

**An International
Review of Legal
Provisions and
Supports for
People with
Disabilities as
Victims of Crime**

December
2013

Shane Kilcommins

Claire Edwards

Tina O'Sullivan



Irish Council for
Civil Liberties

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A comparative law report produced by the Irish
Council for Civil Liberties (ICCL) with the support
of The Equality Authority

Shane Kilcommins, Claire Edwards, Tina O'Sullivan

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Irish Council for
Civil Liberties



THE EQUALITY AUTHORITY
AN tÚDARÁS COMHIONANNAIS

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Scotland

Criminal Justice (Scotland) Act 2003

Criminal Procedure (Scotland) Act 1995

Mental Health (Care and Treatment) Scotland Act 2013

Offences (Aggravated by Prejudice) (Scotland) Act 2009

Sexual Offences (Scotland) Act 2009

Vulnerable Witnesses (Scotland) Act 2004

About the research and Project Management Team

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Ms Tina O'Sullivan is a graduate of University College Cork with both a masters and a degree in law. Tina formerly worked as a legal researcher with the Child Law Clinic in University College Cork subsequently securing positions with both Cork County Council and the Health Information and Quality Authority. Tina is currently completing her training as a solicitor with the Law Society of Ireland.

Irish Council for Civil Liberties (ICCL)

The Irish Council for Civil Liberties (ICCL) is Ireland's independent human rights watchdog which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone. Founded in 1976 by Mary Robinson and others, the organisation has played a leading role in some of Ireland's most successful human rights campaigns including the introduction of Ireland's enhanced equality legislation, legislation to permit divorce, the introduction of legislation governing civil partnership, the decriminalisation of homosexuality, the establishment of the Garda Síochána Ombudsman Commission and enhancing the rights of victims of crime.

The ICCL is the lead partner organisation in the European Commission funded trans-European legal entity, the *JUSTICIA* Consortium. The Consortium endeavours to strengthen the domestic impact of the work of its network member organisations in the area of EU justice. This multi-faceted approach equips partner organisations more effectively, enabling them to promote the observance of EU standards on procedural rights and the rights of victims of crime, and to contribute to an all rights-based progressive reform, whilst strengthening their existing working relationships with their European counterparts.

The Equality Authority

The Equality Authority is an independent body set up under the Employment Equality Act 1998. It was established on 18th October 1999. The Equality Authority seeks to achieve positive change in the situation and experience of those groups and individuals experiencing inequality by stimulating and supporting a commitment to equality:

- Within the systems and practices of key organisations and institutions.
- As part of the cultural values espoused by society.
- As a dimension to individual attitudes and actions.

In 2012 the Equality Authority launched the Equality Small Grants Fund providing grants for equality-focused actions. National and local NGOs working on one or more of the nine equality grounds (gender, civil status, family status, age, sexual orientation, disability, race and membership of the Traveller community) were eligible to apply for this fund. The grants support a wide range of actions including events, training, awareness-raising, research, publications, surveys, and networking.

Summary

Most Western criminal justice systems increasingly seek to accommodate the needs and concerns of victims of crime. As Garland has noted: “The victim is no longer an unfortunate citizen who has been on the receiving end of a criminal harm, and whose concerns are subsumed within the public interest...The victim is now...a much more representative character, whose experience is taken to be collective, rather than individual and atypical.”¹ This “vision of the victim as Everyman” is part of a “new cultural theme”, a “new collective meaning of victimhood”² that is increasingly represented in social, political and media circles. The pattern of the representation of the victim is broadly accurate as it relates to Ireland.

Nevertheless this ‘Everyman’ account of the ways in which the justice system currently depicts and signifies the victim is not without its problems, in particular its tendency to engage in a form of essentialism that oversimplifies the complexities involved. The general constituency of victimhood as ‘Everyman’ as constructed under this account often reveals itself as a narrow caste of individuals — heterosexual, white, mainly urban, often female — that focuses on a relatively restricted band of offences such as domestic violence, sexual offences and homicide.³ These generalising tendencies conceal the multiplicity of experiences of victimhood and the multiplicity of interactions with the criminal justice process. The result is that certain categories of victim are rendered invisible and unable to share in the benefits of the more inclusive approach. One such category is victims with disabilities. Though such individuals are very likely to be conferred with “the complete and legitimate status” of being “ideal victims” in Irish social, media and political networks given their perceived vulnerability and blamelessness,⁴ this status does not readily transpose itself into the more limiting structural framework of the Irish justice system. The values that facilitate the construction of an “ideal victim” at the initial (and very broad discretionary) labelling stage following the commission of a crime — such as

Summary

perceived vulnerability and weakness in relation to the offender — can work in the opposite direction as one moves further into formalised, institutionalised justice network governed by rules (evidence and criminal procedure), rights (the right to cross-examine, for example) and principles (such as the principle of orality).

For the most part, the Irish criminal justice system remains epistemically rooted in mainstream accounts of victims' needs and concerns. Such victims fit more easily within an adversarial paradigm of justice that embraces a morphology of combat and content. The values emphasised within such a paradigm include the principle of orality, lawyer-led questioning, observation of the demeanour of a witness, the curtailment of free-flowing witness narrative, confrontation and robust cross-examination. People with disabilities who are victims of crime remain largely invisible, not least because of the challenges they pose in relation to information gathering and fact finding for this adversarial model of justice. A commitment to reform is hampered as much by a misconceived fidelity to the conventional way of doing things and a reluctance to overly disturb familiar and reified patterns as it is by concerns over the potential for injustice for accused parties.

The marginality of people with disabilities reveals itself in many areas of the Irish criminal process. At a policy level victims of crime with disabilities are not strategically identified as a specific victim group with particular needs and concerns among criminal justice agencies and victim support organisations. In terms of criminal justice agency commitments, no structured and continuous enhanced service mechanism is provided to such victims – whose quality of evidence may be reduced because of the disability – as they pass through investigative, prosecutorial and trial stages of the process. In some instances, the procedural and substantive rules are also inadequate having regard to the social and medical realities of such victims' lives. This is evident in the static, somewhat fixed,

approach to competency to testify determinations, an overly narrow emphasis on the adversarial process and a lack of suitable protections in the criminal law calendar.

There is an onus on all criminal justice agencies to strategically identify people with disabilities as a category of the broader victim constituency and to develop a professional rubric which seeks to meet their communicative, social, mobility, emotional, and other requirements, as befits an equitable, accessible justice process. At present, people with disabilities are disadvantaged by an Irish criminal process that does not facilitate their full and equal participation. The working assumption for all criminal justice agencies should be that victims with disabilities are entitled, as a minimum, to the same rights of access to the justice system as other victims and witnesses. All agencies having contact with victims with disabilities should provide training on the particular needs of such victims. In the pre-trial process, a broader range of criminal offences should be provided for that strikes a better balance between under and over-criminalisation. A specialised victim support organisation, or a specialised unit of a more general support organisation, should cater for the needs of vulnerable victims such as those with disabilities. At trial stage, a special measures package should be created to ensure a more inclusionary approach to the reception of such witnesses' testimony. The package should not be limited to sexual offences and offences involving violence. A more accommodating test of competency to testify should be adopted which is designed to facilitate access to justice. Identification practices should employ video identification by electronic means. Identification by this means should be permitted to be adduced in court. At sentencing stage, an express statutory provision should formally acknowledge that an offence committed against a vulnerable person such as a person with a disability may be considered an aggravating factor in the crime.

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Introduction

1.1 Background

People with disabilities who become victims of crime have derived some benefits from the broader inclusionary momentum in relation to victims in the legal field in Ireland. In addition, there have been some benefits from legislation specifically targeted at supporting people with disabilities. The requirements on public service providers imposed by the **Disability Act** 2005, for example, have led to improved access to courthouses and Garda stations, through wheelchair ramps, the introduction of induction loop systems (a system comprising of a loop of cable around a designated area, usually a room or a building, which generates a magnetic field picked up by a hearing aid), and the provision of information in accessible formats.

People with disabilities who are victims of crime experience the same problems of under reporting, lack of information provision, lack of private areas in courtrooms, and delays in progressing complaints which apply in relation to all other victims in Ireland. However, very often, the centrality of their outsider status is more pronounced. This derives from a general failure to engage with the specific needs of people with disabilities beyond those addressed by the **Disability Act** 2005. This lack of engagement is especially evident in relation to people with intellectual disabilities or other conditions which impede mental capacity because accommodation of the needs of these victims poses real challenges for the fundamental premises of the criminal justice system. The effect is that these victims do not have equal access to the benefits of the broader inclusionary momentum and are disadvantaged, first as victims of crime, and secondly, because of the many barriers society presents to people with impairments. This disadvantage is evident in a number of areas in the criminal process including a lack of policy emphasis, the continued over-reification of the adversarial process, and the under and over-criminalisation of conduct which involves persons with disabilities.

Chapter 1 - Introduction

There is an increasing awareness in Ireland of the disadvantages experienced by such victims. A recent study undertaken on victims of crime with disabilities found, for example, that, as a category, such victims “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.”⁵ The marginality of victims of crime at a policy level in particular is of concern given that the interaction between criminal justice agencies and such witnesses can also reinforce traditional constructions of subordination and inferiority.

Similarly Bartlett and Mears (2011) recently highlighted the issue of underreporting of crime by people with disabilities. They analysed Rape Crisis Network Ireland data on incidents of sexual abuse disclosed by people with disabilities between 2008 and 2010, and estimated that 66% of persons with disabilities who suffered sexual violence and attended Rape Crisis Centres in Ireland in that period did not report the abuse to a formal authority.⁶

At a legal level, commentators such as Delahunt have emphasised the potential of our substantive and procedural rules to contribute to repeat victimisation in respect of such complainants. She recently noted: “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 ...the complainant.”⁷ 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.⁸ The lack of recognition of vulnerable witnesses in Ireland has also been identified in **Report on Services and Legislation Providing Support for Victims of Crime**

which recommended that that “[s]pecific provision should be made...for vulnerable and intimidated victims.”⁹

1.2 Research Objectives

The purpose of this project was to conduct comparative research on the legal and service provisions that are made available to people with disabilities who are victims of crime. In addition to Ireland, the jurisdictions that were examined include England, Wales, Northern Ireland, Scotland, Australia, New Zealand and Canada. The project focused exclusively on victims/witnesses of crime who have a disability, one of the nine grounds specified in the Employment Equality and Equal Status Acts. The research covers people with disabilities across a range of categories, including people with physical and sensory impairments, people with intellectual impairments, people experiencing mental illness, and those with chronic illnesses which may lead to limitations on daily activities.

The report:

- Highlights the legal and service gaps that exist in Ireland in respect of victims of crime with disabilities.
- Demonstrates how these gaps could be filled by reference to international standards and best practices adopted in the jurisdictions identified.
- Makes recommendations for improvements to policy and legislative provisions.

The research project itself is not designed to evaluate the effectiveness of the legal and non-legal provisions in other jurisdictions. Rather its focus seeks to highlight what provisions exist in other jurisdictions in comparison to what does/does not exist in Ireland, to identify good practice and opportunities for learning.

Chapter 1 - Introduction

1.3 Methodology

Information for this research project was gathered by a dedicated research team based in UCC using secondary research (desk based) methods to access, collate and synthesise comparative data from other common law jurisdictions on the following areas:

- Current policy in relation to victims of crime with a disability;
- Gaps in service commitments for disabled victims;
- Issues in relation to capacity;
- Current legislative provisions, including relevant EU law;
- Use of language (appropriate / inappropriate);
- Good practices / gaps in service provision.

Information was compiled using available print and electronic sources including but not limited to:

- **Legal Databases:** Case law (e.g., Westlaw, Justis, Lexis Nexis Butterworths);
- **Country specific legislative databases** (e.g. Irish Statute Book; BAILII; Legislation.gov.uk; Australian Legal Information Institute – AUSTLII; New Zealand Legislation, New Zealand Legislative database ; Commonwealth Legal Information Institute – COMMONLII, Canadian Legal Information Institute – CANLII, etc);
- **National/Regional courts services:** (e.g. Courts Services –Ireland; Crown Prosecution Service – UK; Australian Federal Courts Services – Australia; www.courtsofnz.nz– New Zealand, etc);

- **Disability organisations:** National/regional statutory and non statutory; Publications (e.g. policy documents, research reports, guidance for practitioners, codes of practice, etc);
- **International treaty monitoring databases:** Government / Civil Society reports (UN, EU, Council of Europe, etc);
- **Legal and academic sources:** Academic databases (e.g. Westlaw, Lexis Nexis Butterworths, EBSCO, etc); e-Journals, academic publications and articles, media reports.

1.4 Structure of the Research Project

The research team utilised existing background information on policy commitments and legal provisions that currently exist in Ireland and that have been gathered by academic staff at UCC. Additional information on each of the jurisdictions was identified under the following themes:

Pre-trial provisions

- The extent to which conduct is criminalised which involves the exploitation of persons with disabilities
- The commitments given by various criminal justice agencies and victim support services to victims with disabilities
- The training provided to criminal justice agencies in respect of persons with disabilities
- Identification evidence practices for persons with disabilities
- The use of pre-trial video recordings and statements as evidence

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Trial provisions

- Presumptions in favour of giving evidence via TV link for persons with disabilities
- The use of intermediaries for persons with disabilities
- The extent to which wigs and gowns are removed in court in cases involving persons with disabilities
- Tests to determine competency of persons with disabilities to give evidence at trial
- Corroboration requirements in respect of evidence given by people with intellectual disabilities
- The reception of unsworn evidence
- The extent to which obligations are imposed on service providers such as the court service to provide information to persons with disabilities
- Judicial and legal training in relation to persons with disabilities

Post-trial provisions

- The accommodation of people with disabilities in making victim impact statements
- Enhanced sentencing provisions
- Information provision on offender release dates and parole hearings.

The report concludes with a series of findings and recommendations based on the comparative overview.

1.5 A Note on Language

The terminology regarding disability varies across national contexts. We acknowledge that disability organisations and disability groups utilise the terminology of 'people with disabilities' as a political statement, as it 'puts the person first', and the preferred term in Ireland for intellectual impairment is 'people with intellectual disabilities'. Different jurisdictions use different types of language and some of this is often outmoded and derogatory.

For the purposes of the analysis in this report, we adopt the definition used in the Convention on the Rights of Persons with Disabilities (2006) (CRPD),¹⁰ which defines persons with disabilities as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Art. 1). Thus, we recognise that disability is a result of the interaction between a person's impairments and his or her physical and social environment. The category of 'disabled' persons is broad and multifarious and the ways in which the law can respond to the specific needs of victims are equally varied. However, especially difficult challenges arise in relation to victims with intellectual disabilities who present the most significant challenges to formalised, institutionalised justice as it currently operates. Accordingly, although this report addresses issues across the range of disabilities, particular attention is paid to victims with intellectual disabilities. This also reflects the weight of literature in the area.¹¹

1.6 Project Management

Mark Kelly, Director of the ICCL, retained overall responsibility for the project deliverables and key outputs. Academic research was supervised by Prof Shane Kilcommins and Dr Claire Edwards who were responsible for the overall academic integrity of the final report. Tina O'Sullivan undertook the research. Stephen

Chapter 1 - Introduction

O'Hare, ICCL Policy and Research Officer provided day to day project management for the duration of the project.

1.7 References

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- 3 Kilcommins, S et al (2010), **The Needs and Concerns of Victims of Crime** (Dublin, Commission for the Support of Victims of Crime).

- 4 Christie, N (1986), "The Ideal Victim" in E Fattah, ed, **From Crime Policy to Victim Policy** (Basingstoke, Macmillan), p. 18.

- 5 Edwards, C et al, **Access to Justice for People with Disabilities as Victims of Crime in Ireland** (Cork, 2012), p. 100.

- 6 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>

- 7 Delahunt, M (2010) 'Improved measures needed for vulnerable witnesses in court', **The Irish Times**, 7 December, p 24.

- 8 Inclusion Ireland (2011) 'Access to justice for People with a Disability hampered by antiquated law'. Available at <http://www.inclusionireland.ie/accesstojusticeforpeoplewithdisabilityhamperedbyantiquatedlaw.htm>

- 9 Bacik, I et al, (2007) **Report on Services**

and Legislation Providing Support for Victims of Crime (Dublin: Commission for the Support of Victims of Crime), pp. 10-11.

- 10 The CRPD entered into force on 3 May 2008, on receipt of its twentieth ratification. At the time of writing, the CRPD has been signed by 155 States and ratified by 130 (including Australia, Canada, New Zealand and the United Kingdom). The CRPD has been signed by Ireland but not ratified although there is a political commitment to ratify the CRPD once capacity legislation has been enacted. This is likely to take place in 2014-15.
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- 11 Shakespeare, T (2006) **Disability Rights and Wrongs** (Abingdon: Routledge); French, P (2007) **Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland** (Brisbane: Queensland Advocacy Incorporated).
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Ireland

2.1 Introduction

In the last three decades the status of the crime victim in Ireland has gradually altered from being perceived as a 'non-entity' to a stakeholder whose interests and opinions matter. Victims of crime with disabilities have also benefitted from this broader inclusionary momentum. This increased accommodation includes a presumption in favour of giving evidence via a television link in certain specified cases, the use of intermediaries, the removal of wigs and gowns, the use of video-recordings of statements as evidence in relation to certain offences, greater flexibility in the giving of victim impact statements, more relaxed identification practices, a less exclusionary approach regarding the competence of persons with disabilities to give evidence at trial, provision for the reception of unsworn evidence, the criminalisation of conduct which involves the exploitation of persons with disabilities, and the imposition of statutory obligations on service providers, such as the Courts Service, to provide information to people with disabilities and to make their premises accessible.

Despite the increased awareness of the needs and concerns of victims of crime, shortcomings in the criminal justice system remain stubbornly persistent. These primarily relate to the provision of information to victims, underreporting, attrition rates, the lack of private areas in courts, delays in the system, the lack of opportunity to participate fully in the criminal process, and inadequate support services. As part of the broader victim constituency, people with disabilities experience these more general problems in the same way. They also, however, experience additional hardships that are often excluded from mainstream debates about victims' needs. The purpose of this chapter is to document the more 'invisible' status of victims of crime with disabilities and to provide examples of the variety of ways in which this marginality manifests itself at pre-trial, trial, and post-trial stages of the criminal process.¹²

Chapter 2 - Ireland

2.2 The Pre-Trial Process

During the pre-trial stage of the criminal process, victims of crime will have a number of needs and concerns. Initially they may relate to deciding whether or not a crime has taken place and/or whether it should be reported. They may also wish to access support services for information, counselling or emotional support. If the crime is reported, the needs of victims will vary but ordinarily will relate to information about who will be investigating the crime, what supports are available, and how the system will operate in respect of the alleged crime. Victims will also need to be treated with dignity and respect in their initial dealings with the Gardaí, particularly when giving a statement of the incident. As the investigation progresses, victims will require information from the Gardaí about the status of the on-going investigation. They will also require information from the prosecutor particularly on decisions about whether or not to prosecute or to charge a lesser offence.¹³ These issues arise for victims with or without disabilities alike. However, victims of crime with disabilities may have additional needs and concerns. In this the following section, we will examine some of the more particular needs of victims of crime with disabilities in relation to the issue of reporting, the range of offences on the criminal calendar that cover exploitative conduct, and the extent to which the justice system promotes equal access to justice.

2.2.1 Offences criminalising conduct which exploits persons with disabilities

Certain pieces of criminal law in Ireland make provision for the criminalisation of conduct which involves the exploitation of persons who are defined as 'mentally impaired'. Section 5 of the **Criminal Law (Sexual Offences) Act 1993** provides that it is an offence to have sexual intercourse or commit an act of buggery with a person who is mentally impaired (other than a person to whom he is married or to whom he believes

with reasonable cause he is married), or to attempt such offences. Section 5(2) goes on to state it is also an offence for a male person to commit or attempt to commit an act of gross indecency with another male person who is mentally impaired. For both offences, a defence is provided for an accused if he or she can show that at the time of the alleged commission of the offence he did not know and had no reason to suspect that the person in respect of whom he is charged was mentally impaired.

Section 3 of the **Criminal Justice (Withholding Information on Offences against Children and Vulnerable Persons) Act 2012** also provides that it is an offence for a person to withhold information on certain offences against vulnerable persons. This offence was introduced partly in response to the content of published reports such as the Ryan Report (2009), the Murphy Report (2009) and the Cloyne Report (2011) which detailed serious sexual abuse of children and vulnerable persons. The offences which require disclosure include false imprisonment, rape, serious assault, incest and trafficking of persons. A vulnerable person is defined as a person who:

- (a) is suffering from a disorder of the mind, whether as a result of mental illness or dementia, or has an intellectual disability, which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person, or
- (b) is suffering from an enduring physical impairment or injury which is of such a nature or degree as to severely restrict the capacity of the person to guard him or her against serious exploitation or abuse, whether physical or sexual, by another person or to report such exploitation or abuse to the Garda Síochána (police), or both.¹⁴

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There are, however, a number of apparent difficulties with Ireland's approach to the protection of vulnerable persons, particularly in relation to section 5 of the **Criminal Law (Sexual Offences) Act 1993**. To begin with, it has been suggested that it is not appropriate to use the term 'mentally impaired' to describe persons with disabilities.¹⁵ In a **Consultation Paper on Capacity**, published in 2005, the Law Reform Commission noted that "a regrettable effect of section 5 of the 1993 Act 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".¹⁶ The Commission went on to note that this may in fact breach Article 8 of the European Convention on Human Rights in relation to respect for private life.¹⁷ There is also an evident gap in the provision in that it covers buggery, intercourse and acts of gross indecency between males, but not unwanted sexual contact more generally. Such an obvious hole 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.¹⁸ In a recent case, **The People (DPP) v XY**, 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."¹⁹ 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 the judiciary could not fill a "lacuna in the law."²⁰

A recent Law Reform Consultation Paper on **Sexual**

Offences and Capacity contains a detailed review of the current law on sexual offences involving persons with a disability. It provisionally recommended that section 5 of the **Criminal Law (Sexual Offences) Act 1993** should be repealed and replaced.²¹ In its place, it recommends that any “replacement of section 5 of the **Criminal Law (Sexual Offences) Act 1993** should cover all forms of sexual acts including sexual offences which are non-penetrative and sexual acts which exploit a person’s vulnerability.”²² It also “recommends that there should be a strict liability offence for sexual acts committed by a person who is in a position of trust or authority with another person who has an intellectual disability.”²³

There are also notable absences of the protection of people with disabilities in other relevant pieces of legislation. For example, under the **Prohibition of Incitement to Hatred Act 1989**, it is an offence to incite hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, or membership of the travelling community or sexual orientation. Significantly no mention is made of disability as a criterion in this piece of legislation.²⁴

2.2.2 Reporting

After a crime has been committed, the first decision that has to be made in the criminal process is whether or not the victim reports what occurred to the relevant authorities. This is often a crucial matter, shaping how the conflict is perceived and understood. A failure to report the crime will often result in the non-engagement of criminal justice agencies, ensuring that the wrongdoing goes unpunished. This has significant consequences for individual victims and for society more generally.

