a depth, of 2.4 metres [...] consequently it made, in all, that trench in excess of eight metres [...] was to be dug [...] I believe it is open to the jury to draw the conclusion that what occurred was inevitable [...] Mr. Hartnett's [counsel for the accused] explanation is that, of course, every trench has to be unsupported for a time until the box gets in there, but it is also available to the jury, in looking at the facts, that in a relatively smaller area [...] a trench box was put in a vertical way and I believe it would be reasonably open to them to ask why something like that wasn't done in the area [where the accident occurred] ... it hasn't been explored or discussed in the evidence as to why ever the box south of the district heating system was inserted in that vertical way, other than that it would seem to suggest because it was the only way it would fit. And why something similar wasn't fitted to the other side, again, is a question I believe reasonably open to a jury to consider.”*

It appears to me that the foregoing passages envisage an obligation on the defendant to explain certain things and suggests the inadequacy of such explanation. But that is a misconstruction of the effect of s. 50 which is merely to cast an evidential, and not a legal or substantive burden on the defendant. I believe that this was an error of law by the trial judge and, that if this error had not occurred, it would have been manifest that the defendant was entitled to a direction.”

The constitutional danger in what is being proposed is that a legal burden is being placed on the accused to prove the reasonableness of his belief that the vulnerable person did consent to the sexual act. To expressly place such an

obligation on the accused can be interpreted, in our view, to breach the right of the accused to a presumption of innocence. Nor do we believe that it will be saved by the justification to the effect that ‘it is reasonable to afford special protection to such persons and that any person dealing with a vulnerable person should be under a duty to specifically address the question of understanding and consent before engaging in a sexual act with such a person’. There are other persons who would fall within the vulnerable category and yet the law does not accommodate offences against them by shifting a legal burden of proof – consider the *Egan* judgment, for example, and the interpretation of section 3(5) of the Criminal Law (Sexual Offences) Act 2006 involving an offence of sexual relations with a child under 17 years of age.

**In the light of the constitutional right to a presumption of innocence, and particularly the recent judgments in *Egan*, *Smyth*, and *Carey*, we believe that the reverse onus provision should read as follows: ‘*It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the person against whom the offence is alleged to have been committed was not a vulnerable person*’. The Courts are likely to interpret this in a manner that is consistent with the constitutional right of an accused to a presumption of innocence and the judgments referred to above. This will mean that it will require defendant to ‘raise a reasonable doubt’ rather than prove the defence on the balance of probabilities as a legal burden would require.**

## **6. Two more peripheral but crucial issues in ensuring adequate protection**

The substantive law protecting vulnerable persons from sexual exploitation cannot be looked at in isolation. There are, we suggest, two other important factors that need to be addressed in ensuring adequate protection through law; these relate to the access that vulnerable persons have in sexual offence cases to live television link evidence, and their competency to testify at trial. Both are dealt with below.

**(i) The *DOD* judgment, live television link evidence and its link with Section 5**

The adversarial nature of the Irish criminal process ordinarily requires that witnesses are examined *viva voce* in open court. In recognition, however, of the trauma that this may impose on victims of specified sexual or violent offences, section 13 of the Criminal Evidence Act 1992 provides that victims, among other witnesses, can give evidence in such cases *via* a live television link. In the case of victims of such offences who are under the age of 18 or are persons suffering from a ‘mental handicap’(s 19), there is a presumption in favour of giving evidence via television link (s. 13(1)(a)). In all other cases, leave of the court is required (s. 13(1)(b)).

The use of such a provision was contested in the Irish courts in the cases of both *Donnelly v Ireland* [1998] IR 321 and *White v Ireland* [1995] IR 268 on the grounds that it constituted an unlawful interference with an accused person’s right to fairness of procedures. In neither case was the challenge successful.

More recently, in *D.O’D v Director of Public Prosecutions and Judge Patricia Ryan* [2010] 2 IR 605 the applicant had been charged with having sexual relations with two ‘mentally impaired’ persons. He sought leave to quash the order of the trial judge directing the use of video link facilities pursuant to section 13(1)(b) of the *Criminal Evidence Act* of 1992 (a general provision which permits a witness ‘with leave of the court’ to give evidence via a link). The applicant contended that the giving of evidence by video link by the two complainants would create a real risk that he would not get a fair trial because use of that method for giving evidence could or would convey to the jury that they were persons with ‘mental impairment’, a matter which he disputed as part of his defence. The High Court upheld his claim, holding that evidence by video link in the circumstances carried with it a real risk of unfairness to the accused which probably could not be remedied by directions from the trial judge or statements from the prosecution. In the case, the prosecution applied for evidence to be given in this way under s. 13(1) (b) of the Act of 1992. Had the application been made under s. 13(1) (a) of the Act of 1992 (which permits children and ‘mentally impaired’ persons to give evidence via a link for certain specified offences ‘unless the court sees good reason to the contrary’), it was argued that it would have involved a finding that both of the complainants

suffered from a mental disability. The material put before the trial judge which expressly considered the ability of either complainant to give evidence were the statements of two psychologists who noted that the level of intellectual disability of the complainants fell within the low to mild range and that the use of video link testimony would be ‘advantageous in the circumstances.’