The under-reporting of crime has been well documented in Ireland. For example, in a study on crime in Dublin in the early 1990s, O’Connell and Whelan (1994) noted

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that 19% of those surveyed did not report the crime.²⁵ In a follow-up study a few years later, the figure was reported at 20%.²⁶ The Quarterly National Household Survey in 2006, which asked 39,000 households about the experiences of crime among those over 18 years of age in the previous 12 months, found that 30% of burglaries (up from 23% in 1998), 39% of violent thefts (roughly the same as in 1998), 47% of assaults (up from 43% in 1998), and 57% of acts of vandalism (down from 60% in 1998) were not reported.²⁷ The SAVI Report into sexual abuse and violence in Ireland noted in 2002, after carrying out a study involving 3,120 participants, that disclosure rates to the Gardaí were very low.²⁸ Regarding experiences of adult sexual assault, only 1% of men and 8% of women had reported their experiences to the Gardaí (6% overall). Only 8% of adults reported previous experiences of child sexual abuse to the Gardaí.²⁹

There is also evidence that crimes against people with disabilities are reported at a much lower rate than for the general population.³⁰ 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. In particular, they estimated that 66% of persons with disabilities who suffered sexual violence and attended Rape Crisis Centres in Ireland between 2008 and 2010 did not report the abuse to a formal authority.³¹

Even if crimes are reported, there remain significant challenges for victims in the early stages of the criminal process. These challenges can include the sensitivity of the Gardaí in taking witness statements, fear of intimidation, fear of not being believed or taken seriously, and the provision of information to victims after reporting a crime and during the investigation stage.³² For example,

in a recent empirical study into the needs and concerns of victims of crime in Ireland, the following was noted:

“There is clearly an issue regarding the provision of information from the Gardaí to victims at the initial stages of an investigation. Roughly one in every two respondents indicated that they did not receive the Pulse incident number; one in every two also indicated that they did not receive a contact for a group supporting victims, and only four in every ten respondents indicated that they received a number for the Crime Victims Helpline...In addition, more than four in every ten respondents expressed themselves as dissatisfied or very dissatisfied with the information provided to them by the Gardaí at the investigation stage...”³³

For victims of crime with disabilities, these problems can be even more challenging, and yet there is very little acknowledgement—as shall become clearer in the next section — within the process of their needs and concerns.

2.2.3 Policy prioritisation

It is now well recognised that witnesses with disabilities are entitled to a high quality service from the criminal justice agencies and support organisations that they encounter. Article 2 of the 2001 EU **Framework Decision** provides that “each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.” More recently Article 3(4) of the Council of Europe Recommendation (2006)(8) provides that States “should ensure that victims who are particularly vulnerable, either through their personal characteristics or through circumstances of the crime, can benefit from special measures best suited to their situation.” More recently, a new EU Directive (2012/29/EU), which will amend and expand the provisions of the Framework Decision, makes specific reference to the identification (Article 22) and protection (Article 23) of vulnerable victims (including

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persons with disabilities) during criminal proceedings.³⁴

Such a commitment is seen as vital to ensure that people with disabilities are provided with equal access to the criminal justice system and are given the opportunity to provide the best evidence at trial. Significantly, there is little evidence of this commitment in Ireland and it is clear — even at the level of rhetoric — that people with disabilities are not strategically identified as a specific victim group with particular needs and concerns among criminal justice agencies and victim support organisations. In terms of criminal justice agency commitments, no structured and continuous enhanced service mechanism is provided to such victims – whose quality of evidence may be reduced because of the nature of impairment and disabling barriers presented by the system – as they pass through investigative, prosecutorial and trial stages of the process.

The Victims Charter, for example, has marked an important policy development for crime victims in Ireland. This Charter was produced by the Department of Justice, Equality and Law Reform in September 1999. It reflects the “commitment to giving victims of crime a central place in the criminal justice system.” As such, it amalgamates for the first time “all the elements of the criminal justice system from the victim's perspective.”³⁵ In 2005, a review of the entire Charter was undertaken by the Commission for the Support of Victims of Crime and in 2010 a revised **Victim's Charter and Guide to the Criminal Justice System** was produced. This attempts to increase the information available to victims of crime from the Crime Victims Helpline, the Gardaí, the Courts Service, the Director of Public Prosecutions, the Prison Service, the Probation Service, the Legal Aid Board, the Coroner's Service and the Criminal Injuries Compensation Tribunal. It sets out the entitlements a victim has from these various services, but it does not confer legal rights. Significantly, there is only one reference to people with disabilities in the Charter. In the Garda

section, a commitment is made as follows: “if you have any form of disability we will take your special needs or requirements into account.”³⁶ The absence of a reference to people with disabilities from any of the other criminal justice agencies in the non-binding Charter is significant, demonstrating their peripheral status at a policy level.

The Office of the Director of Public Prosecutions has also published four documents which have implications for victims' experiences of criminal justice organisations: **The Role of the DPP** (2010); **Going to Court as a Witness** (2010); **Statement of General Guidelines for Prosecutors** (2001 and recently revised in 2010); and, **Policy on the Giving of Reasons for Decisions Not to Prosecute** (2008). Again, however, there is nothing in the way of specific commitments to people with disabilities. Indeed, in the **Statement of General Guidelines for Prosecutors** (2010), for example, the Office of the Director of Public Prosecutions at para 4.14 sets out a non-exhaustive list of factors which a prosecutor must consider in evaluating the strength of evidence in determining whether or not to prosecute a case. They specifically included the following:

- ...(g) Could the reliability of evidence be affected by physical or mental illness or infirmity?
- ...(n) In relation to mentally handicapped witnesses, are they capable of giving an intelligible account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the **Criminal Evidence Act 1992**?

Aside from difficulties with some of the phraseology used, such statements are objectionable on the basis that they may give the impression that the evidence of persons with disabilities carry less weight – and are less likely to be believed – than their counterparts. They certainly do little to encourage such witnesses to come forward and report crime. In particular, the statements link – without

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qualification — the reliability or intelligibility of evidence to the physical or mental illness of a witness. There should be no assumption that a person with a disability is any less reliable or intelligible than any other category of witness. To the extent that it is a valid criterion for determining whether a prosecution case should proceed, it should be couched in a framework that seeks as far as possible to accommodate such witnesses as part of their right of equal access to justice, whilst also ensuring fairness of procedures. That balance, it is submitted, is not reflected in the aforementioned statements.

The Courts Service has also issued a number of publications including **Going to Court**, a guide to going to court for child and young witnesses as well as parents and guardians, and **Explaining the Courts** (2010).³⁷ The **Disability Act** 2005 also sets out obligations on public service providers such as the Courts Service to provide information to people with disabilities in accessible formats, and also to make their premises accessible. Many courthouses, for example, have sought to make physical adjustments for people with disabilities, such as putting in wheelchair ramps and induction loop systems. The Committee for Judicial Studies also recently published a guide for the Irish judiciary, entitled **The Equal Treatment of Persons in Court: guidance for the judiciary** (2011). It includes a section entitled “Guidance on appropriate treatment of persons with disabilities” (pp. 124-125). Aside from this development, it is notable that no specific commitments are made within the literature of the DPP and Courts Service to facilitating people with disabilities as victims of crime.

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. A recent study undertaken on victims of crime with disabilities in Ireland found 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."³⁸ One of the factual supports it used to confirm this claim was the information deficit that exists in Ireland in respect of such victims. It noted:³⁹

"A key challenge in the context of assessing the experiences of people with disabilities in the Irish criminal justice system is the lack of data on the prevalence of crime perpetrated against people with disabilities in the State, of the experiences of people with disabilities who have experienced a crime, and of how far supports put in place for people with disabilities are working to secure equitable access to justice. There is no clear statistical information in Ireland on rates of crime and victimisation as they pertain to people with disabilities, as neither of the two main sources of information on crime — the Gardaí Public Attitudes Survey and Crime and Victimization module on the Quarterly National Household Survey (QNHS) — provides a breakdown of figures based on disability. With a couple of exceptions, few agencies involved in the criminal justice system in Ireland appear to be monitoring or keeping records of people with disabilities who are victims of crime, and the fact that there is no systematic recording of cases which come to trial at District and Circuit Court level also makes it difficult to identify cases where a person's impairment may have been significant. These data absences need to be acknowledged as serious gaps which undermine our knowledge of people with disabilities' experiences as victims of crime."

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2.3 The Trial Process

At trial stage, victims of crime will also have a number of needs. In general, they will require information on a whole series of issues including the timing of hearings, court accompaniment, how the court process works, and how to get reimbursed for the expense of attending court. They will also expect to be treated with dignity and respect by lawyers, court officials and the judiciary. More specific needs relate to seating arrangements in courtrooms and separate waiting rooms. People with disabilities who are victims of crime will have all of these requirements. They may also have additional needs. In this section, we will examine the specific legal provisions that have been made for people with disabilities at trial stage. These include live television links, the use of intermediaries, the removal of wigs and gowns, the use of pre-trial statements, a relaxation of identification evidence requirements, a more inclusionary approach to competency to testify determinations, and the admission of unsworn evidence. The section will conclude with an examination of the extent to which the justice system facilitates equal access to justice at trial stage.

2.3.1 Television link evidence

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,⁴⁰ 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 18⁴¹ 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**⁴² and **White v**

Ireland⁴³ 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.

2.3.2 The use of intermediaries

Under section 14 (1) of the **Criminal Evidence Act** 1992, witnesses may, on application by the prosecution or the defence, also be permitted to give evidence in court through an intermediary in circumstances where they are using the live television link and are under 18 years of age or are persons with a 'mental handicap' who have reached that age in relation to a sexual offence or an offence involving violence. The trial judge can grant such an application if he or she believes that the interests of justice require that any questions to be put to the witness be put through an intermediary. Questions put to a witness in this manner shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his or her age and or mental state the meaning of the questions being asked.

2.3.3 The removal of wigs and gowns

While evidence is being given through a live television link pursuant to section 13(1) of the **Criminal Evidence Act** 1992, (except through an intermediary) neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or a gown. Moreover if a child or a person with a 'mental disorder' is giving evidence via a television link in respect of a victim impact statement, the same rule applies.⁴⁴

2.3.4 Pre-trial statements

Given the emphasis placed by our adversarial system on the orality of the proceedings, pre-trial statements are not generally permitted in the criminal process. The rationale underpinning the exclusion of such statements is that they constitute hearsay and ordinarily are

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excluded because the court is deprived of the normal methods of testing the credibility of the witness. A pre-trial statement for example is not given on oath; the demeanour of the witness making the statement cannot be observed by the trier of fact; and the defence has no opportunity to cross-examine the witness. The absence of this latter safeguard is of particular importance. More recently, however, it has been recognised that an overly rigid application of the hearsay rule can lead to injustice. Provision has accordingly been made for the admission of video recordings, depositions and out of court statements in certain circumstances.

Under section 16(1) of the **Criminal Evidence Act 1992**, for example, it provides that a video recording of any evidence given by a person under 18 years of age or a person 'with a mental handicap' through a live television link at the preliminary examination of a sexual offence or an offence involving violence shall be admissible at trial. It also renders admissible at trial a video recording of any statement made by a person under 14 years of age or a person with a 'mental handicap' (being a person in respect of whom such a sexual offence or an offence involving violence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose, provided the witness is available at trial for cross examination. This provision is, as Delahunt notes, "undoubtedly a practical step towards making the testimony of child witnesses and witnesses with an intellectual disability more easily heard within the criminal justice system".⁴⁵ In either case the video recording shall not be admitted in evidence if the court is of opinion that it is not in the interests of justice to do so. In **The People (DPP) v XY**, for example, 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. In the case, the trial judge admitted as evidence a DVD recording of an interview with the complainant. This pre-trial recording

was admitted as examination-in-chief testimony.⁴⁶

2.3.5 Identification evidence

In some instances eye witness identification of the perpetrators of crime will be required at the pre-trial and trial stages of criminal process. This can be very traumatic for witnesses, particularly those who are the alleged victims. There are no one-way mirror identification systems in Garda stations, and very often the victim may find himself or herself in the same room as the accused. Moreover, at a pre-trial identification parade, the witness will, according to the Garda Síochána **Criminal Investigation Manual**, generally be asked to “place his/her hand on the identified person’s shoulder” though fortunately it is now the case that this practice has been relaxed and the witness can, if he or she requests, make the identification by pointing and describing the person in question.⁴⁷ Making an identification in court can also be difficult for a witness. More recently, efforts have been made to alleviate this trauma. Persons giving evidence via television link under section 13 of the **Criminal Evidence Act 1992**, for example, shall not now be required to identify the accused at the trial of the offence if the accused is known to them (unless the court in the interests of justice directs otherwise). Moreover, evidence by a person other than the witness, that the witness identified the accused as being the offender at an identification parade, shall be admissible as evidence.

2.3.6 Competency to testify

The Irish criminal process ordinarily works on 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.⁴⁸ Testimony

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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**, “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.”⁴⁹

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.⁵⁰ In **People DPP v JT**,⁵¹ for example, the competence of a 20 year old complainant with Down Syndrome 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**⁵² 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.

2.3.7 The admission of unsworn evidence

If, however, a person with an intellectual disability was not able or permitted to give sworn evidence, there was no means by which unsworn evidence could be given. In **DPP v JS**⁵³ for example, a complainant with a moderate intellectual disability could not answer questions as to the nature of the oath or the nature of a lie at trial. She made no response when asked by the judge what the moral and legal consequences of telling a lie were. In the result, she could not be sworn and, as there was no independent evidence in the case, a *nolle prosequi* was entered.⁵⁴ Similarly, in **DPP v MW**⁵⁵ a person with a moderate intellectual disability alleged that she was raped in a car. The accused was charged with two counts, rape and unlawful carnal knowledge of a 'mentally impaired' person. At the rape trial, the trial judge ruled that she was competent to take the oath. Her testimony at trial, however, was held to be contradictory and the judge directed an acquittal. Subsequently the accused was tried with the second count, unlawful carnal knowledge of a 'mentally impaired' person. On this occasion, however, her preliminary answers on questions pertaining to the nature of an oath were less satisfactory, and the trial judge declined to have her sworn. As there was no independent evidence in the case, the prosecution was compelled to enter a *nolle prosequi*.⁵⁶

Section 27(3) of the **Criminal Evidence Act** 1992 now provides that the evidence of a person with a 'mental handicap' may be received otherwise than on oath or affirmation if the court is satisfied that the person is capable of giving an intelligible account of events which are relevant to the proceedings. In

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O'Sullivan v Hamill,⁵⁷ O'Higgins CJ noted:

"Unsworn evidence is provided for from a person with a mental handicap 'if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings'. In my view, before that section comes into play there are two requirements on which the court has to be satisfied — (1) that the person has a mental handicap, and (2) that he is capable of giving an intelligible account of events which are relevant to the proceedings. Clearly there must be an inquiry."

Determining the answers to these questions in that inquiry at trial may require expert medical opinion evidence.

2.3.8 The requirement of corroboration

Over the years the common law also devised particular corroboration rules in respect of certain categories of 'suspect' witnesses such as sexual complainants, children, and accomplices. Ordinarily, an accused person in a criminal trial can be convicted on the testimony of one witness alone. However, for suspect witnesses such as those cited above, a warning of the dangers of convicting on such evidence in the absence of corroboration had to be given to the jury. In respect of witnesses with an intellectual disability, there is no statutory law requiring corroboration or that a corroboration warning be given. However, there is some case law support for the view that in the case of such witnesses, a warning should be given of the dangers of convicting on the testimony of such witnesses in the absence of corroborative evidence.⁵⁸ In Ireland, in **The People (Director of Public Prosecutions) v. M.J.M.**,⁵⁹ in a sexual offence case, a trial judge invoked his discretion to give a warning under section 7 of the **Criminal Law (Rape) (Amendment) Act 1990** in a sexual offences case, in part, based on the mental status of the complainant, and in particular the fact that she had a childlike mind. It should be noted however that the Law Reform Commission in Ireland suggested in

1990 that there should be no corroboration requirement in respect of people with an intellectual disability.⁶⁰

2.3.9 Continued problems at trial

Notwithstanding the increased recognition of victims in the Irish criminal process, it remains the case that some of the needs of victims also continue to be unmet at trial stage. A lack of knowledge among criminal justice agencies and actors about the needs of victims of crime is a key issue.⁶¹ There are also many reported difficulties with the provision of information to victims.⁶² Other issues that cause concern include intimidation by the process;⁶³ attrition rates;⁶⁴ the lack of private areas in courts;⁶⁵ difficulties for victims understanding procedural rules and legal definitions (e.g. consent in rape cases);⁶⁶ delays in the system;⁶⁷ and the lack of opportunity to participate fully in the criminal process, and the sensitivity of court professionals.⁶⁸

People with disabilities who are victims of crime also experience these more general problems. Very often, however, the centrality of their outsider status is more pronounced. This has already been observed in our examination of the pre-trial process. It is also evident in a number of areas relating to the trial stage. To begin with, determining the competency of a witness to give an intelligible account can give rise to significant difficulties. 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.⁶⁹ In the recent **Laura Kelly** case, the complainant, who has Down Syndrome, alleged that she was sexually assaulted at a 21st 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

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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.”⁷⁰

Delahunt 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.”⁷¹

Elsewhere 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...[A] more nuanced understanding of what a fair trial requires would facilitate a more effective utilisation of existing accommodations as well as the development of new ones.”⁷² In Ireland, Delahunt makes a similar point, suggesting that we continue to “endure a situation where our adversarial system risks imposing a secondary trauma on the complainant.”⁷³ She went on to note:

“As the courts move towards pre-trial deposition,

legislation is required which will take the vulnerable witness out of the trial process entirely by giving all of his or her evidence pre-trial. For the complainant, having his or her testimony deposed soon after the alleged incident will mean not having to endure the considerable delay waiting for the case to come to court... 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."⁷⁴

More specifically, the adversarial process places a heavy emphasis on consistency and credibility of account. The observation of direct, unmediated responses to questions is often crucial in this regard. Consistency of account, clear and rational recollection, accuracy as to detail, appearance and deportment, poised expressions and body language are all important indicators of a witness's truthfulness and credibility in relation to determinations of fact. A failure along any or all of these lines either at reporting or trial stages may cast fatal doubt on the truthfulness of a witness's account, which ultimately will impact on decisions to prosecute and determinations of guilt. This foundational commitment to the reception and observation of unmediated *viva voce* testimony is grounded in the need to uphold the integrity of the adjudicative process and minimise the risk of mis-decision. For victims with disabilities, however, it can be a significant discriminatory barrier, particularly for those, for example, who have difficulty with long term memory recall, with communicating information, with cognitive overload or who are vulnerable to questioning that invites suggestibility, acquiescence and compliance.⁷⁵ The interaction between criminal justice agencies and witnesses with disabilities can therefore reinforce traditional constructions of subordination and inferiority. As Benedet and Grant (2007) note:

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“It is not unusual in cases involving complainants with mental disabilities to see inconsistencies in, or a certain amount of confusion regarding, some details of their testimony. Such inconsistencies might raise issues of credibility if the complainant did not have a disability. But in cases involving complainants with mental disabilities, trial judges should carefully examine the real significance of those inconsistencies to the legal issues at stake, with a view to understanding the essence of the complainant’s testimony. In some cases, for example, the complainant may be easily influenced by the nature of the questions or may not fully understand them. Trial judges must be cautious not to dismiss too easily all of the complainant’s testimony because some of the details may be unreliable.”⁷⁶

A blindingly narrow emphasis on adversarial legalism – rooted stubbornly in a State-accused way of knowing – is also evident in other areas of Irish case law. For example, in **D.O’D v Director of Public Prosecutions and Judge Patricia Ryan**,⁷⁷ 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 overturned this decision. He stated:⁷⁸

"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."

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He went on to note:⁷⁹

“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.”⁸⁰

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”.⁸¹ 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 straight-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.⁸² 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

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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/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.

Though research is sparse in the area, the failure of the legal profession to understand the difficulties posed by the criminal justice system for people with disabilities has also been noted in Ireland.⁸³ It is difficult to find any evidence of a training programme for lawyers in advising, examining, and cross examining witnesses with disabilities. 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.⁸⁴

2.4 The Post-Trial Process

In the post-trial stage, victims will also have a number of obvious needs and concerns. They may like to give a statement on the impact that the crime has had on them and/or on their families at sentencing stage in the process. After conviction, they may also require particular information relating to parole, prison release dates, and any compassionate release of the offender. Concerns about the reappearance of an offender back into the community require that information on post-sentencing is effectively developed and conveyed where the victim indicates a wish to receive this information. Such information is processed through the Victim Liaison Service in the Irish Prison Service Headquarters. This information is then passed on to the Prison Service when making sentence management decisions, such as the granting of temporary release. They will also receive information on parole board hearings, prison transfers, expected release dates, and so on. It appears that victims of crime in Ireland are not always aware of their entitlement to this information.⁸⁵ There also appears to be confusion as to the purpose of victim submissions to the Parole Board. For example, the Parole Board has stated in its 2005 Annual Report that the views of victims are considered when making its recommendation. It noted:

“All of the information, including all information in relation to the victim or the victim’s family is

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considered by the Board before they come to what is hoped is a rounded and well reasoned recommendation to the Minister in any given case."⁸⁶

One year later, in its subsequent annual report, the Board stated the opposite, claiming that the views of victims cannot influence the Board's recommendations:

"Obviously victims cannot influence the Board in their recommendations but they may well influence conditions imposed on the granting of temporary release to any prisoner."⁸⁷

More recently again, in 2012, the current Chairman of the Parole Board, Mr John Costello stated the following to an Oireachtas Sub-Committee on Justice:

"The Board, as it has acknowledged on a number of occasions, will take into consideration the views of the victims and the impact on their lives prior to making any recommendations."⁸⁸

This kind of confusion as to the purpose of such victim submissions is unhelpful. Such difficulties also impact on people with disabilities as victims of crime.

In this final section, we focus on the use of victim impact statements for people with disabilities and whether the fact that a crime was committed against a person with a disability should be considered as an aggravating factor at sentencing stage.

2.4.1 Victim impact statements

At post-trial stage, the reduction of victim alienation has also occurred through the use of victim impact statements. Section 5 of the **Criminal Justice Act** 1993 made provision for the court to receive evidence or submissions concerning any effect of specified offences on the person in respect of whom an offence

was committed. These offences relate to most sexual offences and to offences involving violence or the threat of violence to a person. Section 5 initially presupposed that the victims of these offences were capable themselves of giving evidence in open court of the impact that the crime had on them.⁸⁹ Under section 5A of the **Criminal Procedure Act** 2010, a child or a person with a 'mental disorder' may now give evidence of the impact of the crime through a live television link unless the court sees good reason to the contrary.⁹⁰ Moreover, where a child or a person with a mental disorder is giving evidence through a live television link pursuant to section 5A, the court may, on the application of the prosecution or the accused, direct that any questions be put to the witness through an intermediary (provided it is in the interests of justice to do so).⁹¹

2.4.2 An offence against a person with a disability as an aggravating factor in the crime

It is also the case that disability may be viewed as an aggravating factor at sentencing stage when assessing the gravity of an offence in which a person with a disability has been a victim. Standard aggravating factors include the use of excessive force, particularly degrading or dehumanising behaviour, breach of trust and so on. Though there is little jurisprudence on the area, there is no reason why a sentencing judge in Ireland could not regard the fact that the crime was committed against a person with a disability as an aggravating factor.⁹² In England and Wales, in contrast, such a viewpoint is made explicit through the enactment of section 146 of the **Criminal Justice Act** 2003. This imposes a duty on courts to increase the sentence for any offences aggravated by hostility based on the victim's disability or presumed disability. Such 'hate crime' legislation emerged, in part, in response to a series of high profile murders of people with intellectual disabilities and a campaign mounted by disability organisations. The implementation of such legislation, as well as providing

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greater protection from hostility and harassment for people with disabilities, also provides a source of information on the extent of such hostility against people with disabilities, as disability hate crime cases taken under this law are recorded for statistical purposes.

2.5 Conclusion

The Irish criminal justice system, to the extent that it accommodates victims of crime, remains epistemically rooted in mainstream accounts of victims' needs and concerns. Such victims fit more easily within the governing principles of an adversarial paradigm of justice, especially those emphasising orality, lawyer-led questioning, observation of the demeanour of a witness, the curtailment of free-flowing witness narrative, confrontation and robust cross-examination. People with disabilities who are victims of crime remain largely invisible, not least because of the difficulties they pose in relation to information gathering and fact finding for the adversarial model of justice. A commitment to reform is hampered as much by a misconceived fidelity to the conventional way of doing things and a reluctance to overly disturb familiar and reified patterns as it is by concerns over the potential for injustice – indeed there is no empirical evidence that an adversarial model is the best means of reaching the truth or ensuring fairness in all instances.

The marginality of people with disabilities as victims of crime reveals itself in many areas of the Irish criminal process. At a policy level people with disabilities are not strategically identified as a specific victim group with particular needs and concerns among criminal justice agencies and victim support organisations. In terms of criminal justice agency commitments, no structured and continuous enhanced service mechanism is provided to such victims, whose quality of evidence may be reduced because of the nature of their impairment and the disabling barriers presented by the justice system, as

they pass through investigative, prosecutorial and trial stages of the process. In some instances, the procedural and substantive rules are also inadequate having regard to the social and medical realities of such victims' lives. This is evident in the static, somewhat fixed, approach to competency to testify determinations, an overly narrow emphasis on the adversarial process, the linking of special procedural provisions with specific offences, and a lack of suitable protections in the criminal law calendar.

2.6 References

- 12 More generally, see Farrell, M (2011) 'Sign of the Times: no practical difficulty in allowing deaf jurors' **Law Society Gazette** April, pp. 16-17.

- 13 For a general analysis, see Kilcommins, S et al (2010), **The Needs and Concerns of Victims of Crime** (Dublin, Commission for the Support of Victims of Crime).

- 14 The Act came into force on the 1st August, 2012.

- 15 Law Reform Commission (2006) **Vulnerable Adults and the Law** (LRC 83-2006) (Dublin: Law Reform Commission). By the same reasoning, the use of the phrase 'mental handicap' in the **Criminal Evidence Act** 1992 is also inappropriate.

- 16 Law Reform Commission [2005], **Consultation Paper on Vulnerable Adults and the Law: Capacity** (Dublin: Law Reform Commission), p. 141.

- 17 Ibid, p. 143.

- 18 See **MC v Bulgaria** [2005] 40 EHRR 20.

- 19 As quoted in Law Reform Commission (2011) **Sexual Offences and Capacity to Consent: Consultation Paper** (LRC CP 63 – 2011),

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(Dublin: Law Reform Commission, 2011), p. 191.

20 Ibid, p. 192.

21 Ibid, p. 179.

22 Ibid, p. 180.

23 Ibid, p. 179.

24 The lack of recognition of vulnerable witnesses has also been identified in Ireland. In December 2007, Bacik et al noted: "Specific provision should be made...for vulnerable and intimidated victims. A specific definition should be developed for each category and a statement of the additional supports which are to be made available to such victims. Useful models for such supports may be found on other jurisdictions...The creation of a statutory definition of vulnerable and intimidated witnesses should be considered, as well as guidelines on the identification of intimidated and vulnerable witnesses and measures to provide protection and reassurance to intimidated witnesses...Guidelines should be issued in order to ensure that appropriate interview methods are used in respect of vulnerable or intimidated witnesses, and providing for a full range of investigative and pre-trial support measures." Bacik, I et al, (2007) **Report on Services and Legislation Providing Support for Victims of Crime** (Dublin: Commission for the Support of Victims of Crime), pp. 10-11.

25 O'Connell, M and Whelan, A (1994) 'Crime Victimization in Dublin' **Irish Criminal Law Journal** 4(1), 85.

26 Kirwan, G and O'Connell, M (2001)'Crime Victimization in Dublin Revisited' **Irish**

- 27 Central Statistics Office (2007), **Quarterly National Household Survey** 2006 (crime victimisation) (CSO: Cork and Dublin).
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- 28 McGee, H et al (2002), **The SAVI Report: sexual abuse and violence in Ireland** (Dublin, Liffey Press), pp. 128-132.
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- 29 Ibid, p. xxxvii.
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- 30 See Wilson, C and Brewer, N (1992) 'The Incidence of Criminal Victimization of individuals with an intellectual disability' **Australian Psychologist** (1992) 27(2) 114-117; Petersilia, J (2001) 'Crime Victims with Developmental Disabilities' **Criminal Justice Behaviour**. (2001) 28, 655.
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- 31 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>
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- 32 See European Commission, **Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings** (Strasbourg, SEC 2004), p. 5; Irish Council for Civil Liberties (2008) **A Better Deal: the human rights of victims in the criminal justice system** (Dublin, ICCL), p. 21; McGee H et al, **The SAVI Report: Sexual Abuse and Violence in Ireland** (Dublin, Liffey Press).
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- 33 Kilcommins, S et al (2010), **The Needs and Concerns of Victims of Crime** (Dublin, Commission for the Support of Victims of Crime),

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pp. v-vi. These figures are surprising not least because it is now well recognised that part of the process of addressing victims' needs and concerns relates to the provision of information. The Victims Charter, for example, identified the need to describe 'all the elements of the criminal justice system from the victim's perspective'. The Gardaí commit to providing assistance which includes the promise to provide information about the services available; and to provide information about the investigation of a crime and the prosecution of the accused. More generally, the EU **Framework Decision on the Standing of Victims in Criminal Proceedings**, which the Council adopted in March 2001, requires that victims in EU states have access to relevant information, in particular from their first contact with law enforcement agencies, to the information relevant to the protection of their interests like the type of organisations they can turn to for support, and the type of support they can obtain.

34 The Directive was adopted in October 2012 and entered into force on 15th November 2012, giving EU member states three years to implement the provisions.

35 **Victim's Charter and Guide to the Criminal Justice System** (Dublin, Department of Justice, 1999), p. 3.

36 **Victim's Charter and Guide to the Criminal Justice System** (Department of Justice and Law Reform, 2010: 17). As part of this commitment, some members of An Garda Síochána have undergone training as specialist interviewers for victims with disabilities who allege that they have been subjected to a sexual crime, a crime of violence, or human trafficking. See **Dáil Debates**, Vol 740 No 3 col. 832, per Alan Shatter. A recent

report, however, noted that though “many Gardaí are now trained in specialist victim interviewing techniques, ...it is not always clear whether the trained officer will be the one who deals with the person with disabilities who reports a crime, or indeed, whether there will always be someone available who is trained to communicate with people with disabilities.” Edwards, C et al, **Access to Justice for People with Disabilities as Victims of Crime in Ireland** (Cork, 2012), p. 107.

37 The lack of disability awareness training at the Court service was noted in a report by Edwards, C et al, **Access to Justice for People with Disabilities as Victims of Crime in Ireland** (Cork, 2012), p. 105.

38 Ibid, p. 100.

39 Ibid., p. 3.

40 See Law Reform Commission (1989), **Consultation Paper on Child Sexual Abuse** (Dublin, Law Reform Commission, pp. 120-121. Delahunt argues that the confinement of this support measure to specified sexual or violent crimes is unnecessarily restrictive. See 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, 3rd/4th May, 2012.

41 The **Criminal Evidence Act** 1992 originally set this age at 'under 17', but this was amended by section 257(3) of the **Children Act** 2001.

42 [1998] 1 I.R. 321.

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43 [1995] 1 I.R. 268.

44 See section 5 of the **Criminal Procedure Act** 2010.

45 Delahunt, M (2011) 'Video evidence and s.16(1)(b) of the Criminal Evidence Act 1992' **Bar Review** 16, p. 6.

46 As referenced in Law Reform Commission, **Sexual Offences and Capacity to Consent: Consultation Paper** (LRC CP 63 – 2011) (Dublin, Law Reform Commission, 2011), para. 6.28. See also M. Delahunt, 'Improved Measures needed for vulnerable witnesses in court' **The Irish Times**, 7th December 2010, p. 24. More general provision for the admission of depositions (and video recordings) at the pre-trial stage are now made under section 4G of the **Criminal Procedure Act** 1967, as amended. Moreover, under section 255 of the **Children Act** 2001, a judge of the District Court, when satisfied on the evidence of a registered medical practitioner that the attendance before a court of any child would involve serious danger to the safety, health or wellbeing of the child, may take the evidence of the child concerned by way of sworn deposition or through a live television link in any case where the evidence is to be given through such a link. Part 3 of the **Criminal Justice Act**, 2006 also makes provision for the admission of a statement made by a witness in any criminal proceedings relating to an arrestable offence. It can be invoked either by the prosecution or the defence. It can occur in circumstances where the witness, although available for cross examination, refuses to give evidence, denies making the statement, or gives evidence which is materially consistent with it. See also **DPP v O'Brien** [2011] 1 IR 273.

- 47 As quoted in Walsh, D (2002) **Criminal Procedure** (Dublin, Thomson Round Hall), para 6.55.
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- 48 The determination as to whether a child understands the nature and consequences of an oath is one for the trial judge. See **AG v. O'Sullivan** [1930] I.R. 553.
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- 49 [1991] I.R. 253.
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- 50 See **R v Hill** [1851] 2 Den 254.
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- 51 [1988] 3 Frewen 141.
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- 52 (Unreported, Court of Criminal Appeal, 14 December, 1998).
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- 53 (Unreported, Circuit Court, 1983).
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- 54 Law Reform Commission (1990) **Report on Sexual Offences Against the Mentally Handicapped** (LRC 34-1990) (Dublin, Law Reform Commission), p. 10.
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- 55 (Unreported, Circuit Court, 1983).
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- 56 Law Reform Commission (1990) **Report on Sexual Offences against the Mentally Handicapped** (LRC 34-1990) (Dublin, Law Reform Commission, 1990), p. 10.
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- 57 [1999] 3 I.R. 9.
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- 58 See, for example, the Australian case of **Bromley v R** [1986] 161 C.L.R. 315.
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- 59 (Unreported, Court of Criminal Appeal, 28th July, 1995).
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- 60 Law Reform Commission (1990) **Report on Sexual Offences against the Mentally Handicapped** (LRC 34-1990) (Dublin, Law Reform Commission), p. 24.
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- 61 See McGrath, A (2009) **The Living Victims of Homicide: analysing the needs and concerns of the co-victims of homicide within the Irish criminal justice system** (Unpublished Ph.D. thesis, UCC).
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- 62 See European Commission (2004), **Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings** (Strasbourg, SEC), p. 5; Irish Council for Civil Liberties (2008) **A Better Deal: the human rights of victims in the criminal justice system** (Dublin, ICCL), p. 21; McGee H et al (2002), **The SAVI Report: Sexual Abuse and Violence in Ireland** (Dublin, Liffey Press, 2002). Victims, for examples, are often not told of their right to expenses for going to court. See Kilcommins, S et al (2010), **The Needs and Concerns of Victims of Crime** (Dublin, Commission for the Support of Victims of Crime).
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- 63 Kelleher, P and O'Connor M (1999) M. **Making the Links: Towards an Integrated System for the elimination of violence against women in intimate relationships with men** (Dublin, Women's Aid).
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- 64 Hanly, C et al (2009) **Rape and Justice in Ireland: a national study of survivor, prosecutor and court responses to rape** (Dublin, Liffey Press); O'Mahony, P (2009) 'Ireland' in Lovett and Kelly, **Different Systems, similar outcomes? Tracking attrition in reported rape cases in**

eleven European countries (London: Child and Woman Abuse Unit, 2009).

65 Kilcommins, S et al (2010) **The Needs and Concerns of Victims of Crime in Ireland** (Dublin: Commission for the Support of Victims of Crime).

66 Bacik, I et al (1998), **The Legal Process and Victims of Rape**. (Dublin: Dublin Rape Crisis Centre).

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

68 Kilcommins, S et al (2010) **The Needs and Concerns of Victims of Crime in Ireland** (Dublin: Commission for the Support of Victims of Crime).

69 Inclusion Ireland (2011) 'Access to justice for People with a Disability hampered by antiquated law'. Available <http://www.inclusionireland.ie/accesstojusticeforpeoplewithdisabilityhamperedbyantiquatedlaw.htm>

70 McEnroe, 'Family want 'archaic' law overhauled', **Irish Examiner**, March 30th 2010.

71 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, 3rd/4th May, 2012.

72 Benedet, J and Grant, I (2007) 'Hearing the

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Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues', **MacGill Law Journal** p. 547.

- 73 Delahunt, (2010) 'Improved measures needed for vulnerable witnesses in court', **The Irish Times**, 7 December, p. 24.
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- 74 Ibid.
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- 75 Kebbell, M et al, (2004) 'Witnesses with Intellectual Disabilities in Court: What questions are asked and what influence do they have?' **Legal and Criminal Psychology** 9, pp. 23-35. See also Sanders, A et al (1996) **Victims with Learning Disabilities: negotiating the criminal justice system** (findings no 44), (London, HMSO).
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- 76 Benedet, J and Grant, I (2007) 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues', **MacGill Law Journal** 542.
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- 77 [2010] 2 I.R. 605.
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- 78 [2010] 2 I.R. 605 at 612-613.
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- 79 [2010] 2 I.R. 605 at 613.
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- 80 See also **DPP v McManus** [2011] IECCA 32.
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- 81 [2010] 2 I.R. 605 at 613.
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- 82 See **Donnelly v Ireland** [1998] 1 IR 338; **White v Ireland** [1995] 2 IR 268; and **DPP v McManus** [2011] IECCA 32.
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- 83 See Edwards, C et al (2012), **Access to Justice for People with Disabilities as Victims of**

Crime in Ireland (Cork, 2012), pp. 111-112.

- 84 Available at <http://www.advocacytrainingcouncil.org/images/word/raising%20the%20bar.pdf>
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- 85 See Kilcommins, S et al (2010) **The Needs and Concerns of Victims of Crime in Ireland** (Dublin: Commission for the Support of Victims of Crime). It is also worth noting that they are currently no victims' representative on the Parole Board, despite the allocation of seven community representative posts to the Board. 'Victims Advocates slam lack of representation on Parole Board' **Irish Examiner**, August 20, 2012.
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- 86 **Parole Board Annual Report** 2005, p. 7.
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- 87 **Parole Board Annual Report** 2006, p. 9.
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- 88 The Oireachtas Sub-Committee on Justice, 24th October 2012.
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- 89 To combat the narrowness of this presumption, the Irish courts began as a practice to admit the evidence of family members of homicide victims as witnessed in **DPP v O'Donoghue** [2007] 2 IR 336. As a result of the introduction of section 4 of the **Criminal Procedure Act** 2010, a "person in respect of whom the offence was committed" now includes a family member of that person when that person has died, is ill or is otherwise incapacitated as a result of the commission of the offence. A family member may also give evidence under section 5(3)(b)(ii) of the **Criminal Justice Act** 1993, as amended, where the victim of the specified offence suffers from a mental disorder (not related to the commission of the offence).
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- 90 Provision is also made for any other witness,

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with leave of the court, to give victim impact evidence via a television link.

91 Section 5B **Criminal Justice Act** 1993, as inserted by section 6 of the **Criminal Procedure Act** 2010.

92 A number of aggravating factors were listed in DPP's **Guidelines for Prosecutors** booklet (2010, para 4.20). It noted that "the more vulnerable the victim the greater the aggravation."

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England and Wales

3.1 Introduction

This chapter will examine how victims of crime are dealt with under the criminal justice system in England and Wales. The report **Speaking up for Justice**⁹³ produced in 1998 specifically highlighted the need for special training for all those involved in the criminal justice system to assist them in responding to the needs of vulnerable witnesses. This chapter will identify the measures that are currently available at all stages of the criminal justice process to vulnerable victims of crime, notably pre-trial, trial and post-trial processes.

3.2 The Pre-Trial Process

In this section an outline will be provided of the offences which criminalise conduct involving the exploitation of persons with disabilities and the various commitments given by criminal justice agencies to victims of crime with disabilities.

3.2.1 Offences criminalising conduct which exploits persons with disabilities

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

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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).

Section 5 of the **Domestic Violence, Crime and Victims Act 2004** creates an offence of causing or allowing the death of a child or vulnerable adult. This offence was created to deal with cases where it was clear that one of a number of adults in a household was responsible for the death of a child or a vulnerable adult in that household but it could not be proved. The **Domestic Violence, Crime and Victims (Amendment) Bill 2011** extends the offence in Section 5 to cover causing or allowing serious physical harm (equivalent to grievous bodily harm) to a child or a vulnerable adult. For the purposes of this section a vulnerable adult is defined in Section 6 as a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

Vulnerable persons have also been afforded increased protection under the **Mental Capacity Act 2005**. Section 44 of the 2005 Act creates the criminal offences of ill treatment or wilful neglect against mentally incapable adults. This offence must be distinguished from that contained in Section 127 of the **Mental Health Act 1983** which creates an offence in relation to staff employed in hospitals or mental nursing homes where there is ill-treatment or neglect. Section 4 of the **Asylum and Immigration (Treatment of Claimants, etc) Act 2004** has introduced criminal offences of trafficking people for exploitation. Section 4 makes it an offence for a person to arrange or facilitate the arrival in the UK (section 4(1)) or departure from the UK (section 4(3)) of an individual, if he intends to exploit that individual or believes that another person is likely to do so. A person also commits an offence under subsection (2) if he arranges or facilitates travel within the UK by an individual in respect of whom he believes an offence under subsection (1) may have been committed, if he intends to exploit that individual or believes that another person is likely to do so. For the purposes of this section a person will be exploited under Section 4(4) (d) if he is requested or induced to undertake any activity, having been selected on the grounds that he is mentally or physically ill or disabled and where a person without the disability or the illness would be likely to refuse the request or resist the inducement.

In England and Wales hate crimes aggravated by racial or religious hostility are prohibited under Sections 29 to 32 of the **Crime and Disorder Act 1998**. A Report produced in 2008, entitled **Getting Away with Murder: disabled people's experiences of hate crime in the UK** noted that disabled persons are regularly the victims of crime. They gave the following examples:

"...In July 2007 Christine Lakinski, a disabled woman, collapsed in a doorway on her way home. As she lay dying a man threw a bucket of water over her, covered her in shaving foam and urinated on her. One

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of his friends filmed the incident on a mobile phone... In May 2006 Raymond Atherton, a 40 year old man with learning difficulties, was severely beaten had bleach poured over him and was thrown in the River Mersey, where his body was later found by the police. His attackers were people he considered his friends... In April 2007 Colin Greenwood, a blind father with young children was kicked to death by two teenagers. Before his murder Mr Greenwood had stopped using his white stick in public for fear of being targeted..."⁹⁴

There are no specific offences prohibiting crimes involving hostility based on disability in the 1998 Act. However, section 146 of the **Criminal Justice Act** 2003, which is a sentencing provision, has added hostility based on disability to the list of statutory aggravating factors for sentencing. Technically any crime therefore in England and Wales can be a disability hate crime – including assault, financial exploitation, threats and intimidation – once it is perceived by the victim to be motivated by hostility or prejudice based on a person's disability or perceived disability. A recent publication by the Home Office on hate crimes reported that there were a total of 43,748 hate crimes reported by the police in 2011/2012.⁹⁵

A recent survey conducted by the Muscular Dystrophy Campaign⁹⁶ noted that nearly two in three young disabled people say that they have been victims of disability hate crime such as being verbally or physically abused.⁹⁷ Moreover, 8 out of 10 young people surveyed think that the police do not take disability hate crimes seriously enough, and 79% think that some disabled people may be dissuaded from reporting hate crimes because of the police's negative perceptions surrounding hate crime and disability.⁹⁸ The research thus raises concerns that there are hundreds of attacks on disabled persons going underreported in England and Wales. The Equality and Human Rights Commission in England and Wales also recently noted that the number of disability hate crimes recorded by police forces in 2011 was 1,877. Yet the

Crime Survey for England and Wales highlighted that the number of people who claimed to have experienced a hate crime (to Spring 2011) was 65,000, a disparity that emphasises the extent of under-reporting.⁹⁹ The Home Office is attempting to combat such hate crime — their blueprint being **‘Challenge it, Report it, Stop it’** — by working with local agencies and voluntary organisations to increase the reporting of hate crime by building victims’ confidence to come forward and seek justice, and working with partners at national and local level to ensure the right to support is available when they do so.¹⁰⁰

At present the United Kingdom Disabled People’s Council (UKDPC) has produced a guide on ways in which disabled people and disabled person’s organisations can become involved in reporting disability hate crime.¹⁰¹ The guide highlights the importance of reporting hate crime as well as the possibility of reporting crimes online, ways to contact the local police force, the availability of independent advisory groups and the possibility of becoming or reporting to a third party reporting site. Disability Rights UK has also recently launched a new guide on reporting hate crime experienced by disabled people.¹⁰² This is a comprehensive guide set out in clear and unambiguous language to enable victims of disability hate crime to report the crime; to know when to report it; how to report; a list of organisations who may be able to offer support; what to tell when the crime is being reported; what to do if the report is not taken seriously; what to do if the person is afraid of the occurrence of further hate crime by reporting the initial crime; what to do if a person needs to report a crime against someone close to them and who to report to if the hate crime is committed in school, college, university, on a bus or train or in a taxi.