The defence objected on the grounds that it would create an inference that the complainants were vulnerable persons and persons who suffered from a ‘mental impairment’, if permitted to give evidence by way of video link. In essence, the defence argued that the issue of their ‘mental impairment’ would be pre-determined and would impinge on the accused’s right to a fair trial. The trial judge directed that the evidence should be given by video link under 13(1) (b) of the *Criminal Evidence Act 1992*. On appeal to the High Court, O’Neill J over turned this decision. He stated:

‘In my judgment, it is clear that evidence by video link in the circumstances of this case does carry with it a real risk of unfairness to the accused person which probably cannot be remedied by directions from the trial judge or statements from the prosecution. Manifestly, s.13 of the Act of 1992 provides for the giving evidence by video link for offences such as the ones the applicant is charged with. The discretion which the Court has under s.13 (1) (b) to order evidence to be given in this way or to direct otherwise raises the difficult question as to how the Court is to achieve a correct balance between the accused’s right to a fair trial and the prosecution’s right in an appropriate case to have evidence given by video link. It is clear that what is required is a test that achieves the correct balance between these two competing rights.’

He went on to note:

‘Where the Court reaches the conclusion that the giving of evidence in this way carries with it a serious risk of unfairness to the accused which could not be corrected by an appropriate statement from the prosecution or direction from the trial judge, it should only permit the giving of evidence by video link where it was satisfied by evidence that a serious injustice would be done, in the sense of a significant impairment to the prosecution’s case if evidence had to be given in the normal way, *viva voce*, thus necessitating evidence by video link in order to vindicate the

right of the public to prosecute offences of this kind. The fact that the giving of evidence *viva voce* would be very unpleasant for the witness or coming to court to give evidence very inconvenient, would not be relevant factors.’

Having established the test, the judge went on to hold that the trial judge did not achieve ‘the correct balance in this case between the right of the applicant to a fair trial and the right of the first named respondent to prosecute the offences in question on behalf of the public’. The complainants accordingly were required to give evidence *viva voce* in the case.

The reasoning in this case is problematic for a number of reasons. To begin with, it is difficult to understand why the complainants were not permitted to give their evidence via television link under 13(1) (a) of the *Criminal Evidence Act 1992*, which specifically relates to children and persons with a ‘mental handicap’, where there is a presumption operating in their favour. The complainants were channelled into the more general provision of section 13(1) (b) (where a presumption in their favour does not operate) on the basis that a finding of ‘mental impairment’ would be unfair to the accused and would compromise his defence. It is unclear how a finding that the complainants were ‘mentally impaired’ for ‘*the purposes of giving evidence via a television link* under section 13(1) (a) would compromise the accused’s defence, namely that *he (subjectively) did not know and had no reason to suspect that the complainants with whom he had sexual relations were ‘mentally impaired’*. Moreover, such a debate and determination would take place in the absence of a jury, and at the end of the trial a direction could be given by the trial judge informing jury members that nothing was to be taken from the fact that the complainants gave evidence via a television link (the jury would not know that the application was made under section 13(1) (a)).

It should also be borne in mind that the range of section 13 is very limited; it is confined to offences involving physical or sexual violence. When sexual offences are perpetrated against persons with a mental disability under section 5 of the *Criminal Law (Sexual Offences) Act 1993* (the only offence governing sexual relations with ‘mentally impaired’ persons), the specific defence open to an accused party is to argue that he did not know that the complainant had a mental disability. According to *DO’D*, such a defence prevents the complainant

from relying on the presumption of giving evidence under 13(1) (a), and requires the strongest of proof under section 13(1) (b). This reasoning denies — or, at best, greatly reduces — the possibility for such complainants in such sexual offence cases to give their evidence *via* television link, something which is completely at odds with the spirit underpinning section 13. It imposes on the provisions a strait-jacket that is anathema to the accommodation they were designed to facilitate.