3.2.2 Policy prioritisation

There have been numerous policy documents launched in the UK with the aim of supporting victims of crime within

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the criminal justice system as well as policy documents highlighting the importance of dealing with wider social issues that victims of crime face. Given that the Crown Prosecution Service (CPS) works in partnership with the police, the Home Office, the Ministry of Justice and other agencies throughout the criminal justice system, policy documents have emerged from various agencies and bodies. The following documents have been published and produced as part of the main CPS Publication Scheme.

The **Code of Practice for Victims of Crime**¹⁰³ (hereinafter Code) is an important policy document that sets out the rights of victims of crime. While a person will not be liable to criminal proceedings for failure to comply with the code, the code is admissible in evidence in both criminal and civil proceedings. The code deals specifically with vulnerable and intimidated victims under part four. Such victims are able to receive an enhanced service under the code. Vulnerable victims are all victims under the age of 17 or whose quality of evidence is likely to be reduced because they have a mental disorder or a physical disability or disorder.

Part five to eight of the Code sets out the obligations of the service providers throughout the criminal justice process. Part five obliges the police to take all reasonable steps to identify vulnerable and intimidated persons and to explain to such persons the special measures provided for under the **Youth Justice and Criminal Evidence Act 1999** (YJCE Act).¹⁰⁴ This part of the Code also requires the police to ensure that there is an automatic referral to a local Victim Support Group for a vulnerable victim.¹⁰⁵ Part five further provides that vulnerable and intimidated victims must be notified within one day if a suspect is arrested on suspicion of an offence in respect of the relevant criminal conduct; if the suspect is released with no further action being taken or if bail conditions change; notice of all decisions to bring criminal proceedings in respect of the relevant offence; and if a person is charged with the offence and released on bail.¹⁰⁶ In contrast all

other victims must be notified within five working days.

Part six of the Code expressly defines the obligations of the Joint Police/Crown Prosecution Service Witness (CPS) Care Units. Where a criminal trial is held in respect of the relevant criminal conduct, the Joint Police/CPS must notify any vulnerable or intimidated victim of all the pre-trial hearings and the verdicts of the trial no later than one day after the court has reached its decision.¹⁰⁷ This notification requirement of one day to vulnerable and intimidated victims also applies to the Joint Police/CPS in respect of warrants issued for the arrest of a defendant in relation to the relevant criminal conduct or if that person who has been convicted decides to appeal their conviction or sentence to the Court of Appeal.¹⁰⁸

Part seven sets out the obligations of the CPS. Where a Crown Prosecutor takes the decision that there is insufficient evidence to bring proceedings or if a charge is substantially altered or dropped, it is the responsibility of the CPS to notify this fact to a vulnerable or intimidated victim within one working day.¹⁰⁹ Furthermore, if a witness to proceedings is identified as vulnerable or intimidated, the CPS must have systems in place to assist prosecutors in determining whether or not to make a special measures application under the YJCE Act.¹¹⁰

Finally, part eight deals with the obligations of Her Majesty's Court Service. This part of the Code expressly states that court staff must notify the Joint Police/CPS Witness Care Units in relation to all hearings and any court dates in respect of the relevant criminal conduct within one day if the case involves vulnerable or intimidated witnesses.

The **Prosecutors' Pledge**¹¹¹ published in October 2005 compliments the Code, detailing the level of service victims can expect to receive from prosecutors. The pledge contains ten commitments, one of which is of particular relevance when considering vulnerable persons

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in that it commits to addressing the specific needs of such victims and, where justified, seeks to protect their identity by making an appropriate application to the Court. Further practice guidance was published in 2009 entitled **Special Measures Meetings between the Crown Prosecution Services and witnesses**.¹¹² This document which is for CPS prosecutors aims to use the guidance document and the special measures introduced by the **Youth Justice and Criminal Evidence** Act 1999 to enable vulnerable and intimidated witnesses to give their best evidence in criminal proceedings.

In March 2011, **Achieving Best Evidence in Criminal Proceedings**¹¹³ was published which is a handbook of good practice on how to deal with vulnerable and intimidated witnesses. The purpose of the guidance is to assist those service providers responsible for conducting video-recorded interviews with vulnerable and intimidated witnesses as well as those who are tasked with preparing and supporting witnesses during the criminal justice process. The code however is not legally enforceable and is merely advisory.

In 2007 a policy document, entitled **Disability Hate Crime**,¹¹⁴ was published which explains the way in which disability hate crime is dealt with by the CPS. The purpose of the policy document is to ensure confidence in people with disabilities who are victims and/or witnesses and their families and local communities that the CPS understands the serious nature of this crime and are committed to promoting disability equality. Further guidance for safeguarding vulnerable adults has been underpinned by **No Secrets** in England¹¹⁵ and **In Safe Hands** in Wales.¹¹⁶ This guidance essentially directs agencies working with vulnerable adults to work together to prevent and respond to the abuse of vulnerable adults.

The document **Crimes against older people**¹¹⁷ identifies that crimes are often targeted against older people as they are perceived as vulnerable persons. This document

thus sets out the way in which the CPS deals with crimes against older people and how such persons are supported. In November 2011 the Social Care Institute for Excellence published a document entitled **Financial Crime against Vulnerable Adults**¹¹⁸ which highlights the current and potential threats to vulnerable adults in relation to economic crime. The policy document also outlines a range of strategic recommendations to combat and reduce the threat to such vulnerable adults.

While it is evident that there has been a surge in policy documents produced as part of the CPS Publication Scheme to enhance protection afforded to vulnerable victims of crime, it is questionable whether those working within the criminal justice system are adequately trained to understand the needs and concerns of vulnerable witnesses. The question as to how vulnerable witnesses are treated in the court system is interesting given that there is no coordinated system for training lawyers, barristers and judges in how to best deal with vulnerable people in court.¹¹⁹ Recent research conducted in this area has revealed a 'patchy' application of such training provisions from Circuits, Inns and other training institutions.¹²⁰ In England and Wales a 'Sex ticket' is required by judges before they can preside at sexual offence trials. This is essentially a three day training course to make the judge aware not only of the relevant laws but the wider social policy issues and how such issues are to be dealt with by the criminal justice system. Such training has been acknowledged as being desirable in the context of vulnerable witnesses to order to achieve best evidence. As the Advisory Training Council noted:

"The handling and questioning of vulnerable witnesses, victims and defendants is a specialist skill, and should be recognised as such by practitioners, judges, training providers and regulators. The desirability of a system of accrediting or "ticketing" advocates suitably trained, qualified and experienced in the handling of vulnerable witnesses should now be recognised."¹²¹

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A Home Office Research Report in 1996 also documented the variety of problems faced by witnesses with disabilities in the criminal process. It noted:

Memory: "People with learning disabilities can have difficulty recalling information because they may take longer to take information in, understand and categorise it. Some find recalling details difficult. Moreover some may not remember an event in a form that is coherent to others..."

Communication skills: "Limited language ability can mean that some... [people with learning disabilities] have difficulty understanding a question or responding to it. They may recall pictures rather than words so that although they may remember events they may find it difficult to put their recollections into words."

Response to perceived aggression: "Some... [people with learning disabilities] have traits which may influence their experience of the criminal justice system. People with Down Syndrome, for example, can be particularly sensitive to negative emotion. They tend to be suggestible and respond to what they perceive as aggression (such as 'tough questioning') by trying to appease the questioner."¹²²

3.3 The Trial Process

The **Youth Justice and Criminal Evidence Act 1999** (YJCE Act) introduced a range of measures that can be used at all stages of the criminal justice process to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. These measures are collectively known as 'special measures' and were introduced to help combat secondary victimisation in the courtroom.¹²³ In determining whether or not to issue a special measure direction the court must concern itself with the eligibility of the adult witness under sections 16 and 17. Vulnerable witnesses are defined by section 16 as those witnesses whose quality

of evidence is likely to be diminished by reason of the fact they suffer from a 'mental disorder', an impairment of intelligence and social functioning or have a physical disability/disorder. Intimidated witnesses are defined by section 17 as those suffering from fear or distress in relation to testifying in proceedings. While section 17 distinguishes between vulnerable witnesses and intimidated witnesses it is important to highlight that some witnesses may be intimidated as well as vulnerable.

Given that the provision of special measures is subject to the discretion of the court, an eligible victim will not automatically be granted such measures. Under section 19, the court has to satisfy itself that the special measure or the combination of special measures will in fact improve the quality of the witness's evidence before granting an application. A trial judge retains a residual exclusionary discretion having regard to the interests of justice. In making such a determination the court must consider all the circumstances of the case including any views expressed by the witness and whether the measure might tend to inhibit such evidence being effectively tested by a party to the proceedings. A vast variety of measures are provided for in sections 23-29 of the Act.

3.3.1 Screens

Under section 23 of the YJCE Act screens may be made available to shield the witness from the defendant. Section 23(2) expressly states that the screen must not prevent the witness from being able to see and to be seen by (a) the judge and the jury, (b) the legal representatives acting in the case and (c) any interpreter or other person appointed to assist the witness. Screens are generally unobtrusive, easy to use and most importantly give confidence to witnesses throughout proceedings.

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3.3.2 Television link evidence

Section 24 of the YJCE Act provides for witnesses to give evidence by live link. For the purposes of this section 'live link' means a live television link or other arrangement whereby a witness is enabled to give evidence during the trial from outside the court. The witness will generally be accommodated in some room or part of the court building, although section 24(5) further provides for a suitable location outside the court. Where a special measure direction provides for the use of a live link, section 24(2) does not permit the witness to give evidence in any other way without the permission of the court. If it appears to the court that it is in the interests of justice to grant permission for the purposes of section 24(2) the court may do so either: (a) on an application by a party to the proceedings if there has been a material change of circumstances at the relevant time or (b) of its own motion.

3.3.3 Evidence given in private

Prior to the YJCE Act, the courts in England and Wales had discretion to order that some or all of the evidence be heard without the public or the press being present. Section 25 of the 1999 Act places this power on a statutory footing for cases involving sexual offences or intimidation by someone other than the accused. Under section 25(2) however, the accused, the legal representatives acting in the proceedings or any interpreter or any other person appointed to assist the witness cannot be excluded from the court. The court must also allow a nominee of the press to remain present under Section 25(3). More importantly, section 25 is limited to cases where the proceedings relate to a sexual offence or if it appears to the court that there are reasonable grounds to believe that the witness will be subject to intimidation during proceedings.

3.3.4 The removal of wigs and gowns

If a court considers that the removal of wigs and gowns may help a vulnerable witness to give evidence, a special measure direction may be granted under section 26 of the **Youth Justice and Criminal Evidence Act 1999**. Similar to evidence given in private this is a procedure that has always remained within the power of the court at common law, particularly in relation to young witnesses.¹²⁴ The measure is intended to be particularly beneficial for child witnesses and witnesses with learning disabilities who might find the costume of the court unfamiliar and inhibiting.¹²⁵

3.3.5 Video recorded evidence-in-chief

Section 27 of the **Youth Justice and Criminal Evidence Act 1999** provides that a video-recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness's evidence-in-chief, unless having regard to all the circumstances of the case, the interest of justice requires that it should not be admitted. Similar to video link evidence, once the court has made a direction that a witness should give evidence by means of a video recording, the witness may not give the evidence-in-chief in any other manner unless the court so orders on the ground that it would be in the interests of justice. Under section 27(5)(a), the party tendering the recording must call the witness to give evidence unless the special measures direction provides for cross-examination to be given otherwise than by evidence in court, or the parties agree that he need not be called. This cross-examination may be by live video-link.¹²⁶ This has been held to be compatible with fairness of procedures for the accused. As was noted in **R (D) v Camberwell Green Youth Court**.¹²⁷

“There is nothing in the fair trial provisions of Article 6 [of the European Convention on Human Rights], or the entitlement to examine witnesses in Article 6(3)

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(d), or the Strasbourg jurisprudence on Article 6, which prohibits a vulnerable witness from giving evidence in a room apart from the defendant. On the contrary, the jurisprudence recognises that vulnerable witnesses, as well as defendants, have rights and may need protection."

The evidence of the young person or vulnerable witness is recorded in accordance with government guidelines, **Achieving Best Evidence in Criminal Proceedings**.¹²⁸ The recording essentially avoids a vulnerable person having to recall from memory difficult and often traumatic events.

3.3.6 Video recorded cross-examination or re-examination

Section 28 of the **Youth Justice and Criminal Evidence Act** 1999, which has not been implemented, allows for pre-trial cross-examination or re-examination of vulnerable and intimidated witnesses to be recorded and admitted as evidence in proceedings. Section 28(2) requires that the recording must be made in circumstances in which (a) the judge and legal representatives acting in the proceedings are able to hear the examination of the witness and to communicate with the persons in whose presence the recording is being made and (b) the accused is able to see and hear any such examination and to communicate with any legal representative acting for him. If a recording has been made, the witness may not be subsequently cross-examined or reexamined in respect of any evidence given by the witness in the proceedings unless further special measures direction is made. A further direction will only be given if it appears to the court that it is in the interest of justice to do so or if a party to the proceedings has become aware of a matter since the original recording which he/she could not have ascertained with reasonable diligence by then.

Since June 2013, section 28 is being tested on a pilot basis

in Leeds, Liverpool and Kingston-upon-Thames and will be expanded to other courts if it proves successful. The aim is to help victims put traumatic memories behind them and receive counselling at an earlier stage. The move follows several high-profile cases – such as that of the violinist Frances Andrade, who killed herself after being subjected to a very harsh cross examination in court about historic indecent assaults – that have raised questions about how vulnerable victims should be treated.¹²⁹

3.3.7 The use of intermediaries

Section 29 of the **Youth Justice and Criminal Evidence Act 1999** provides for the examination of a vulnerable or intimidated witness through an intermediary. Under this section an intermediary may be appointed by the court to assist the witness to give his or her evidence at court. The intermediary special measure provides that an intermediary may not only communicate questions and answers to the witness, but may also explain the questions and answers to enable them to be understood. The intermediary provision does not apply to an interview of a witness that is recorded by means of a video under section 29(6) unless the court issues a further special measures direction. Moreover section 29(3) requires that the judge, legal representatives and the jury are able to see and hear the examination of the witness and to communicate with the intermediary. The provision of an intermediary scheme is unique in that the potential communication problems can be flagged during questioning and with the court's permission resolved by the intermediary.

3.3.8 Aids to communication

Under section 30 of the **Youth Justice and Criminal Evidence Act 1999** aids to communication may be permitted to enable a vulnerable witness as defined in section 16 to give best evidence. Ultimately the court will determine what device is most appropriate to enable questions or answers to be communicated to or by

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the witness, despite any disability or disorder or other impairment which the witness has or suffers from.

3.3.9 Identification evidence

The identification of perpetrators of crime can be a traumatic process for witnesses. Traditionally in the United Kingdom identification evidence was obtained from live line ups. Code of Practice D, which was issued under the **Police and Criminal Evidence Act 1984**, provides for a change from identification parades to video identification.¹³⁰ The video shown to a witness will include the suspect and other foils. Such a method of identification has the advantage of eliminating any possibility of intimidation during the identification process. Although the code does not have statutory force, video identification parades by electronic means have been accorded preferential status, and are employed in England and Wales unless they are impracticable, or a live parade is more practicable and suitable. This is a significant development in the context of vulnerable witnesses given that the use of a video is less threatening to such victims, who no longer have to attend an identification parade where their attacker may be present.

3.3.10 Competency to testify

The general rule in England and Wales is that all witnesses in criminal trials are *prima facie* assumed to be competent and all competent witnesses are compellable. This principle is set out in section 53(1) of the **Youth Justice and Criminal Evidence Act 1999**: "At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence." The rules of competency to testify in criminal proceedings in England and Wales are set out in sections 53-57 of the **Youth Justice and Criminal Evidence Act 1999**. 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. This is a generous, inclusionary approach that establishes the threshold test as one requiring a witness to be capable of imparting relevant information to a fact finder. It is designed to maximise access to justice. It will often be appropriate in such circumstances for the judge to hear expert evidence as provided for under section 54(5) of the Act. In **DPP v R**¹³¹ a 13-year-old complainant with a severe mental disability alleged that she had been sexually assaulted. Her initial police interview about the incident was video-recorded and was considered to be coherent. This was tendered at trial as her examination-in-chief (under a special measures direction). However, when it came to cross-examination, the girl was unable to recall anything about the incident. The Divisional Court concluded that the lack of independent recollection of the incident that had brought her to court did not render her incompetent. The girl satisfied the test set out in Section 53 of the YJCE Act in that she could understand and answer questions coherently, even if her answer was limited to saying that she did not remember anything. This case is therefore authority of the fact that recollection is quite different to competence, demonstrating a less stringent approach to the competency test.¹³²

3.3.11 The admission of unsworn evidence

Section 56 of the **Youth Justice and Criminal Evidence Act 1999** permits the reception of unsworn evidence that is given by witnesses who are either under the age of 14 or by older witnesses who do not appear to understand the solemnity of the proceedings required in taking an oath (perhaps due to a mental or physical disability) but who can nevertheless give an intelligible testimony (i.e. are they competent under section 53(3)). In general the weight of unsworn testimony will be less than that of sworn testimony.

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3.3.12 The requirement of corroboration

Until recently trial judges were under an obligation to warn juries on the danger of convicting the accused on the uncorroborated evidence of certain categories of witnesses. This corroboration requirement in respect of children, sexual complaints and accomplices was abolished towards the end of the twentieth century.¹³³

While the need for obligatory warnings was abolished in respect of these three categories of witnesses, judges retain a general discretion to warn juries in particular cases of suspect witness testimony, taking into account all the circumstances of the case, the issues raised and the content of the quality of the witness's evidence.¹³⁴

In cases where the trial judge exercises this discretion and issues a warning, an evidential basis for suggesting that the witness's evidence may be unreliable will be required.¹³⁵ It may also be possible in court to challenge a witness's veracity on the basis of some medical or mental condition. In **Toohey v The Metropolitan Police**¹³⁶ Peart LJ examined the effect of a physical or mental disability on the reliability of evidence and stated:

"Medical evidence is admissible to show that the witness suffers from some disease or defect or abnormality of the mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness but may give all matters necessary to show, not only the foundations of and the reasons for diagnosis, but also the extent to which the credibility of the witness is affected".

3.4 The Post-Trial Process

In the post-trial stage, people with disabilities are provided for in a number of distinct ways. They can, for example, give a statement on the impact that the crime has had on them and/or on their families at sentencing stage in the process. The fact that a crime was committed against a person with a disability will also be considered

as an aggravating factor at sentencing stage.

A comprehensive range of commitments are made by the various criminal justice agencies to victims (and specifically to vulnerable victims) in England and Wales at the post trial stage. In this stage victims of crime may require particular information relating to parole, prison release dates, and any compassionate release of the offender. Concerns about the reappearance of an offender back into the community require that information on post-sentencing is effectively developed and conveyed where the victim indicates a wish to receive this information. In England and Wales, the **Code of Practice for Victims of Crime** places specific obligations on criminal justice agencies in respect of the provision of information to victims of crime, and specifically to vulnerable victims, in relation to the review of cases by the Criminal Cases Review Commission (para 5.33-5.35), trial verdicts (para 6.7-6.8), appeals against conviction or sentence (para 6.12-6.14), and the rights of victims to make representations regarding licence conditions or supervision requirements in cases where the offender was sentenced to 12 months or more for a sexual crime or violent offence (para 10.2-10.4). The Prison Service, Parole Board and National Offender Management Service also have specific obligations to victims in relation to their concerns about unwanted contact from prisoners, temporary release, final discharge, and conditions to be included on release licences (11.2-12.2). In this section, two specific areas of the law are examined – the use of victim impact statements and the sentencing of offenders who have committed crimes against persons with disabilities.

3.4.1 Victim impact statements

A victim impact statement or a victim personal statement (VPS) as it is known in England and Wales provides the victim of crime with an opportunity to participate in the criminal process by informing the court about the effects

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of the crime on them. VPS were first introduced in England and Wales under the Victims Charter by the Home Office in 1996 but were replaced in 2006 by the **Code of Practice for Victims of Crime** (hereinafter Code). Unlike other jurisdictions VPS measures have not been implemented via legislation and thus have no statutory foundation. Therefore, guidance on the use of VPS is primarily found from non-legislative documents such as Home Office documents and the Crown Prosecution Service (CPS). The CPS's web-based guidance states that VPS are to be made available to all victims of crime and that vulnerable adults fall within the definition of a victim. The VPS leaflet that was published in 2009¹³⁷ as a guide for police officers, investigators and criminal justice practitioners is instructive as it deals specifically with a victim who is a vulnerable adult. The guide expressly states that if a victim is a vulnerable adult, the relevant practitioner should explain to the victim what a VPS is and offer him/her the opportunity to make a VPS. If it would be more appropriate for the carer to provide a VPS, consult the carer about whether they, the victim or both should make the VPS. If a VPS is taken at the same time as the main witness statement, the VPS should be taken in the same format (either written or video-recorded).¹³⁸

Interestingly, a recent survey¹³⁹ conducted on the Victim Personal Statement Scheme in England and Wales revealed that only a minority of victims actually submit Victim Personal Statements. Moreover, the research indicated that prior to 2011, less than half of the victims interviewed for the survey were able to recall being offered the opportunity to make a VPS.¹⁴⁰

3.4.2 An offence against a person with a disability as an aggravating factor in the crime

Section 146 of the **Criminal Justice Act** 2003 imposes a duty upon the courts to increase the sentence for **any offence** where the perpetrator has been hostile towards the victim because of the victim's disability. Essentially

this means that when the court is deciding on what sentence to impose, it must treat evidence of hostility based on disability as an aggravating factor. Section 146 applies if at the time of committing the offence or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on a disability or presumed disability of the victim. For the purposes of this section disability is defined under section 146(5) as any physical or mental impairment.

3.5 Conclusion

In examining the approach to victims of crime with disabilities in England and Wales, it is clear to begin with that there is an extensive array of offences dealing with misconduct against such victims. It has, for example, a much more comprehensive sexual offences calendar that strikes a much better balance between over and under criminalisation than that which exists in Ireland. There is also a much greater awareness of disability hate crime and more proactive measures have been taken to combat it. Section 146 of the **Criminal Justice Act** 2003, for example, imposes a duty upon the courts to increase the sentence for **any offence** where the perpetrator has been hostile towards the victim because of the victim's disability. Offensive terminology employed in legislation has also been replaced by more appropriate language.

Strong commitments are also given by criminal justice agencies in England and Wales to identify people with disabilities as victims of crime and to provide an enhanced service to them across the entire criminal justice network. These commitments extend right through from the identification of such witnesses, to recognising their needs in the making of a victim impact statement, to providing them with information on appeals against conviction and sentence. In many instances commitments of this kind are not provided to the general victim constituency in Ireland, so it is not surprising that they also do not exist in respect of particular groups, such as people with disabilities.

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It is also apparent that a more reflective approach exists in England and Wales in respect of the giving of evidence by people with disabilities (through the use of guidance documents, for example, on how to enable victims with disabilities to give their best evidence). The creation of a special measures package as distinct from a range of *ad hoc* measures that can be applied *inter alia* to vulnerable witnesses is important in ensuring a more inclusionary approach to the reception of such witnesses' testimony. In determining whether such measures should apply, the key emphasis is on whether or not the relevant provision will enhance the quality of the witness's evidence. The competency test as it is applied in England and Wales also appears more nuanced than that which exists in Ireland, given that it focuses on capacity of the witness to impart relevant information to the fact finder rather than a determination of intelligibility *per se*. Express statutory acknowledgement of the use of expert witnesses to facilitate trial judges in making competency determinations is also helpful. Other welcome developments include placing the use of aids to communication on a statutory footing, and the use of video identification parades by electronic means.

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Northern Ireland

4.1 Introduction

This chapter will examine how victims of crime are dealt with in the criminal justice system in Northern Ireland. It will examine the supports and services available at pre-trial, trial and post-trial stages of the criminal process. For the most part, there is a considerable degree of overlap between England and Wales and Northern Ireland, particularly in relation to the identification of vulnerable witnesses, the criminalisation of conduct involving the exploitation of people with disabilities, and the supports provided through special evidential measures.

4.2 The Pre-Trial Process

This section will provide an examination of the broad range of offences protecting people with disabilities including, for example, a specific offence of disability hate crime. It will also make reference to the reporting of such crime and highlight the commitments given by the police and prosecution services of Northern Ireland to victims with disabilities. Though the commitments given by various criminal justice agencies in Northern Ireland to such victims often exist at the level of rhetoric and are not as extensive as that provided in England and Wales, they still represent an improvement on what is available in the Republic of Ireland.

4.2.1 Offences criminalising conduct which exploits persons with disabilities

There are a broad range of offences protecting people with disabilities in Northern Ireland. In many instances they provide similar protection to that provided in England and Wales. In England and Wales, the sexual offences calendar protecting vulnerable persons relate to sexual activity in general rather than specific offences such as rape, focus on the impeding of choice, extend to exploitative conduct that induces victims to watch sexual acts or have such acts occur in their presence, and make

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specific provisions in respect of care workers. The ill-treatment and wilful neglect of a patient with a mental disorder, and the stirring up of hatred against persons with disability are also specifically criminalised.

The **Sexual Offences (Northern Ireland) Order** 2008 which came into force in February 2009 incorporates significant changes to the law in relation to sexual offences and creates a set of offences to protect persons with a mental disorder. The definition of a mental disorder is defined by reference to article 3 of the **Mental Health (Northern Ireland) Order** 1986 as "a mental illness, mental handicap and any other disorder or disability of the mind." There are essentially three categories of offences.

The first category refers to a situation where the victim is unable to agree to the sexual activity because of a mental disorder which impedes his or her choice and is dealt with under articles 43-46. Sexual activity with a person with a mental disorder impeding choice is prohibited under article 43 and attracts a maximum penalty of 14 years imprisonment. However, under the same Article, if the sexual activity involves penetration, the maximum penalty is life imprisonment. There are a further three offences prohibited under this category that each attract a maximum of 10 years imprisonment: article 44, causing or inciting a person with a mental disorder impeding choice to engage in a sexual activity; article 45, engaging in sexual activity in the presence of a person with a mental disorder impeding choice; and, article 46 causing a person with a mental disorder impeding choice to watch a sexual act.

The second category of offences under articles 47-50 refers to instances where the victim is persuaded to engage in or watch a sexual act by means of an inducement offered or given, a threat made or a deception practiced for that purpose. While there is a maximum penalty of 14 years for an agreement obtained through inducement under article 47, the maximum penalty is life imprisonment if penetration is involved. Causing or

inciting a person with a mental disorder to engage in sexual activity by inducement is prohibited under article 48 and where the activity involves penetration a maximum penalty of life imprisonment applies. Engaging in sexual activity in the presence of a person with a mental disorder where their agreement is obtained by inducement, threat or deception is also prohibited under article 49. The final offence in this category creates an offence for a person to cause a person with a mental disorder to watch a sexual act by inducement, threat or deception (article 50).

The final category creates specific offences where the victim is in a relationship of care. Care workers are prohibited from engaging in sexual activity and sexual activity involving penetration with persons who have a mental disorder where they are involved in the care of such persons (article 51). The following three offences as they relate to care workers attract a maximum penalty of seven years imprisonment: causing or inciting sexual activity in the presence of a person with a mental disorder (Article 51); engaging in sexual activity in the presence of a person with a mental disorder (Article 52); and causing a person with a mental disorder to watch a sexual act (Article 54).

Further protection is afforded to persons with disabilities under the **Mental Health Order (Northern Ireland) 1986**. Section 121 provides for criminal offences of ill-treatment and wilful neglect of a patient with a mental disorder. Interestingly, section 129 makes it an offence to refuse to allow the inspection of any premises or to allow the visiting, interviewing or examination of any person suffering from a mental disorder where there is reasonable cause to suspect that he/she has been or is being ill treated or neglected.

Part 3 of the **Public Order (Northern Ireland) Order 1987** prohibits acts intended or likely to stir up hatred or arouse fear by reference to a religious belief, colour, race, nationality or ethnic or national origins. These hate

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crime offences were extended by the **Criminal Justice (No.2) (Northern Ireland) Order** 2004 to include sexual orientation and disability. However, there has been some criticism of the recording of such hate crimes in Northern Ireland. For example, Michael Bailey, who lives in Northern Ireland and suffers from a muscle-wasting disease, reported in 2012 that he had been tormented for seven years by local youths. During this time he contacted police 20 or so times. He said he was called a 'freak' and 'coffin dodger', had his shed set on fire, had youths demanding money from him, and been pelted with missiles and spat at. Many of these incidents were not recorded as disability hate crime by the Police Service of Northern Ireland (PSNI).¹⁴¹

4.2.2 Reporting

The PSNI offers web based guidance to victims as to how to report a crime. The PSNI directs victims how to report a crime in both emergency and non-emergency situations by providing the relevant contact numbers.¹⁴² While the PSNI is committed to supporting all victims of crime, it has dedicated officers to deal with incidents such as domestic violence, hate crime, child abuse and sexual offences. For example, the PSNI is committed to tackling hate crime throughout Northern Ireland and has emphasised the importance of reporting such crimes. The PSNI have defined a disability related incident to be any incident perceived to be on the grounds of a person's physical or mental impairment by the victim or any other person. Moreover, the PSNI have published a hate crime leaflet¹⁴³ which clearly outlines the ways in which a victim of crime may report any such incident. The leaflet also makes specific reference to the appointment of a Hate Incident Minority Liaison Officer in every district who is specifically trained to support and assist victims of disability incidents.

In 2009 the Institute for Conflict Research produced a hate crime report, **Hate Crime against People with Disabilities-a baseline study of experiences**

in Northern Ireland,¹⁴⁴ which confirmed that under-reporting of disability hate crime was a serious issue that needed to be addressed. In this piece of research the consistent reason that emerged for not reporting disability hate crime was the fear of recrimination and 'bringing trouble upon yourself'.¹⁴⁵ Other reasons included a belief that the crime may not be regarded as serious enough and that the complaint would not be believed or received because the victim has a disability.¹⁴⁶ A number of people also expressed the view that the structures and systems that are in place by the PSNI have a deterring effect when it comes to reporting crime as the nature and quality of the response by the PSNI is poor.¹⁴⁷ The lack of credibility is thus regrettable given that the PSNI has been identified as the singular body dealing with disability hate crime.

The recent Statistical Bulletin which was published by the PSNI last May recorded 1,344 hate crime incidents in 2011/2012, 33 of which were disability incidents.¹⁴⁸ This was a decrease on the previous year's disability hate crimes, a decrease of 16 (51.6%).¹⁴⁹ Interestingly it was recorded that the detection was highest for disability crimes (40.0%).¹⁵⁰ However, the need to improve detection rates and under-reporting of disability hate crime are issues that Northern Ireland still needs to address. Such concerns surrounding the area of disability hate crime have been highlighted by Justice Minister David Ford and the Department of Justice is currently working with criminal justice organisations to develop a hate crime action plan.

4.2.3 Policy prioritisation

Section 52 of the **Police (Northern Ireland) Act** 2000 requires the Northern Ireland Policing Board to draft a code of ethics for the purpose of laying down standards of conduct and practice for police officers and for making police officers aware of the rights and obligations arising out of the **Human Rights Act** 1998. The Code of Ethics is central to policing and

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makes reference to special responsibilities that police officers have in relation to vulnerable victims of crime.¹⁵¹ Article 2 expressly states that police officers must be aware of the special needs of witnesses in different situations and the need to support and protect them.¹⁵²

The Public Prosecution Service (PPS) was established by the commencement of the **Justice (Northern Ireland) Act 2002**. While the PPS is the principal prosecuting authority, the 2002 Act does not set out the services that the PPS should provide to victims of crime. However, under Section 37 of the **Justice (Northern Ireland) Act 2002** the Director of Public Prosecutions is required to prepare a Code of Practice for Prosecutors. The Code of Practice for Victims of Crime¹⁵³ (hereafter Code) produced by the Department of Justice is one of the most important policy documents for victims of crime within Northern Ireland. The Code is essentially an agreement between the PSNI, the PPS, the Northern Ireland Courts and Tribunals Service, the Northern Ireland Prison Service, the Probation Board for Northern Ireland, the Youth Justice Agency, the Compensation Agency and voluntary sector support organisations about how you should expect to be treated if you become a victim or witness of crime.

In the introductory stages of the Code specific reference is made to vulnerable and intimidated witnesses and the availability of special measures for such persons when giving evidence in court. Vulnerable witnesses are expressly defined as people who are children under the age of 18 years of age; have mental health issues; have learning difficulties; have neurological and other progressive disorders or have physical disabilities.¹⁵⁴ Intimidated witnesses are defined as those who have experienced domestic violence; have been harassed, victimised or bullied; are a victim of human trafficking; neglect or harm themselves; are old and frail; are witnesses in a murder trial or are making allegations against professionals or carers.¹⁵⁵

The Code is divided into thirteen parts, some of which contain specific references to vulnerable and intimidated persons. Part two of the Code, for example, relates to the PSNI and defines a list of services provided to victims of crime by the PSNI.¹⁵⁶ Specific reference is made to vulnerable and intimidated victims. When dealing with this category of victims the PSNI aim to identify their needs, try to meet their needs when dealing with their case and pass information about such persons' needs to the PPS so that they can continue to support them.¹⁵⁷ Part five of the Code relates to the PPS for Northern Ireland which is the main prosecuting authority for Northern Ireland.¹⁵⁸ This part of the Code makes specific reference to vulnerable and intimidated witnesses when giving evidence in court and states that the PPS will apply to the court for special measures. The PPS will then proceed to write to such persons if the special measures are granted and explain exactly what these measures are.

The Department of Justice has published two further reports, both which make specific reference to vulnerable persons. In 2010 **A Guide to Northern Ireland's Criminal Justice System for Victims and Witnesses of Crime**¹⁵⁹ was published with reference immediately made to special measures for such persons in Section 1.¹⁶⁰ Section 3 addresses 'Police Procedures' and refers to a situation whereby a police officer considers that a person is vulnerable or intimidated, that a video recorded statement may be made instead of a written statement.¹⁶¹ Section five deals with preparing for 'Going to Court' and refers to special measures for vulnerable and intimidated witnesses so that they can give their best possible evidence in court.¹⁶² If special measures are granted, such measures are explained to the individual concerned as well as outlining the range of special measures available.¹⁶³

The second report produced by the Department of Justice which makes reference to vulnerable or intimidated victims is **A Guide to Northern Ireland's criminal**

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justice system for bereaved family and friends following murder or manslaughter.¹⁶⁴

The relevance of this booklet for present purposes is to help and support vulnerable witnesses where someone close to them has been killed or if they are caring for someone bereaved in this way. Section 5 deals generally with 'Attendance at court' but includes reference to the existence of special measures for vulnerable or intimidated witnesses. The report illustrates that witnesses to murder can be considered to be intimidated witnesses.¹⁶⁵ Moreover, the report reiterates that it is the role of the PPS to apply for any special measures and those witnesses should actively inquire about the availability of such measures if they think they may be eligible to avail of them.¹⁶⁶

A further policy document that attempts to safeguard the rights of vulnerable victims is the **Victims Charter** that was published by the Youth Justice Agency.¹⁶⁷ The Charter outlines the policy and procedures to be followed when working with victims of youth crime. The policy also takes account of vulnerable victims and the need to consider cultural, racial, religious and sexual identities of victims.¹⁶⁸ The Charter provides an extensive definition of a vulnerable victim including but not limited to a victim who: is under 17; has a physical or mental disorder; has experienced domestic violence; has been the subject of recorded or reported incidents of harassment or bullying; has a history of self neglect or harm; has made an allegation of criminal conduct which constitutes a sexual offence or which is racially aggravated, or aggravated on religious, or homophobic or transgender grounds; has a limited knowledge of English and is likely to be or who has been subjected to intimidation in respect of the allegation of criminal conduct which the person has made.¹⁶⁹ Part six of the Charter specifically deals with the service that is to be provided to vulnerable victims. If a victim is under 18 or has a mental or physical impairment, the agency will identify a responsible adult or a suitable support person.¹⁷⁰ Victims who have suffered hate crime will be offered support from an appropriate

support person with a background of common interest that is acceptable to the victim.¹⁷¹ The importance of the Charter lies in the fact that it gives due recognition to vulnerable victims right throughout the criminal process.

4.3 The Trial Process

The Government in Northern Ireland has a stated commitment to protecting vulnerable and intimidated witnesses throughout the criminal justice process. Following the publication of the **Speaking up for Justice Report** in 1998,¹⁷² the **Criminal Evidence (Northern Ireland) Order** 1999 was introduced setting out a range of special measures to assist vulnerable or intimidated witnesses to give their best evidence in court. Those adults who will be considered eligible for special measures fall into two groups defined in Article 4 and Article 5 of the 1999 Order. The first group relates to those persons who have a physical disability or disorder, have a significant impairment of intelligence or social functioning or suffer from a mental disorder that is likely to affect the quality of evidence given. The second group refers to those persons whose quality of evidence is likely to be diminished by reason of fear or distress because of their age, personal circumstances or the nature of the alleged offence. This section will thus proceed to examine the range of special measures which can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses.

4.3.1 Screens

Article 11 of the **Criminal Evidence (Northern Ireland) Order** 1999 provides for the special measure of screening. A screen is placed around the witness box which prevents the witness from seeing the defendant. However, the screen must not prevent the witness from being able to see and to be seen by the judge, jury, lawyers, barristers, any interpreter and in some courts the public gallery (Article 11(2)). A recent formal inspection conducted

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by the Criminal Justice Inspection, Northern Ireland (CJI) into the use and effectiveness of statutory special measures outlined that some legal practitioners would object to the use of a screen in every case since it might be seen to prejudice the defendant.¹⁷³ Other concerns surrounding the use of screens ranged from issues such as the witness being seen coming into court to practicalities of getting a witness into court and behind screens.¹⁷⁴

4.3.2 Television link evidence

Article 12 provides that a special measure direction may provide for the witness to give evidence by means of a live link. Article 12(6) defines a 'live link' as a live television link or other arrangement whereby a witness, while absent from the court room or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by persons in the courtroom. Article 12(5) further provides for the use of a live link away from the court house where the trial is taking place. In all cases this will need to be agreed by the court. While there is generally widespread support for the use and development of remote link facilities the National Society for the Prevention of Cruelty to Children (NSPCC) Northern Ireland has identified that there continues to be considerable variation from court to court in confidence in the use of the live and remote link systems which includes court staff and the judiciary.¹⁷⁵

4.3.3 Evidence given in private

Under Article 13 of the 1999 Order, the judge can make a special measure direction that members of the public are to be excluded from the courtroom while the witness is giving evidence. However Article 13(2) expressly states that the accused, legal representatives acting in the proceedings, interpreters or other persons appointed to assist the witness should remain in the courtroom. Inspectors have found very broad support for this provision as a special measure

and no specific concerns in its use were raised in the formal inspection conducted by the CJI.¹⁷⁶

4.3.4 The removal of wigs and gowns

The special measure provision in Article 14 permits the judiciary and the legal profession to dispense with their wigs and gowns while the witness is giving evidence. The CJI noted that this measure has almost become a customary measure in cases with the court often automatically applying the measure.¹⁷⁷ However, the CJI proceeded to point out that a blanket approach to special measures should be avoided with the need for an individual case by case assessment being the preferred option.¹⁷⁸

4.3.5 Video recorded evidence in chief

Article 15 provides that a special measures direction may provide for a video recording of an interview of the witness to be admitted as evidence in-chief of the witness. This measure stands apart from the other special measures in that it is the only special measure dependent on preparatory measures having taken place in the police station and thus lies outside the control of the courts and prosecution.¹⁷⁹ The NSPCC of Northern Ireland believes that technical aspects of video recorded evidence should be reviewed in order to make improvements to the quality of evidence presented.¹⁸⁰

4.3.6 Video recorded cross examination or re-examination

Article 16 provides for the video recording of cross examination or re-examination of a witness prior to the trial and for the recording to be admitted as evidence. A recent consultation published by the Criminal Justice System of Northern Ireland (CJSNI) on the statutory special measures available to assist vulnerable and intimidated witnesses outlined the need to commence this Article without delay.¹⁸¹ The CJSNI went further

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and stated that such a special measure may be the only practical way by which evidence can be given by a small group of the most vulnerable witnesses including those suffering from some form of mental incapacity who are nevertheless still able to give evidence.¹⁸²

4.3.7 The use of intermediaries

Article 17 provides for witnesses with communication difficulties to have an intermediary to assist them when the case in which they are involved is at investigative stage and in court to ensure they receive a fair trial. Such a special measure allows an intermediary to help a vulnerable witness to understand questions that are being put to him or her and to help the court understand the meaning of the answers given by the witness. The CJSNI again noted that there was widespread support for this Article to be commenced as soon as possible.¹⁸³ Moreover, it was considered that intermediaries could help vulnerable witnesses whose quality of evidence was likely to be reduced by reason of witnesses suffering from a mental disorder or significant impairment of intelligence and social functioning and witnesses with a physical disability or disorder.¹⁸⁴ A Registered Intermediaries Pilot Scheme will commence in April 2013.¹⁸⁵

4.3.8 Aids to communication

Aids to communication are provided for under Article 18 such as symbol books, alphabet boards, and the loop system, to help vulnerable witnesses to understand and respond to questions in court and when giving the police their statement. Article 18 permits the use of such communication devices despite any disability or disorder or other impairment which the witness has or experiences.

4.3.9 Identification evidence

Section 2 of Code D of the Codes of Practice issued under the **Police and Criminal Evidence (Northern**

Ireland) Order 1989 and Section 2, Part 2 of the Section 99 **Code of Practice** issued under the **Terrorism Act 2000** both provide for four methods of identification that may be used: identification parade; group identification; video identification and confrontation. However, the system known as Video Identification Parade Electronic Recording (VIPER) has been given primacy over all forms of identification. A video parade is thus compiled from a database of volunteer images rather than using real people in a line up. VIPER is crucial for enhancing the needs of vulnerable people in that such technology will ultimately increase the percentages of positive identifications taking place. Positive identifications will in turn make video identification a much more positive experience for such vulnerable people and promote confidence in the criminal justice process for them.

4.3.10 Competency to testify

The general principle which is set out in Article 31 of the **Criminal Evidence (Northern Ireland) Order 1999** is that all witnesses are deemed competent to give evidence at every stage of the criminal justice process. Article 31(2) limits the application of this general principle and expressly provides that a person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to (a) understand questions put to him as a witness and (b) give answers to them which can be understood. In accordance with Article 32 the court will determine whether or not a witness is competent to give evidence in proceedings. Ultimately it is for the party calling the witness to satisfy the court on a balance of probabilities that the witness is competent to give evidence (Article 32(2)). Moreover, any proceedings held for the determination of competency shall take place in the absence of the jury and expert evidence may be received on the question.¹⁸⁶ The test of competency for vulnerable persons in Northern Ireland is thus identical to the test in England and Wales as set out in the previous chapter.