It also difficult to establish what was the real risk of unfairness to the accused in this case in permitting the complainants to give their evidence via television link. Such evidence already passes constitutional muster as outlined in cases such as *Donnelly v Ireland* [1998] 1 IR 338; *White v Ireland* [1995] 2 IR 268; and *DPP v McManus* [2011] IECCA 32.

An accused does not have a right to face-to-face confrontation with his or her accuser in Irish criminal law. The right to fair procedures is adequately safeguarded by the possibility that such video link evidence will be given on oath, that it can be tested by a rigorous cross-examination, and that his or her demeanour can be observed by the trial judge and jury members. The public interest in the prosecution of crime is an important interest at stake in such cases; it should not be set aside on general —well trodden but somewhat speculative— grounds that it may cause injustice to the accused, without adducing specific evidence as to how in fact there would be a real risk of unfairness.

Using a complainant's disability to deny him or her the right to give evidence via television link because of the nature of an accused's defence is insufficiently specific and is hard to justify on objective grounds. No explanation is forthcoming in the case regarding the precise nature of the injustice; nor is a normative justification provided for in the decision having regard to all the legal principles and rules at play in the case. It tends in the direction of reifying the principle of orality and legal adversarialism, particularly when the purpose of such a determination is considered, and others such as that the determination takes place in the absence of a jury, that a direction about the use of video link evidence can in any event be given to the jury at the end of the trial, and that we permit other such preliminary determinations (the refusal of bail, for example) without claiming that they compromise fairness of procedures. It speaks of a

system unwilling to adjust its practices to accommodate the different circumstances of some witnesses and the distress and trauma that giving evidence in court may cause them.

More generally, it has been noted that the greatest impediment to accommodating complainants with mental disabilities ‘lies in our assumptions about what is necessary to ensure a fair trial for an accused’ (Benedet and Grant 2007: 547). In Ireland, as in other common law jurisdictions, the assumption is that fairness to the accused can be delivered only through the adversarial process, delivered in the main through oral evidence with cross-examination. Insofar as measures have been taken to accommodate victims with disabilities, they have for the most part attempted to facilitate victims in engaging in the adversarial process rather than challenging any of the foundational premises of the process. Yet, as Ellison argues, ‘the paradigmatic adversarial process offers limited scope for the improved treatment of vulnerable and intimidated witnesses’ (2001: 160). In Ireland, Delahunt (2010) makes a similar point, suggesting that we continue to ‘endure a situation where our adversarial system risks imposing a secondary trauma on the complainant’. She goes on to note:

We have legislation here which is 20 years out of date [referring to the Criminal Evidence Act 1992], which is limited in respect of the offences to which it applies, which contains archaic, undefined terms, which does not provide statutory guidelines for Gardaí or courts to work within, and which does little to safeguard the interests of either the complainant or defendant.

**It will be important therefore that a specific ‘special measures’ package (which will obviously include television link evidence) should be created for vulnerable witnesses - as distinct from a range of ad hoc measures that can be applied inter alia to vulnerable witnesses – to ensure a more inclusionary approach to the reception of such witnesses’ testimony.**

## **(ii) Competency to testify**

The Irish criminal process ordinarily works off the assumption that all witnesses are competent to testify in court. If a dispute arises as to the competence of a particular witness, the party calling that witness bears the legal burden of proving that he or she is in fact competent. At common law, a witness demonstrates competence by showing that he or she understands the nature of an oath and is capable of giving an intelligent account. Testimony in civil and criminal proceedings normally requires that the evidence has to be given on oath or affirmation. As was noted in *Mapp v Gilhooley* [1991] IR 253, ‘the broad purpose of the rule is to ensure as far as possible that such *viva voce* evidence shall be true by the provision of a moral or religious and legal sanction against deliberate untruth’.

Persons deemed to have an intellectual disability were traditionally excluded from giving evidence at trial. The common law, however, then altered and permitted such a witness to testify provided he or she was capable of understanding the nature and consequences of an oath, was capable of giving an intelligible account, and the mental disorder did not impede his or her ability to give evidence at trial (*R v Hill* (1851) 2 Den 254). In *People DPP v JT* (1988) 3 Frewen 141, for example, the competence of a 20 year old Down Syndrome complainant was considered by the court. The trial judge asked her certain questions to ascertain if she understood the meaning of the word oath to which she replied she did. She was then asked if she understood what it meant to tell the truth and she said she did. At that stage the trial judge expressed himself satisfied and did not further question her and she was duly sworn. The testimony of the complaint was to the effect that she had been the victim of various sexual offences perpetrated upon her by her father. The applicant was convicted by a jury at the Circuit Court. One of the grounds in which the appellant sought to have his conviction set aside was that the trial judge had erred in allowing the complainant’s testimony given that she was a witness with a mental disability. This argument was rejected by the court.