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4.3.11 The admission of unsworn evidence

Article 34 of the 1999 Order permits the reception of unsworn evidence that is given by witnesses who are either under the age of 14 or by older witnesses who do not have a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking the oath but who can nevertheless give an intelligible testimony. (Article 33(2)) Thus, in cases where a vulnerable person may not be permitted to give evidence on oath in criminal proceedings, this will not debar the vulnerable person from giving evidence. However, if a witness is deemed unable to take the oath, a test of competence to tell the truth should be considered particularly where the witness has a learning disability.¹⁸⁷

4.3.12 The requirement of corroboration

Article 45 of the **Criminal Justice (Northern Ireland) Order** 1996 abrogated the requirement for a full warning to be given to the jury about convicting the accused on the uncorroborated evidence of a person merely because that person is an alleged accomplice of the accused or where the offence charged is a sexual offence. Such a reform was welcomed by vulnerable persons given that the highly technical rules relating to the meaning of corroboration had rendered the full warning complex and difficult to understand. However, the abrogation for full warnings did not remove the discretion on the part of the judge to warn the jury to exercise caution whenever he or she considered it appropriate to do so whether in respect of an accomplice, or a complainant or any other witness.¹⁸⁸ In determining whether or not a full warning will be given the circumstances of each case must be considered. As to the circumstances in which it may be appropriate for the judge to give a warning Lord Taylor expressly stated in the case of **Makanjuola**:

“The judge will often consider that no special warning is required at all. Where, however the witness has

been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury."¹⁸⁹

Thus, the judge retains discretion to exercise a full warning in the case of a vulnerable witness and appears to focus on the reliability of the witness's evidence.

4.4 The Post-Trial Process

In the post-trial stage, people with disabilities are provided for in a number of distinct ways (though no specific reference to such victims in the Code of Practice exists at this stage of the process). They can, for example, give a statement on the impact that the crime has had on them and/or on their families at sentencing stage. A sentencing judge also has to take into account the fact that an offence has been aggravated by hostility based on a disability or a presumed disability. The **Prisoner Release Victim Information Scheme** (PRVIS) allows a victim of a crime in Northern Ireland to receive and submit information about the offender before he or she is released from custody. It applies to adult offenders who have been sent to prison for six months or more and young people who were sentenced to six months or more before they were 18, but who turn 18 while in custody. Information is provided on the month and year the offender is expected to be released from custody; periods when the offender is temporarily released (and the victim is entitled to express views on a prisoner being given temporary release

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which the Home Leave Board of the prison will take into account); conditions that the offender must keep to when he/she are released; and, if the offender has broken any conditions which has resulted in him or her going back into custody. It is also possible for Victim Support Northern Ireland to act as the victim's representative and receive information on his or her behalf. If the prisoner's case is referred to the Parole Commissioners for a decision on release, the victim will be told when the commissioners are considering the prisoner's case; that he or she is entitled to give a view to the commissioners; be told of the commissioners' decision; and, if the commission is to release the prisoner, the conditions which will apply. The Probation Board for Northern Ireland's Victim Information Scheme aims to provide information to victims — who register with the Victim Information Office — about what it means if the offender receives any sentence which has to be supervised by a probation officer. They offer information to victims on the type of supervision the offender will receive; how long the offender will be supervised for; any extra conditions that apply to the sentence; and any further sentences relating to the case. The Compensation Agency in Northern Ireland deals with three main types of compensation — criminal injuries, criminal damage and compensation covered under the **Justice & Security (Northern Ireland) Act 2007**. It assists victims in filling in the application form, and informs applicants of their right to appeal its decisions. In this section, two specific areas of the law are examined — the use of victim impact statements and the sentencing of offenders who have committed crimes against persons with disabilities.

4.4.1 Victim impact statements

Both Victim Impact Statements (VIS) and Victim Impact Reports (VIR) can be made available to enable the court to consider the impact of a specific crime on a victim in Northern Ireland. The PSNI policy dealing with victims and witnesses has however limited the use of VIS in indictable cases, in particular those cases involving

sexual and serious physical assault stating that the “investigating officer should consider the need to record data concerning the effect of the crime on the victim”.¹⁹⁰ A VIR is different to a VIS in that they are prepared following a request by the court for a professional assessment and report.¹⁹¹ VIR are generally prepared for more serious crimes. Currently a victim may make a VIS to the police, the PPS or Victim Support Northern Ireland. The VIS which is optional is then forwarded to the PPS to include in the prosecutorial paper as an evidence statement.¹⁹² The entitlement to make a VIS is as of yet not placed on statutory footing in Northern Ireland.

4.4.2 An offence against a person with a disability as an aggravating factor in the crime

Since the **Criminal Justice (No.2) (Northern Ireland) Order** 2004, sentencing has to take into account the fact that an offence is aggravated by hostility based on religion, race, sexual orientation a disability or a presumed disability. Article 2 of the 2004 Order states that if the offence was aggravated by hostility, the court shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offense) and shall state in open court that the offence was so aggravated. For the purposes of this Article disability means any physical or mental impairment.

4.5 Conclusion

Northern Ireland provides for a broad range of offences protecting people with disabilities, particularly in relation to sexual offences and the stirring up of hatred. Clear commitments are also given to victims with disabilities in the Code of Practice of Victims of Crime and the Victims Charter. These commitments include the identification of such witnesses, and the passing on of information about such witnesses to other criminal justice agencies to ensure a continued and consistent level of service. Vulnerable witnesses are expressly

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defined as people who 'are children under the age of 18 years of age; have mental health issues; have learning difficulties; have neurological and other progressive disorders or have physical disabilities'. The existence of such a definition assists criminal justice agencies in the performances of their duties and responsibilities. Other notable provisions include the employment of video identification parades, a similar test of competency to that employed in England and Wales, and the requirement that a sentencing judge has to take into account the fact that an offence is aggravated by hostility based on disability or a presumed disability.

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Scotland

5.1 Introduction

This chapter will examine the extent to which the criminal justice system of Scotland accommodates people with disabilities. It will follow the same format of previous chapters, commencing with a general review of the pre-trial process, before moving on to document the provisions that exist and the commitments that have been given in the trial and post-trial processes.

5.2 The Pre-Trial Process

This section will provide an overview of the range of criminal laws that protect people with disabilities in the criminal process in Scotland, the structure put in place to facilitate such victims in reporting a crime, and the commitments given by criminal justice agencies such as the police and prosecutors to identifying and supporting them. It will commence by identifying the offences that exist on the Scottish criminal law calendar that criminalise wrongdoing against victims with disabilities.

5.2.1 Offences criminalising conduct which exploits persons with disabilities

The **Sexual Offences (Scotland) Act 2009** (the 2009 Act) came into force on the 1st of December 2010 and criminalised a range of sexual conduct which takes place without consent. Part two of the Act defines consent as “free agreement” which may be withdrawn at any time as well as a non-exhaustive list of circumstances in which consent can never be present. Part three is significant for present research purposes in that it makes provision regarding the capacity of persons with a mental disorder to consent to conduct. For the purposes of this Act a mental disorder has the same meaning as Section 328 of the **Mental Health (Care and Treatment) (Scotland) Act 2003** and means any mental illness, personality disorder or learning disability however caused or manifested. Section 17 of the 2009

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Act expressly states that a mentally disordered person is incapable of consenting to conduct where by reason of the mental disorder the person is unable to: (a) understand what the conduct is, (b) form a decision as to whether to engage in the conduct, (c) communicate any such decision. This section in relation to mentally disordered persons applies in respect of the offences created in sections 1-9 of the 2009 Act including rape, sexual assault, and sexual assault by penetration. The following sexual offences are also prohibited under the 2009 Act in respect of mentally disordered persons: sexual coercion, the coercion of a person into being present during a sexual activity or into looking at a sexual image, indecent communication, sexual exposure, voyeurism and the administration of a substance for sexual purposes.

Part five of the 2009 Act provides for offences concerning the abuse of a position of trust. Section 46 specifically provides that a person is deemed to hold a position of trust in relation to a mentally disordered person if they provide care services to the victim or if they are employed in, contracted to or managing a hospital or care service, whether public or private, in which the victim is being given medical treatment. Further specified offences are provided for in the **Mental Health (Care and Treatment) Scotland Act 2003** in relation to mentally disordered victims. There are essentially two forms of behaviour that can lead to a specific charge namely, sexual acts with, or ill treatment of, a mentally disordered person and interference with the functioning of the Act.¹⁹³

Section 311 relates to non-consensual sexual acts. Under this section, sexual intercourse or the performance of a sexual act with a person who does not consent or is incapable of consenting because of a mental disorder is an offence. For the purposes of this section, a person's consent will be deemed invalid if it is obtained as a result of being placed in such a state of fear or having been subjected to any such threat, intimidation, deceit or persuasion. Moreover, a

person is deemed incapable of consenting to an act if he/she is unable to understand what the act is, form a decision about the act or communicate any such decision. It will be a defence under subsection five for the person charged to prove that at the time of the sexual behaviour he or she could not reasonably have been expected to know that the other person had a mental disorder and was incapable of consenting to the act.

Section 313 prohibits persons who are providing care services to mentally disordered persons from engaging in sexual intercourse or any other sexual act with a mentally disordered person. However, a person charged with such an offence is provided with a defence under subsection 3 if that person can prove that they could not have reasonably have been expected to know that the person was mentally disordered, that the person is their spouse or if there was a pre-existing sexual relationship. Section 315 provides that it will be an offence to wilfully neglect or ill-treat a mentally disordered person by a person employed in or contracted to provide care services in or to a hospital. A volunteer for a voluntary organisation is specifically excluded for the purposes of this section.

In March 2010, legislation for the category of disability hate crime came into force. Disability aggravated offences are defined as charges that include an aggravation of prejudice relating to disability in terms of Section 1 of the **Offences (Aggravated by Prejudice) Scotland Act** 2009. This legislation builds upon current hate crime legislation based on race, religion or belief under the **Crime and Disorder Act** 1998 and the **Criminal Justice (Scotland) Act** 2003. The Lord Advocates Guidelines to Chief Constables¹⁹⁴ recognises the seriousness of hate crime and sets out robust actions for the reporting and prosecution of such cases. For the purposes of investigating such offences the Lord Advocate directs that the following definition be used: "an incident is aggravated by prejudice if it is perceived to be aggravated by prejudice by the victim or any other person."¹⁹⁵ The

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guidelines emphasise the importance of the Prosecutor Fiscal Service being advised if the victim has perceived an incident to be aggravated by prejudice. The Lord Advocate further directs that in the investigation of such crimes, the motive for the crime must be fully investigated and clearly recorded.¹⁹⁶ Finally the guidelines direct that when police officers are reporting offences that appear to be aggravated by prejudice, details of the impact of the crime on the victim should be recorded.¹⁹⁷

A recent publication by the Crown Office and Procurator Fiscal Service on hate crime in Scotland noted that there were a total of 68 charges with an aggravation of prejudice relating to disability reported in 2011-2012.¹⁹⁸ This was an increase of 20 more than were reported in 2010-2011, a full year after the implementation of the new hate crime legislation.¹⁹⁹ The 2009 legislation thus illustrates Scotland's commitment to provide more protection for victims of disability hate crime.

5.2.2 Reporting

The Victims of Crime in Scotland website provides a general guide on how to report a crime.²⁰⁰ The website advises victims of hate crime of alternative methods of reporting crime such as 'Remote Reporting' or 'Third Party Reporting'. Such reporting methods allow the person affected by the crime to report the crime to a non-police organisation that in turn forwards it to the police. Capability Scotland Advice Service, a voluntary organisation supporting disabled people acts as a remote reporting centre for victims of hate crime. Capability Scotland encourages disabled people to report crimes by way of remote reporting and supports and advises such victims of hate crime throughout the reporting process.²⁰¹

5.2.3 Policy prioritisation

The first **Scottish Strategy for Victims** (the Strategy) was developed in 2000 with the aim of putting the

needs of witnesses at the heart of the criminal justice system. The purpose of the Strategy is to ensure that victims of crime will be able to get all the support and assistance they need at all stages of the criminal justice system.²⁰² The underlying premise of the Strategy is that all victims should be treated fairly and specifically states that victim's interests are to be considered irrespective of their disability.²⁰³ The first objective of the Strategy is to provide for the emotional and practical support needs of victims.²⁰⁴ The Strategy identifies that one of the key features of providing support is to identify victim's needs, in particular those witnesses who are especially vulnerable.²⁰⁵ Objective One also recognises that some witnesses are especially vulnerable to distress and that organisations need to be especially attentive to the needs of "those with sensory or mobility impairments and those with learning difficulties, mental illness, acquired brain injury or suffering from dementia."²⁰⁶ The major agencies such as the Crown Office and Procurator Fiscal Service, the Association of Chief Police Officers in Scotland and the Scottish Court Service involved in the criminal justice system have all undertaken to develop their own Action Plans to integrate the Strategy into their working practices. The Crown Office and Procurator Fiscal Service (COPFS) is Scotland's sole prosecuting authority working closely with partners in the criminal justice system to make Scotland a safer place. The COPFS produced an information booklet in 2010 on their commitments to victims and prosecution witnesses and specifically refer to cases involving vulnerable persons as priority cases.²⁰⁷ The COPFS offers a Victim Information and Advice service, a service that offers specific information and advice to vulnerable witnesses about the legal procedures and a chance to discuss what supports may be needed in order to give best evidence at court.²⁰⁸ Moreover, the COPFS will inform the judge of the views of a vulnerable person as well as applying for special measures support if required.²⁰⁹

The Association of Chief Police Officers (ACPO) in Scotland is 'the professional voice of police leadership

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in Scotland' whose aim is to make the police service accessible to a broad range of groups and individuals.²¹⁰ The ACPO published a Diversity Booklet in 2008 which expressly stated "as a police service we must not discriminate against people with disabilities when delivering our service."²¹¹ The police are also obligated to make reasonable adjustments so that persons with disabilities receive the same level as service as non-disabled persons.²¹² The booklet further outlines the dangers of making assumptions about people, how to identify a disabled person and general advice when dealing with someone with a disability.²¹³ The ACPO also deal with the considerations that need to be examined when dealing with people who may be experiencing a mental health/disorder and emphasise that assumptions should not be made about their ability to understand, reason or respond coherently.²¹⁴

The Scottish Court Service (SCS) is an important executive agency of the Scottish Executive Justice Department whose function is to support the judges and sheriffs in the Supreme and Sheriff Courts in Scotland. The SCS has published a leaflet entitled **The Scottish Service Standard of Service for Victims** with provisions for victims who are especially vulnerable including those with learning difficulties, mental illness, acquired brain injury or those suffering from dementia.²¹⁵ As part of this standard of service the SCS has been committed to making provisions for particularly vulnerable witnesses through the refurbishment of court buildings and the introduction of equipment to be used by witnesses in order to give best evidence. This is evident for example in Edinburgh and Glasgow High Court buildings where video conferencing equipment has been installed and in Ayr, Kilmarnock and Inverness Sheriff Courts where CCTV and video link equipment has been upgraded or installed.²¹⁶

Victim Support Scotland noted that a lack of training for lawyers on how to communicate and question vulnerable witnesses remains somewhat of a problem:

“There is a lack of skills or caring amongst judges, solicitors and legal representatives in how they communicate and interact with child witnesses and adults with severe learning or communication difficulties. Irrespective of provided guidance, legal agencies are, in our view, still not giving children and adult witnesses the chance to provide the best possible evidence, by enabling them to understand the question and articulate their own response... Victim Support Scotland sees a need for specialised training for all legal professionals who come in contact with a child or adult vulnerable witness, in order to provide them with the necessary expertise and the ability to assess and understand the needs of vulnerable witnesses. The training should also provide the individual with the skill to communicate with the witness and help her/him provide the best possible evidence according to her/his potential.”²¹⁷

5.3. The Trial Process

At trial stage, witnesses with disabilities have a number of needs that have to be met by the criminal process. These relate to practical issues such as physical accessibility to the courtroom, but also information and support services provided by agencies such as the court service, the police, prosecutors, and victims support organisations. More specifically, at trial stage, people with disabilities may also require the use of special measures provisions (such as screens and live television links). Access to justice for such witnesses may also depend on rules and legal practices that exist in relation to the admission of out of court statements, the test to determine competency, the admission of identification evidence, and prohibitions on cross-examination by the accused party.

In Scotland, there are a range of special measures provisions available under the **Vulnerable Witnesses (Scotland) Act** 2004. Section 271 of the Act extended the definition of a vulnerable witness in addition to those under 16 (a child witness) or with a mental disorder to

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include anyone where there is a significant risk that the quality of their evidence will be diminished through fear or distress. The reference to quality of evidence is to its quality in terms of completeness, coherence and accuracy. In determining whether a person is a vulnerable witness the court will take into account matters including any physical disability or other physical impairment which the person has.²¹⁸ The 2004 Act introduced a 'vulnerable application procedure' to authorise the use of special measures for the purposes of taking the witness's evidence.²¹⁹ The party making a vulnerable witness application must specify the special measure provision which he/she considers most appropriate for the purposes of taking evidence from the vulnerable witness as well as the views expressed by the witness and any other relevant information. Moreover, the court may review arrangements in any case in which a person is giving evidence for the purposes of trial if it appears to the court that the witness is vulnerable.²²⁰ It has been suggested that this provision may imply that the court actually has an obligation to consider whether any adult witness may be vulnerable even where no special measures application has been made.²²¹ Section 271(E) provides a further supplementary provision whereby the court will take account of the views expressed by the vulnerable witness when deciding which of the special measures is the most appropriate for the purpose of taking evidence. Currently intermediaries are not part of the special measures package in Scotland, though in practice, the courts can on a non-statutory basis authorise the use of intermediaries if it sees it necessary and beneficial to the collection of evidence. This section will proceed to examine the range of special measure provisions that are made available to vulnerable witnesses under Section 271(H).

5.3.1 Taking of evidence by a commissioner

Section 271(I) makes provision for the appointment of a commissioner to take evidence from a vulnerable witnesses. Such proceedings must be recorded. The

recording of such proceedings may be received in evidence without being sworn to by the witness.

5.3.2 Television link evidence

Section 271(J) provides for the special measure of television link whereby a vulnerable witness can give evidence via a television link without having to go into the court room. The place where the witness gives evidence via television link may be part of the court building or another suitable building outside of the building and will be treated as being part of the court room for the purposes of proceedings.

5.3.3 Screening

Screening a vulnerable witness from the accused is provided for under Section 271(K) of the 2004 Act. However, the court must make arrangements to ensure that the accused is able to see and hear the witness giving evidence.

5.3.4 Supporters

A supporter may be nominated by or on behalf of a vulnerable witness under Section 271(L) to be present alongside the witness in court to support the witness while he/she is giving evidence. The supporter is merely a support mechanism for the witness and cannot prompt or otherwise influence the witness while giving evidence.

5.3.5 Evidence in chief

Section 271(M) permits a vulnerable witness to give evidence in chief in the form of a prior statement. Section 271(M)(2) provides that a prior statement by a vulnerable witness may be lodged by a party citing the witness and will be admissible as evidence in chief without the witness being required to adopt or otherwise speak to the statement in giving evidence in court. This provision

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is however subject to Section 260 of the **Criminal Procedure (Scotland) Act** 1995 which deals with the admissibility of prior statements of witnesses. In line with Section 271(M) of the 2004 Act and Section 260(2) of the 1995 Act a prior statement will not be admissible in proceedings unless the statement is contained in a document and at the time the statement was made the person who made it would have been a competent witness in the proceedings. Moreover, any such statement will not be admissible unless it is sufficiently authenticated.

Interestingly, Section 271(H)(1)(f) of the 2004 legislation also makes provision for Scottish Ministers to enact secondary legislation for the purposes of creating additional special measures.

5.3.6 Further protective measures at trial

Section 288(F) provides for the power to prohibit personal conduct of the defence in cases involving vulnerable witnesses. If the court is satisfied that it is in the interests of the vulnerable witness it will make an order prohibiting the accused from conducting his offence in person at the trial and in any victim statement proof relating to any offence to which the trial relates. (Section 288(F) (2)) The court will not however make such an order if it considers that the order would (a) give risk to a significant risk of prejudice to the fairness of the proceedings of the trial or otherwise in the interests of justice and (b) that risk significantly outweighs any risk of prejudice to the interests of the vulnerable witness if the order is not made.²²²

5.3.7 Identification evidence

For the purposes of identification evidence in Scotland, Lord Advocates Guidelines on the conduct of visual identification evidence are instructive.²²³ Under these guidelines identification procedures comprise of witnesses being given the opportunity to identify a suspect or

accused person visually in a video identification parade, identification parade or related procedure.²²⁴ The guidelines specifically address identification parades involving child, vulnerable or intimidated witnesses.²²⁵ In cases involving vulnerable victims, a video identification parade will be the preferred method of identification which requires advance planning and liaison between the officer who has knowledge of the witness and the officer conducting the parade.²²⁶ The guidance also provides that an appropriate adult must accompany a witness during the identification parade where the witness has a known mental disorder, including people with mental illness, learning disability, acquired brain damage or dementia.²²⁷ The issue of communication difficulties for vulnerable witnesses is also addressed and the guidelines provide that arrangements must be made in such instances for the witness to give the best evidence as far as is practically possible.²²⁸ Reference is made to symbols, pictures, hearing aids, contact lenses and cases where verbal identification is not possible.²²⁹ While the guidelines accommodate vulnerable witnesses to give best evidence, care must be taken to ensure that the procedure remains fair to the accused.²³⁰

The **Vulnerable Witnesses (Scotland) Act** 2004 is noteworthy given that section 281A extends the routine evidence provisions to allow identification evidence to be accepted in evidence on service of a report providing for identification, provided no objection is taken by the defence. Lord Advocates Guidelines to the Police providing information on Vulnerable Adult Witnesses notes the important relationship between the holding of a parade and the availability of special measures.

5.3.8 Competency to testify

The method in which the competence of a witness is determined varies across jurisdictions. Section 24 of the **Vulnerable Witnesses (Scotland) Act** 2004 has abolished the competence test for witnesses

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in civil and criminal proceedings. Section 24(1) of the Act provides that the evidence of a witness will not be inadmissible solely because the witness does not understand the difference between truth and lies and the duty to give truthful evidence.