In *People (DPP) v Gillane* (Unreported, Court of Criminal Appeal, 14 December, 1998) it was held that it was permissible for a witness to give identification evidence for the prosecution in a case. This was despite the fact that he believed that staff at the Mater Hospital had inserted a microchip into his head. As the court noted, though the witness ‘had very strange ideas about what

was done to him when he had an operation on his head some twenty years before in the Mater Hospital, [this] does not mean that he was incapable of giving evidence'. If a witness has communicative difficulties, an interpreter may be provided to aid with the giving of evidence. Anatomical dolls were also used in the *JT* case to facilitate the complainant in giving evidence.

A number of problems continue to exist in relation to the competency test for vulnerable witnesses in Ireland. The intellectual disability organisation, Inclusion Ireland, has argued that many cases involving people with intellectual disabilities are failing to proceed because the victims are deemed incompetent either before, or when they reach, court. In the recent *Laura Kelly* case, the complainant, who has Down Syndrome, alleged that she was sexually assaulted at a 21<sup>st</sup> birthday party. The family claimed that shortly after Ms Kelly was put to bed, a family member entered the bedroom and saw a man in bed with her. It was alleged that Ms Kelly had most of her clothes removed and that the man was naked from the waist down. However, at trial, Ms Kelly, who had 'a mental age of four', was deemed incompetent to testify and the case was dismissed. Ms Kelly's mother stated:

'She [Laura] was brought into this room in the Central Criminal Court and asked questions about numbers and colours and days of the week which had no relevance in Laura's mind. She knew that she had to go into a courtroom and tell a story so the bad man would be taken away. "It was ridiculous. There is no one trained in Ireland to deal with someone similar to Laura, from the Gardaí up to the top judge in Ireland and the barristers and solicitors.'" (McEnroe 2010)

Delahunt (2012) makes a similar argument:

'It is submitted that the current test of competency is inadequate to deal with the needs of the vulnerable witness. It is arguable as to whether a judge is qualified to ascertain whether a witness with an intellectual disability is competent to act as a witness or whether he or she should be assisted by external information provided by a qualified person in respect

of the relevant intellectual disability of the witness. Significant information may be lost to the trial if a witness is deemed incompetent when the witness may merely have a different vocabulary or expression in respect of what it means to tell the truth.’

**It is submitted that the current test of competency in Ireland is inadequate to deal with the needs of the vulnerable witness. It currently overly focuses on recollection and consistency of account. A more accommodating test of competency to testify should be adopted which is designed to facilitate access to justice. The threshold test should be one requiring a witness to be capable of imparting relevant information to a fact finder. The test provided for in England and Wales is very useful in this regard. It provides that a person with a disability is not competent to give evidence in criminal proceedings if it appears to the court that he or she is a person who is unable to understand questions put to him or her as a witness and give answers to them which can be understood. Such a test facilitates access to justice by permitting as much relevant information as possible to be left to a trier of fact. The weight to be attached to such information can then be assessed by that trier of fact.**

**In making a determination about competency, a judge should seek the assistance of an expert on the relevant impairment of the witness. He or she should be reluctant to exclude the evidence of such a witness on the grounds of incompetence without the assistance of such an expert, though the judge will remain the final arbiter on the issue. It would be helpful in this regard if there was a statutory acknowledgement recognising that it will often be appropriate in such circumstances for the judge to hear expert evidence (as exists in England and Wales).**

**Standard guidance on how assessments of competence are carried out should also be published that would assist judges in making determinations of competence. The guidelines provided by the Canadian Supreme Court are helpful in this regard, particularly those that emphasise that a witness should not be found incompetent ‘too hastily’; that the primary source of evidence for a witness’s competence is the witness himself or herself; that questioning a witness with a disability may require consideration and**