5.3.9 The admission of unsworn evidence

While there has been a distinction drawn between sworn evidence and evidence not on oath in some jurisdictions such as England and Wales, such a distinction has never existed in Scotland. Given that there is no distinction between sworn and unsworn evidence, the possibility that jurors may draw an inference about the value of unsworn evidence is eliminated.²³¹

5.3.10 The requirement of corroboration

The general rule of evidence in criminal proceedings in Scotland is that every material fact must be proved by corroborated evidence before a person can be convicted. Thus the essence of the corroboration rule is that an individual cannot be convicted of a crime on the evidence of a single witness. Each material fact will require proof from more than one source, for example by the evidence of one eye witness together with circumstantial evidence coming from another source or the evidence of two eye witnesses.²³² The law in Scotland has developed to recognise certain circumstances in which corroboration of a witness will not be required. In the case of **Moorov v HMA**²³³ the Moorov rule was set down. It provides that "where the accused is charged with a series of similar offences, closely linked in time, character and circumstances, the evidence of one witness as to each offence will be taken as mutually corroborative, each offence being treated as if it were an element in a single course of conduct."

An important distinction must therefore be drawn between corroboration rules in Scotland and in other jurisdictions.

The previous chapters have highlighted that under the English and Northern Ireland systems of law the judge retains discretion to warn the jury that they should be cautious when accepting the uncorroborated evidence of certain categories of witnesses such as vulnerable witnesses. Such an approach ultimately can be seen to discriminate between different classes of witnesses and would appear to suggest that some witnesses are more acceptable than others. The law of Scotland does not however make any such distinctions and allows children, adults and vulnerable persons to have their evidence considered in the same way as any other witness.

5.4 The Post-Trial Process

In the post-trial category of the process, witnesses with disabilities may also have service and procedural needs, particularly in relation to participation at sentencing and parole stages and information provision on release dates and release conditions. In Scotland, victims of crime who are dissatisfied with the verdict or sentence can talk to the Victim Information and Advice Service (part of the Crown Office and Procurator Fiscal Service) about how they feel and ask for a meeting with the fiscal or trial prosecutor to find out more about what happened and, if possible, the reasons for it. If the offender has been sentenced to 18 months or more in prison, the victim of the offence is entitled to register with the Victim Notification Scheme in Scotland. This entitles victims to receive information about the offender's: release, date of death, if he or she dies before being released, date of transfer, if he or she is transferred to a place outside Scotland, eligibility for temporary release (for example, for training and rehabilitation programmes or home leave in preparation for release), escape or absconding from prison, and return to prison for any reason. The scheme also entitles victims to information about the offender being considered either for parole or release on home detention curfew (tagging). Statutory recognition of crimes motivated by prejudice against

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people with disabilities are also be expressly provided for as an aggravating factor when determining the sentence to be imposed. In this section we will examine the use of victim impact statements and provisions permitting offences against people with disabilities to be viewed as an aggravating factor in the crimes.

5.4.1 Victim impact statements

The Victim Impact Statement Scheme (the Scheme) was introduced in Scotland in 2009 after a pilot scheme was piloted in a number of Sheriff Courts.²³⁴ The Scheme allows victims or relatives of higher tariff offences to make a written statement to inform the court how the crime has affected them physically, emotionally and financially.²³⁵ The scheme in Scotland differs from other jurisdictions in that a Victim Statement can only be made once a decision has been made to take the case to trial.²³⁶ The judge will then take the Victim Statement into account as part of the circumstances of the case and decide what weight it should be given when determining sentencing provisions.²³⁷ A copy of the Victim Statement will be made available to the defence at the same time. The Scottish Government has also published a booklet which guides victims of crime on how to make a Victim Statement.²³⁸ This information booklet also outlines information that should not be included such as how the crime has affected others or what sentence the victim thinks the accused should receive.²³⁹ Further guidance is provided for victims who are physically unable to complete a Victim statement but can do so by alternative methods of communication — by using voice recognition software for example.²⁴⁰ In such circumstances the guidance is clear and expressly states that “the right to make a victim statement stays with the victim.”²⁴¹

If a victim is unable to make a Victim Statement because of a mental disorder or an inability to communicate, a relative or carer may be entitled to complete the Victim Statement on the victim's behalf.²⁴² In such

instances the guidance highlights the need to respect the views of the victim at all times and to ensure that the statement reflects the impact that the crime has had on the victim and not how it has affected the person making the statement.²⁴³ The general consensus regarding the Scottish Victim Statement Scheme is generally positive and a recent study found that most victims who had submitted a statement reported that they would submit a statement again in the event of further victimisation.²⁴⁴ A final point to outline is that the **Vulnerable Witness Scotland Act** 2004 also provides for the same special measures for vulnerable witnesses who are giving evidence on a Victim Statement.

5.4.2 An offence against a person with a disability as an aggravating factor in the crime

The **Offences (Aggravation by Prejudice) (Scotland) Act** 2009 provides for statutory aggravations for crimes motivated by malice and ill words towards a person based on their sexual orientation, transgender identity or disability. Section 1 provides that if it is proved that an offence is aggravated by prejudice relating to disability, that the aggravation may be taken into account when determining the appropriate sentence. It is immaterial if the offender's malice or ill-will is based on any other factor. For the purposes of this section, reference to disability is a reference to physical or mental impairment of any kind.

5.5 Conclusion

There are some notable achievements in Scotland's approach to people with disabilities. It has a very broad range of offences covering misconduct against vulnerable witnesses, including specific disability hate crime legislation. Victim support is also provided through, among others, a specific voluntary organisation supporting disabled people (Capability Scotland). The same organisation encourages disabled people to report crimes by way of remote reporting and supports and advises such

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victims of hate crime throughout the reporting process. Victims with disabilities are also 'written in' at a policy level. Objective one of the Scottish Strategy for Victims, for example, recognises that some witnesses are especially vulnerable to distress and that criminal justice agencies and organisations need to be especially attentive to their needs. Scottish police literature also emphasises that assumptions should not be made by police officers about the ability of victims with disabilities to understand, reason or respond coherently. Commitments are also made in relation to passing on information about vulnerable witnesses to other agencies. Prosecution Service literature also emphasises vulnerable persons as priority cases.

Improvements have also been made in relation to criminal and evidential procedure. Specific legislation was enacted for vulnerable witnesses, which sets out a definition as to who can be considered such a witness, as well as providing a vulnerable application procedure for the use of special measures. Express statutory provision is also provided for the use of court supporters for witnesses with disabilities. Moreover, if a court is satisfied that it is in the interests of the vulnerable witness it will make an order prohibiting the accused from conducting his or her offence in person at the trial and in any victim statement proof relating to any offence to which the trial relates. As regards competency requirements, the evidence of a witness will not be inadmissible solely because the witness does not understand the difference between truth and lies and the duty to give truthful evidence. Video identification parades are the preferred method of identification in Scotland which includes the support of an accompanying adult and the accommodation of communication difficulties.

At sentencing stage, the Scottish prosecution service will in many instances engage with victims in relation to its reasons for decisions. Victims who are physically unable to complete a victim statement can do so by alternative methods of communication including voice

recognition software. There is also statutory recognition of crimes motivated by prejudice against victims with disabilities as an aggravating sentencing factor. A very comprehensive information provision service is provided to victims under the notification service about offenders.

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New Zealand

6.1 Introduction

New Zealand's approach to people with disabilities who are victims of crime is interesting in that although it is only now beginning to formulate a specific code for victims of crime, it has already made numerous changes that facilitate witnesses, including vulnerable witnesses. For example, the competency rule requirement has been removed since 2006 on the basis that it had the potential to unfairly exclude relevant evidence. This chapter will document the manner in which the jurisdiction of New Zealand deals with victims with disabilities at all stages of the criminal process.

6.2 The Pre-Trial Process

This section will outline the array of criminal law provisions that specifically exist for the protection of people with disabilities. It will also examine the support mechanisms that are in place for such victims to report a crime and to be assisted in the early stages of the criminal process. The **Enhancing Victims' Rights Review** identified a number of issues for victims, including: a lack of accessible, detailed information on agency processes; confusion over the number of agencies and where to go to for assistance; a lack of visible complaints processes which may prevent victims from making complaints, and a lack of accountability in relation to how agencies respond to complaints. It noted: "The criminal justice sector could be more responsive to the needs of victims. A greater focus on victims of crime will assist in reducing the negative impact of crime on individuals and on our society."²⁴⁵ It is anticipated that the introduction of Victims Code, and the establishment of a Victims Centre that will provide oversight of victims rights and resources, will improve the responsiveness and accountability of justice sector agencies to victims.

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6.2.1 Offences criminalising conduct which exploits persons with disabilities

Part 8 of the **Crimes Act** 1961 deals with “offences against the person” including offences such as murder, manslaughter, injury and assault. Following a review by the Law Commission on Part 8 of the **Crimes Act** in 2009,²⁴⁶ the **Crimes Amendment Act (No.3)** 2011 has introduced criminal liability for persons caring for and working with vulnerable adults and children. For the purposes of the act a vulnerable adult means a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person.

Section 151 imposes a legal duty on people who have the actual care or charge of a person who is a vulnerable adult to provide the “necessaries” and to take reasonable steps to protect the person from injury. When Section 151 is read in conjunction with Section 150A criminal liability will arise where a person omits to discharge or perform a legal duty or performs an unlawful act. However, criminal liability will only arise in circumstances where the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act.

Section 195 provides for the offence of ill treatment or neglect of a child or a vulnerable adult by persons who have the actual care or charge of the victim or a person who is a staff member of any hospital, institution, or residence where the victim resides. If such a person intentionally engages in conduct, or omits to discharge or perform any legal duty which is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability and which is a major departure from the standards expected of a reasonable person, it will be a criminal offence (Section 195(1)). Furthermore, Section 195A creates an offence of failing to protect a vulnerable adult from risk of death, grievous

bodily harm or sexual assault. A person will be liable under this section if they are a member of the same household as the victim or a staff member of any hospital, institution, or residence where the victim resides²⁴⁷; or if they have knowledge of the risks and fail to take reasonable steps to protect the victim from that risk.²⁴⁸

Part 7 of the 1961 Act deals with crimes against religion, morality and public welfare and specifically deals with sexual crimes. Section 138 prohibits sexual exploitation or an attempt to have exploitative sexual connections with a person with a significant impairment. Sexual connection is defined under the act as meaning: (a) connection effected by the introduction into the genitalia or anus of one person or otherwise than for genuine medical purposes of a part of the body of another person or an object held or manipulated by another person or, (b) connection between the mouth or tongue of one person and a part of another person's genitalia or anus or, (c) the continuation of connection of a kind described in paragraph (a) or (b).²⁴⁹

For the purposes of this section, a significant impairment is an intellectual, mental, or physical condition or impairment that affects a person to such an extent that it significantly impairs the person's capacity to, (a) understand the nature of the sexual conduct, (b) understand the nature of decisions about sexual conduct, (c) foresee the consequences about sexual conduct or (d) to communicate decisions about sexual conduct.²⁵⁰ A person will be deemed to have had "exploitative sexual conduct" with a person if he or she has sexual connection with the impaired person knowing that the victim is a person with a significant impairment; and has obtained the victims acquiescence in, submission to, participation in, or undertaking of the connection by taking advantage of the impairment.²⁵¹

Moreover, a person will be liable to imprisonment if he/she performs an indecent act on a person with a significant impairment under Section 138(4). For the

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purposes of this section an indecent act will be committed against a person with a significant impairment if he/she perpetrates an indecent act on the person, knowing that the impaired person has a significant impairment and has obtained the impaired person's acquiescence in, submission to, participation in, or undertaking of the doing of the act by taking advantage of the impairment.

Section 25(1) of the **Race Relations Act** 1971 provides for the offence of incitement to racial disharmony against any group of persons based on colour, race or ethnic origins of such groups of persons. There is thus no specific provision for disability hate crime under the Act.

6.2.2 Reporting

In New Zealand there are no specific laws that require an incident of abuse or an abusive situation to be reported. However as outlined above, Section 195A of the **Crimes Act** 1961 requires that if a child or vulnerable adult in a household or under the care of an authorised person is being abused or neglected, there is a duty to report such abuse. Failure to do so could result in imprisonment for a term not exceeding ten years.

The New Zealand Police website is the main source of guidance that advises victims of crime on how to go about reporting a crime.²⁵² In cases of emergency, victims are directed to call 111 and in cases of non-emergency to contact their nearest police station. The police services in New Zealand have however established an emergency text messaging service for people who are deaf or hard of hearing.²⁵³ Deaf and hearing impaired persons can thus register with the police to join the emergency 111 Deaf TXT Service.²⁵⁴

The New Zealand Police Service also offers web-based guidance of support organisations such as Crimestoppers who can help victims of crime to solve and report crime. Organisations such as Crimestoppers are vital for victims

of crime who may feel too vulnerable to go directly to the police and are instead encouraged to report the crime with the support of such organisations. Crimestoppers is an independent charity that facilitates victims of crime who may be reluctant to report a crime to the police, to anonymously report information about the crime via an independent third party.²⁵⁵ Crimestoppers give an absolute guarantee that calls cannot be traced, that calls are not recorded and that the caller ID number is not able to be viewed in the call centre.

A further reporting measure available to victims of crime is the 'orb' which has been developed by NetSafe to offer all New Zealanders a simple and secure way to report online crime.²⁵⁶ The orb is currently working in conjunction with the New Zealand Police, the Department of Internal Affairs, the Privacy Commissioner, Consumer Affairs, the Commerce Commission, the National Cyber Community Centre and the New Zealand Customs Service to direct reported incidents to the most suitable organisation to investigate or advise on the reported crime. Essentially the orb allows online crimes to be reported online and has profiled the types of reports the orb has been set up to handle. The various types of online crimes that the orb deals with include scams and frauds, spam messages, objectionable material, privacy breaches and problems whilst online shopping.²⁵⁷

6.2.3 Policy prioritisation

In March 2011, the **Victims of Crime Reform** Bill (the Bill) was introduced which will amend the **Victims Rights Act** 2002 and will require the Ministry of Justice to prepare a Victims Code. Government Agencies have been meeting to discuss the Code and have compiled a stock of what services and rights are currently available to victims of crime. The outcome of this stock-take was published by the Ministry for Justice in a working paper entitled Government Services for Victims.²⁵⁸ The working paper will thus be examined

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to see what services and rights are made available to vulnerable victims of crime in New Zealand.

The primary service providers for victims of crime in New Zealand are: the New Zealand Police, the Police Prosecution Service, Crown Law Office and Crown Solicitors, Ministry of Justice, Department of Corrections, the Parole Board, Department of Labour and the Ministry of Health. The services are for those victims who fall within the definition of victim under the **Victims Rights Act** 2002. No specific reference is made to victims of crime with disabilities or vulnerable or intimidated witnesses.

This section will proceed to examine government services that make specific reference to victims of crime with disabilities or vulnerable or intimidated victims of crime. The New Zealand Police is the leading agency responsible for reducing crime and enhancing community safety. When interviewing victims of crime the police interviewers must treat them with empathy and sensitivity.²⁵⁹ The police must take special care to avoid further distress to particularly vulnerable victims because of age or trauma, fear of intimidation or because they are victims of a serious crime.²⁶⁰ The police may be required to refer the vulnerable victim to a specialist support agency so that the victim is supported throughout the interview and investigation stages.²⁶¹ Further to that young people or adults with an intellectual disability will be interviewed by a specially trained forensic interviewer.²⁶² The police will usually provide victims of crime with information about progress and outcome of their investigation. The working paper notes that information can be given to the victim's support person if the victim is not capable of understanding the information alone.²⁶³

The Police Prosecution Service is an autonomous national prosecution service within the New Zealand Police and is the main prosecuting body within the jurisdiction of the District Court.²⁶⁴ The police officer in charge of

the case must ensure that victims are informed about their role as witness in the prosecution and their right to have a support person near them in court when giving evidence.²⁶⁵ In certain circumstances the police prosecutor may make an application to the court for a victim to give evidence via an alternative method. A victim may give evidence from outside the courtroom, by video recording made before the hearing or in the courtroom but where the offender is unable to see them. The working paper notes that such alternative methods may be made available to a victim because of their age, the trauma suffered or because of the nature of the proceeding.²⁶⁶ While vulnerable or intimidated victims are not directly referred to, it is important to note that these provisions are nonetheless available upon application by the police officer dealing with the case.

Crown Solicitors are entirely independent of the police and are appointed by the Governor General. Crown Solicitors represent the Crown and so thus act in the interests of the community rather than the victim. However, the Crown Prosecutors may also apply to the judge to enable victims to give their evidence in an alternative way such as by video or behind a screen.²⁶⁷

The Ministry of Justice provides administrative, case management and support services to the Supreme Court, Court of Appeal, High Court and District. In the District Court, the Court Services for Victims (CSV) is a free confidential and professional service available to victims from the time of the first court hearing in the District Court.²⁶⁸ The service is provided by victim advisors and for those victims with disabilities who chose to receive CSV, the advisor will organise mobility assistance for victims with a physical disability.²⁶⁹ CSV is also available for any victim who requests assistance in the High Court.²⁷⁰

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6.3 The Trial Process

This section will involve an examination of the special provisions that apply to vulnerable victims in the trial stage of the criminal process. While many of the provisions provided for in New Zealand legislation do not make any specific references to victims or witnesses of crime with disabilities, the provisions nonetheless protect such persons. Under Section 83 of the **Evidence Act 2006** (the 2006 Act) the ordinary way for a witness to give evidence in criminal proceedings is orally in a court room. It may also be given by way of a filed affidavit, or by reading a written statement in the court room, if both the defence and the prosecution consent to the giving of evidence in this form. A witness is defined under section 4 as a person who gives evidence and is able to be cross-examined in a proceeding. The questioning of vulnerable witnesses in the ordinary way is not ideal and the alternative ways of giving evidence as well as the additional protective measures for such witnesses will therefore be examined under Part 3 of the 2006 Act.

6.3.1 Alternative ways of giving evidence

The **Evidence Act 2006** together with the **Evidence Regulations 2007** governs the use of alternative ways of giving evidence in proceedings to which the 2006 Act applies.²⁷¹ Under Section 105 of the Act a witness may give evidence in an alternative way as follows:

- (1) while in the courtroom but unable to see the defendant or some other specified person; or
- (2) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or
- (3) by a video record made before the hearing of the proceeding.

Under Section 103 of the 2006 Act, the judge may direct

on application of a party, or on the judge's own initiative, that a witness can give evidence in chief and be cross examined in the alternative ways set out in Section 105 of the Act. In giving such directions under the Act, the judge must have regard to the need to ensure the fairness of the proceeding and to ensure that there is a fair trial while at the same time minimising the stress on the complainant.²⁷² In order for a direction for evidence to be given in an alternative way under Section 103, grounds that are to be considered include: the age and maturity of the witness; the physical, intellectual psychological, or psychiatric impairment of the witness; the trauma suffered by the witness; the witnesses fear of intimidation; the nature of the proceeding; the nature of the evidence that the witness is expected to give and the relationship of the witness to any party in the proceedings.²⁷³ People with disabilities may thus qualify for alternative ways of giving evidence in criminal proceedings.

6.3.2 Chamber hearing

Section 104 of the **Evidence Act** 2006 provides for a chamber hearing before directions for alternative ways of giving evidence are granted. Before deciding on how a witness is to give evidence, the judge must give each party the opportunity to be heard in the chambers and may call for a report by a qualified person to advise on the effect of the witness giving evidence in the ordinary way or in the alternative way.²⁷⁴

6.3.3 Video recorded evidence

Section 106 of the **Evidence Act** 2006 makes provision for video recorded evidence as an alternative way of giving evidence in criminal proceedings. Section 106(2) states that any video record offered as evidence under this Act must be in compliance with any regulations under the Act. A video record is defined in Section 4(1) to mean a recording on any medium from which a moving image may be produced by any means and includes an accompanying

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soundtrack. Under Regulation 6 a person to support the witness may be present at the video recording of an interview if the interviewer considers that it is in the interests of the witness and the person is an appropriate person to support the witness. Regulation 7 provides that an interpreter may be present at the interview if the witness does not have sufficient proficiency in the English language to understand the interview if conducted in English or if the witness has a communication disability. Both the support person and the interpreter present at the interview must be clearly visible throughout the recording of the interview.²⁷⁵ Regulation 8 specifies what must be included on the video record such as the interviewer stating the date and time at which the interview starts and the time at which the interviewer finishes. Regulation 8 provides that witnesses over the age of twelve years must, subject to any contrary direction by the judge, must make a promise to tell the truth. This interview process provided for under Section 106 benefits adults who suffer from some sort of impairment, who are particularly traumatised, have a fear of intimidation or are related to the suspect.

6.3.4 Support at court

Under Section 79 of the **Evidence Act** 2006, a complainant is entitled to have one person near him or her when giving evidence for the purposes of support. Other witnesses are only entitled to such support with the permission of the judge.²⁷⁶ The judge may however refuse such support where it is in the interests to do so to either a complainant or a witness.²⁷⁷

6.3.5 Communication assistance

Section 80(3) of the **Evidence Act** 2006 provides that a witness in criminal proceedings is entitled to communication assistance. Such assistance will be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the judge.²⁷⁸ It is the judge who will direct what

kind of communication assistance is to be provided to the witness. However, communication assistance will not be provided if the judge considers that the witness can sufficiently understand questions put orally and can adequately respond to them.²⁷⁹

6.3.6 Name suppression

Under the **Criminal Procedure Act** 2011, child complainants, and witnesses as well as complainants in specified sexual cases are entitled to an automatic suppression of identity.²⁸⁰ While vulnerable victims of crime are not specifically referred to, Section 202 permits the suppression of the identity of witnesses, victims and connected persons if the court is satisfied that publication would be likely to: (a) cause undue hardship, (b) create a real risk of prejudice to a fair trial, (c) endanger the safety of any person, (d) lead to the identification of another person whose name is suppressed by order or by the law, (e) prejudice the maintenance of the law and (f) prejudice the security or defence of New Zealand.