**accommodation for his or her particular needs; and that preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.**

### **Third Party Disclosure of Personal Records**

A further issue which particularly affects complainants with intellectual disabilities or mental illness is the potential for their personal records (e.g. social work records or therapeutic or counselling notes) to be adduced at trial. The issue of third party disclosure of personal records is one which has been increasingly highlighted as an issue for all sexual offence complainants (Leahy, 2012) and is currently under review by the Law Reform Commission who recently published an *Issues Paper on Disclosure and Discovery* (Law Reform Commission, 2014). This is an issue which is particularly pertinent for complainants with intellectual disability or mental illness as they are highly likely to be documented with social services, therapeutic professionals or other similar professionals and thus are vulnerable to an application for admission of this evidence at trial. The defence may seek access to these records in order to mine them for any inconsistencies in the complainant's account or even recantations of the allegation. Currently, there is no facility to regulate third party disclosure of such records in sexual offence trials. This was made clear in *HSE v White* [2009] IEHC 242. Given the intricate balance to be struck in this area between the right of the defendant to have access to all material relevant to make a defence and the right of the complainant not to have intrusive and prejudicial material introduced in court, this is an area which requires legislation. Leahy has recommended that a procedure similar to section 278 of the Canadian Criminal Code be introduced to regulate access to third party records in sexual offence trials (Leahy, 2012). The Canadian regime provides for a formalised application process for the admission of third party records and provides explicit guidance for judges who must make a decision on whether to disclose such records or not.

**We recommend that a legislative regime to regulate third party disclosure of personal records should be adopted in Irish law.**



## Bibliography

Bartlett, H. and Mears, E. (2011) *Sexual violence against people with disabilities: data collection and barriers to disclosure*. Rape Crisis Network Ireland. Available at

<http://www.rcni.ie/uploads/SexualViolenceAgainstPeopleWithDisabilities2011.pdf>

Benedet, J and Grant, I (2007) 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues', *MacGill Law Journal* 542.

Delahunt, M (2010) 'Improved measures needed for vulnerable witnesses in court', *The Irish Times*, 7 December 2010.

Delahunt, M (2011) "Video evidence and s.16(1)(b) of the Criminal Evidence Act 1992" *Bar Review* 16

Delahunt, M (2012) 'Issues in Respect of Support Measures for Witnesses with an Intellectual Disability in the Irish Criminal Justice System', *Creating Equitable access to Justice: Recognising People with Disabilities as Victims of Crime Conference*, UCC, Cork, 3<sup>rd</sup>/4<sup>th</sup> May, 2012.

Edwards, C, Kilcommins, S and G Harold (2012) *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (Dublin: National Disability Authority).

Hanly, C *et al* (2009) *Rape and Justice in Ireland: a national study of survivor, prosecutor and court responses to rape* (Dublin: Liffey Press).

Inclusion Ireland (2011) 'Access to justice for People with a Disability hampered by antiquated law'. Available at

<http://www.inclusionireland.ie/ACCESSTOJUSTICEFORPEOPLEWITHADISABILITYHAMPEREDBYANTIQUATEDLAW.htm>

Kilcommins S, Edwards, C, and O'Sullivan T (2014) *An International Review of Legal Provisions for Support of People with Disabilities as Victims of Crime* (Dublin: ICCL).

Law Reform Commission (1990) *Report on Sexual Offences Against the Mentally Handicapped* (LRC 34-1990) (Dublin: Law Reform Commission).

Law Reform Commission (2005), *Consultation Paper on Vulnerable Adults and the Law: Capacity* (Dublin: Law Reform Commission).

Law Reform Commission (2006) *Vulnerable Adults and the Law*. (LRC 83-2006) (Dublin: Law Reform Commission).

Law Reform Commission (2011) *Sexual Offences and Capacity to Consent: Consultation Paper*. (LRC CP 63 – 2011), (Dublin: Law Reform Commission, 2011).

Law Reform Commission, *Issues Paper on Disclosure and Discovery*, (LRC IP 5-2014), (Dublin: Law Reform Commission, 2014).

Leahy, ‘The Defendant’s Right or a Bridge too Far? Regulating Defence Access to Complainants’ Counselling Records in Trials for Sexual Offences’ (Part 1) (2012) 22(1) *Irish Criminal Law Journal* 13 and (Part 2) (2012) 22(2) *Irish Criminal Law Journal* 34.

Leahy, ‘[LRC Report on Sexual Offences and Capacity to Consent: A Timely Assessment of a Complex Area](http://humanrights.ie/criminal-justice/lrc-report-on-sexual-offences-and-capacity-to-consent-a-timely-assessment-of-a-complex-area/)’, Human Rights in Ireland, November 18<sup>th</sup> 2013. Available at: <http://humanrights.ie/criminal-justice/lrc-report-on-sexual-offences-and-capacity-to-consent-a-timely-assessment-of-a-complex-area/>

McEnroe, ‘Family want ‘archaic’ law overhauled’, **Irish Examiner**, March 30th 2010.