6.3.7 Identification evidence

The **Evidence Act** 2006 codifies the admissibility of identification evidence in criminal proceedings. Section 45 provides for the admissibility of visual identification evidence obtained following a formal procedure unless the defendant proves on the balance of probabilities that the evidence is unreliable. While Section 45 makes reference to a formal procedure, it does not mandate the medium to be used to obtain identification evidence such as a live line up or photographic montages. The Court of Appeal recently expressed a preference for live parades, although it is accepted that photographic montages are now commonplace in New Zealand.²⁸¹

Section 4 defines “visual identification evidence” as, (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present

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at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done or, (b) an account whether oral or in writing of an assertion of the kind described in paragraph (a). While dock identification may fall within the meaning of paragraph (a), the Courts have held that dock identification, identifying the defendant for the first time in court will not be admissible.²⁸²

Section 46 provides for the admissibility of voice identification evidence in criminal proceedings. There is a presumption that such evidence will be inadmissible unless the prosecution proves on the balance of probabilities that the circumstances in which the identification was made have produced a reliable identification.²⁸³

It is also important to highlight that Section 126 provides for a mandatory judicial warning regarding the dangers of voice and visual identification. Under subsection 2, the jury must (a) be warned that a mistaken identification can result in a serious miscarriage of justice and, (b) alert the jury to the possibility that a mistaken witness may be convincing and (c) where there is more than one identification witness, refer to the possibility that all of them may be mistaken.

A final point to note is that if it is necessary to protect the identification witness, the judge may make an order excusing the prosecutor from disclosing to the defendant the name and address of the identification witness.²⁸⁴ This provision could thus be regarded as a beneficial safeguard for the rights of vulnerable or intimidated witnesses in criminal proceedings.

6.3.8 Competency to testify

The general rule in New Zealand which is set out under section 71 of the **Evidence Act** 2006 Act is that any person who is 'eligible' to give evidence in criminal

proceedings is also compellable to give that evidence. This section does not differentiate between different categories of persons on age or on any other grounds. However, under section 8, the judge retains residual discretion to exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on proceedings or needlessly prolong the proceedings. In determining the effect that the evidence will have on proceedings, the judge must take into account the right of the defendant to offer an effective defence.²⁸⁵

The New Zealand Law Reform Commission recommended in 1996 that the competency test that had existed in New Zealand law should be abolished. It noted:

“[T]he abolition of the competence requirement would ensure that an increased amount of relevant evidence is made available to fact-finders for the assessment of reliability and weight...We recognise that problems may arise with the evidence of some witnesses, due to difficulties with communication and accurate perception and recall. However, the differences between adult witnesses generally and vulnerable witnesses may have been exaggerated. Where difficulties do exist, they may be appropriately addressed by ensuring that procedures for giving evidence enhance reliability and effective communication, rather than simply excluding the evidence.”²⁸⁶

The common law competency requirement in New Zealand has accordingly been abolished as a result of section 73 of the **Evidence Act** 2006. No complainant can be excluded from giving evidence on the basis of incompetence alone, albeit that a judge retains a residual exclusionary discretion under section 8 of the **Evidence Act** 2006. Moreover, under section 85 the judge has discretion to disallow or direct that a witness is not obliged to answer any question that the judge considers improper, unfair, misleading, needlessly repetitive, or expressed in a language that is too

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complicated for the witness to understand. The factors amongst others that the judge may take into account for the purposes of Section 85 include the age and maturity of the witness and any physical, intellectual, psychological, or psychiatric impairment of the witness.²⁸⁷

6.3.9 The admission of unsworn evidence

Under Section 77 of the **Evidence Act** 2006 Act a witness who is over the age of twelve years must take an oath or make an affirmation before giving evidence. A witness under the age of twelve years may be examined without oath if he or she makes a declaration instead.²⁸⁸ However, a witness may apply under subsection 4 to give evidence without taking an oath or making an affirmation, or making a promise to tell the truth with the permission of the judge.²⁸⁹ If the judge gives permission for evidence to be taken under such circumstances, the witness must be informed by the judge of the importance of telling the truth and not telling lies before the witness gives evidence.²⁹⁰ Once the judge has informed the witness on how to give evidence under such circumstances, the evidence of the witness must be treated in the same manner as if the evidence had been given on oath.²⁹¹ Such a provision accommodates a vulnerable witness in giving unsworn testimony.

6.3.10 The requirement of corroboration

Section 121 of the **Evidence Act** 2006 Act provides that the evidence on which the prosecution relies does not need to be corroborated. Under the Act it is generally not necessary for the judge to warn the jury that it is dangerous to act on uncorroborated evidence or give a direction relating to the absence of corroboration.²⁹² Judicial directions may however be given about evidence which may be unreliable or about certain ways of offering evidence.²⁹³

In the case of unreliability of evidence the judge may warn

the jury of the need for caution when deciding whether to accept the evidence and what weight is to be given to the evidence.²⁹⁴ While the evidence of a vulnerable victim is not specifically referred to, a party to criminal proceedings may nonetheless request the judge to issue a warning.²⁹⁵ The judge will not however be obliged to issue such a warning if he or she is of the opinion that there is a good reason not to comply with the request.²⁹⁶

Section 123 of the Act permits a judicial direction if a witness offers evidence in an alternative way under the Act, if the defendant is not permitted to personally cross-examine a witness or if a witness offers evidence in accordance with an anonymity order. In such instances a direction to the jury is required to outline that the law makes special provision for the manner in which evidence is to be given in certain circumstances and that the jury must not draw any adverse inference against the defendant because of the manner of that evidence.²⁹⁷ Thus, such a direction will often apply in the case of a vulnerable victim of crime giving evidence, given that they will generally utilise alternative methods in order to give best evidence. A judicial direction may also be given in criminal proceedings where the case against a defendant depends wholly or substantially on the correctness of visual or voice identification or if there has been delayed complaints or a failure to complain in sexual cases.²⁹⁸

6.4 The Post-Trial Process

In the post-trial stage of the criminal process in New Zealand, victims of certain crimes are entitled under the **Victims' Rights Act** 2002 to receive information about the accused or offender. The Victim Notification System (VNS) is a system involving the Department of Corrections, Police, Department of Labour, and Ministry of Health to notify victims about an offender's progress through the criminal justice system. Victims of crime are eligible to be kept informed if: they have been a victim of a serious assault; the offence included serious injury

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or death of a person; they have ongoing fears for either their own physical safety or the safety of a member of their immediate family. Registered victims can receive information on court proceedings, bail, release dates, temporary release from prison, escape from prison, home detention, and hospital detention. Registered victims can participate in decisions to do with the offender, such as bail or parole. Provision is also made for the use of victim impact statements and for enhanced sentencing laws in circumstances where the crime was motivated wholly or partly by hostility based on disability. Sentencing law in New Zealand also permits offences against persons with disabilities to be viewed as an aggravating factor.

6.4.1 Victim impact statements

In New Zealand victims are entitled to make a Victim Impact Statement under Section 17 of the **Victims Rights Act** 2002. While Victim Impact Statements are dealt with under Sections 17-27 of the Act, there is no express reference to victims of crime who are vulnerable or victims who have a disability. For the purposes of this Act a Victim Impact Statement (VIS) means any information prepared for submission to a judicial officer and includes any recording, summary, transcript or copies of any other relevant documents of that kind.²⁹⁹ A VIS that comes within this meaning may be submitted to a judicial officer for the purposes of giving a sentence under section 61 of the **Criminal Procedure Act** 2011.

Section 17 of the Act requires that the prosecutor must make all reasonable efforts to ensure that information is ascertained from the victim for submission to the judicial officer sentencing the offender on the following matters: any physical injury or emotional harm suffered because of the occurrence of the offence; any loss or damage to property suffered by the victim because of the offence and any other effects of the offence on the victim. The information ascertained from the victim must then be put into writing or recorded for example by

audiotape or videotape for submission to the judicial officer sentencing the defendant.³⁰⁰ Section 19 also requires that the information ascertained must be verified by the victim and this is usually achieved by submission to the victim for signature. However, the Act further provides that if such a verification process is not practicable, the information may be verified by being signed by some other person on behalf of the victim where he or she has (a) advised the victim that any information submitted must be the truth, and (b) read or replayed or submitted the information to the victim in another way, and is satisfied that the victim approves it.³⁰¹ The information must then be submitted by the prosecutor in the form in which it was recorded. Requests can however be made by the prosecutor, the victim or a person named by the victim to read or reply all or part of the statement.³⁰²

6.4.2 An offence against a person with a disability as an aggravating factor in the crime

Section 9 of the **Sentencing Act** 2002 makes provision for an extensive list of sentence enhancement provisions that must be taken into account by the court when determining the sentence to be imposed. Aggravating and mitigating factors provided for under section 9 include a case where the victim is particularly vulnerable because of his or her age or health or because of any other factor known to the offender.³⁰³ Moreover, section 9(1) (h) provides that sentencing must take into account the fact that an offence was motivated wholly or partly because of hostility towards a group of persons based on a common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability. The hostility must be because of this common characteristic and the offender must believe that the victim has that characteristic.³⁰⁴ Section 9(1) (h) thus reflects a commitment by New Zealand to tackle and combat hate crime and more importantly for purposes of present discussion, disability hate crime.

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6.5 Conclusion

Though the New Zealand authorities are still in the process of implementing a Code of Practice for victims of crime, a number of notable achievements have already been achieved that facilitate witnesses with disabilities in accessing the justice system. At pre-trial stage, these achievements include the use of an emergency text messaging service for people who are deaf or hard of hearing and wish to report a crime. At trial stage a number of procedural and evidential changes have been made to further accommodate victims with disabilities. Most notable of these changes is perhaps the abolition of the competency test in New Zealand, promoting greater access to justice for vulnerable witnesses by ensuring that relevant evidence is more likely to be adduced before the trier of fact. Other alterations include the employment of screening provisions in court; the use of video recorded evidence that is not linked to specific offences; the provision of clear guidelines on the use of interpreters and supporters in relation to the introduction of video recorded evidence; specific provision on adducing expert evidence on whether or not a witness should give evidence by way of oral testimony in court or by alternative means; the admissibility of identification evidence via photographic montages; the reception of unsworn evidence; greater clarity on corroboration warnings and judicial directions; and statutory recognition for the practice of allowing complainants to have a support person near them when giving evidence in court in criminal cases. In the post-trial stage of the process, changes that have been made include the introduction of victim impact statements and a comprehensive victim notification system. Offences against vulnerable victims and disability hate crimes are provided for within its sentencing framework.

6.6 References

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277 Section 79(3), **Evidence Act** 2006.

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281 **Daniels v R** [2011] NZCA 234.

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283 Section 46, **Evidence Act** 2006.

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Canada

7.1 Introduction

This chapter will examine the extent to which the criminal justice system of Canada accommodates people with disabilities. It will commence with a general review of the pre-trial process, before documenting the provisions that exist and the commitments that have been given in the trial and post-trial processes.

7.2 The Pre-Trial Process

This section provides an overview of the range of criminal laws that protect people with disabilities in the criminal process in Canada. It will also describe the services available to facilitate the reporting of crime, and the commitments given by criminal justice agencies such as the police and prosecutors.

7.2.1 Offences criminalising conduct which exploits persons with disabilities

The Criminal Code of Canada (hereinafter Code) is the primary piece of legislation that codifies most of the criminal offences and procedures in that jurisdiction. Section 153.1 of the Code prohibits the sexual exploitation of a person with a disability. Section 153.1 makes it an offence to have sexual contact with a person who has a mental or physical disability in circumstances in which there is a relationship of dependency, trust or authority between the offender and the person with the disability and where the person with the disability does not consent to the sexual contact. For the purposes of this section consent is defined as the voluntary agreement of the complainant to engage in the sexual activity in question.³⁰⁵ Consent will be deemed not to have been obtained for the purposes of this section if (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused counsels or incites the complainant to engage

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in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.³⁰⁶

Section 159 of the Code contains a general prohibition regarding an act of anal intercourse. This section does not apply however to an act engaged in, in private between a husband and wife, or any two persons over the age of eighteen years both of whom consent to the act.³⁰⁷ A person shall however not be deemed to consent to an act of anal intercourse, if the court is satisfied beyond a reasonable doubt that the person could not have consented to the act by reason of a mental disability.³⁰⁸

Section 215 of the Code makes it a criminal offence if an individual fails to provide necessaries of life to a person under his or her charge if that person is unable by reason of detention, age, illness, mental disorder, or other cause to withdraw himself from that charge, and is unable to provide himself with necessaries of life. For the purposes of this section a mental disorder means a disease of the mind.³⁰⁹

Section 318 and 319 of the Code provide for hate crime offences against identifiable groups. There are four specific offences recognised in the Code as hate crime: advocating genocide, public incitement of hatred, wilful promotion of hatred and mischief in relation to religious property. However, there is no specific disability hate crime legislation and for the purposes of these sections an identifiable group means any section of the public distinguished by race, religion, ethnic origin or sexual orientation.³¹⁰ As we shall see, provisions in the Code allow for increased penalties when hate — including hatred in relation to disability — is determined to be an aggravating factor in any criminal offence.

The Canadian Charter of Rights and Freedoms, which is the only charter of rights contained within the Canadian Constitution, contains guaranteed equality rights. Article 15 of the Charter specifically prohibits discrimination on the grounds of mental or physical disability as well as colour, religion, sex age, race and ethnic and national origin. The object of the Charter is to protect the citizen against the State and to protect minorities against parliamentary majorities. The **Canadian Human Rights Act**, 1976 also addresses the issue of hate propaganda. Section 13 specifies that it is a violation of the act "to communicate telephonically or to cause to be so communicated in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of parliament any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination [race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, disability, family status, and conviction for which a pardon has been granted]."

7.2.2 Reporting

The most valuable guidance for reporting crime is the web based resource (Victimsinfo.ca) developed by the Justice Education Society of British Columbia in partnership with Victim Services and the Criminal Branch of the Government of British Columbia.³¹¹ This website is a one stop shop for information, resources, and links providing guidance on how to report a crime.

Victims and witnesses are guided as to how to report a crime, whether or not to report the crime to the police, and what to expect after a report has been made. Victims and witnesses in danger are instructed to call 911, their Royal Canadian Mounted Police Service (RCMP) Department or municipal police at their emergency number immediately. For those persons who are apprehensive about reporting

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a crime there is a link (entitled VictimLink BC) whereby such a person may first discuss any concerns with a victim service worker.³¹² VictimLinkBC is a toll free and 24/7 information and support line that provides information and referrals to all victims of crime.³¹³ This service is available to victims at any hour by calling a dedicated helpline, by texting or by e mail. VictimLinkBC also advises victims on the importance of reporting crime, the availability of support persons when reporting crime and other victim services and agencies that can support a victim when considering reporting a crime.

The Canadian Government has recognised the importance of reporting cybercrime and established the Canadian Anti-Fraud Centre (CAFC) for reporting online fraud in Canada in 1993.³¹⁴ The CAFC has now established itself as Canada's central fraud data repository.³¹⁵ The CAFC is a centre with dedicated, trained anti-fraud specialists who provide advice to citizens on how to recognise scam types, identify theft and the typical indicators to establish if a person has been a victim of online crime. The CAFC also advise citizens on the importance of protective measures against such crimes and ways to minimise risk of exposure to such crimes.

The Canadian Crime Stoppers Association (CCSA)³¹⁶ is a charitable organisation that brings together the police services of a community, the media and the community in the fight against crime. Crime Stoppers provides a service to victims whereby they can report any information about a crime or a potential crime to the police anonymously. Crime Stoppers have set up a 'Tip-Line' whereby trained personnel receive, process and pass on tip information to the investigating officer. The callers are then given a code number which is used in all subsequent calls and they do not have to identify themselves. The CCSA has a dedicated tip line available on its website whereby any information about a crime can be reported. While there is no specific reference evident to victims of crime with disabilities, the above reporting mechanisms are nonetheless valuable

services for such victims to report instances of crime.

7.2.3 Policy prioritisation

The primary policy documents that assist victims of crime as they go through the criminal justice system have been published by the Correctional Service of Canada, the National Parole Board, the National Office for Victims, the Policy Centre for Victims Issues, and the Federal Ombudsman for Victims of Crime.³¹⁷

The Office of the Federal Ombudsman for Victims of Crime (OFOVC) was set up as an independent resource for victims in Canada. The aim of establishing the office was to ensure that the Federal Government meets its responsibilities to victims of crime.³¹⁸ Victims of crime may contact the office to find out more about their rights under federal law, the services available to them or to make a complaint about any federal agency or federal legislation dealing with victims of crime. The OFOVC has published **Giving a Voice to Victims**³¹⁹ which outlines the role of the OFOVC, how the OFOVC can help victims and address complaints as well as informing victims how to contact the ombudsman. A victim of crime is again defined in a generally broad manner with no reference being made to victims of crime with disabilities.

In 2003, the Department of Justice published the **Canadian Statement of Basic Principles of Justice for Victims of Crime**³²⁰ which guides the development of policies, programmes and legislation related to victims of crime. Of the ten basic principles advanced, none of them refer to victims of crime with disabilities. There are however a number of relevant principles which are applicable to people with disabilities. Number one, for example, provides that victims of crime should be treated with courtesy, compassion and respect. Number four states that the safety and security of victims should be considered at all stages of the criminal justice process and appropriate measures

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should be taken when necessary to protect victims from intimidation and retaliation. Number seven provides that information should be provided to victims about available victim assistance services, other programs and assistance available to them, and means of obtaining financial reparation. Number nine states that the needs, concerns and diversity of victims should be considered in the development and delivery of programmes and services, and in related education and training.

The Department of Justice has also published **A Crime Victims Guide to the Criminal Justice System**³²¹ and under the section dealing with the protection of victims of crime deals specifically with vulnerable witnesses. This section addresses for example the power of judges to exclude the public from criminal proceedings to protect adult victims and witnesses who may be vulnerable due to their age, relationship with the offender, the nature of the offence or other factors.³²² Moreover, the power of the judge to order testimonial aids to vulnerable victims and witnesses when giving testimony in court is also addressed. The information provided in this publication is essentially a guide for victims of crime when going through the criminal justice process simplifying the main sections of the Criminal Code of Canada which will be dealt with in the next section.

There appears to be very little policy dealing specifically with victims of crime with disabilities in Canada aside from policy documents dealing with alternative measures for such victims at trial.

7.3 The Trial Process

The majority of information for victims and witnesses of crime when going through the criminal justice process in Canada is found within the Criminal Code of Canada. The Code not only codifies the criminal offences, but sets out the procedures for a criminal case from the laying of a charge to sentencing and appeals. This section will

proceed to examine the protective measures that are available within the Canadian criminal justice system for victims of crime with disabilities. Not only those provisions which are disability specific will be examined, but other provisions that are general in nature, but nonetheless have a protective effect for victims of crime with disabilities.

7.3.1 Evidence on commission

Section 709 of the Code provides that a party to proceedings may apply for an order appointing a commissioner to take evidence from a witness who is by reason of physical disability arising out of illness or any other good and sufficient cause not likely to be able to attend at the time the trial is held. An application for an order appointing a commissioner must be made to a judge of the court in which the proceedings are taken and may be granted on the evidence of a registered medical practitioner.³²³ The evidence of a witness who is ill or suffering from a physical disability taken by a commissioner may be admitted as evidence in the proceedings if, (a) it is proved by oral evidence or by affidavit that the witness is unable to attend by reason of death or physical disability arising out of illness or some other good and sufficient cause, (b) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken and (c) it is proved to the satisfaction of the court that reasonable notice of the time for taking the evidence was given to the other party, and that the accused or his counsel, or the prosecutor or his counsel, as the case may be, had or might have had full opportunity to cross-examine the witness.³²⁴

7.3.2 Video and audio evidence

Section 714.1 of the Code makes provision for the evidence of a witness to be given by means of video technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court. Such an order will be granted if the court is of the opinion that it would

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be appropriate in all of the circumstances including (a) the location and personal circumstances of the witness, (b) the costs that would be incurred if the witness had to be physically present and (c) the nature of the witness's anticipated evidence. Section 714.2 permits the reception of evidence of a witness outside of Canada by means of technology that permits the witness to testify in the virtual presence of the parties and the court unless one of the parties can satisfy the court that the testimony would be contrary to the principles of fundamental justice.

Section 714.3 permits the reception of evidence by means of audio technology that allows the parties and the court to hear and examine the witnesses elsewhere in Canada if the court is of the opinion that it would be appropriate considering all the circumstances including, (a) the location and personal circumstances of the witness, (b) the costs that would be incurred if the witness had to be physically present, (c) the nature of the witness's anticipated evidence and (d) any potential prejudice to either of the parties by the fact that the witness would not be seen by them. Section 714.4 makes provision for the evidence of a witness to be given by means of audio technology that permits the witness to testify outside of Canada which allows the parties and the court in Canada to hear and examine the witness. Such an order will be granted if the court is of the opinion that it would be appropriate considering all the circumstances including, (a) the nature of the witness's anticipated evidence and (b) any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them.

Section 714.5 provides that any evidence given under Section 714.2 or Section 714.4 (evidence given outside Canada rather than in Canada by means of technology) must be given (a) under oath or affirmation in accordance with Canadian law, (b) under oath or affirmation in accordance with the law in the place in which the witness is physically present or (c) in any other manner that demonstrates that the witness understands that

they must tell the truth. Such evidence given outside of Canada will be deemed to be given in Canada and given under oath or affirmation in accordance with Canadian law, for the purposes of the laws relating to evidence, procedure, perjury and contempt of court.³²⁵

7.3.3 Video-recorded evidence

Section 715.2 of the Code makes provision for a victim or a witness who may have difficulty communicating evidence by reason of a mental or physical disability to give evidence via a video recording within a reasonable time after the alleged offence. A video recording of the acts complained of is admissible in evidence if the victim or witness adopts the contents of the video recording while testifying unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

7.3.4 Exclusion of the public

Under Section 486 of the Code, an order may be made to exclude all or any members of the public from the court room during proceedings if the judge or the justice is of the opinion that such an order is in the interest of public morals, the maintenance of order, or the proper administration of justice, or is necessary to protect injury to international relations or national defence or national security. For the purposes of this section the proper administration of justice includes ensuring that justice system participants who are involved in the proceedings are protected.

7.3.5 Support person

Under Section 486.1 of the Code, on application of the prosecutor in proceedings against the accused, the judge or justice may order that a witness who has a mental or physical disability is permitted to have a support person of his choice present and to be close

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to the witness while the witness testifies. Such an order will not be granted however if the judge or justice is of the opinion that the order would interfere with the proper administration of justice. An order for a support person may also be obtained if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts which have brought about the complaint.³²⁶

An application for such an order may be made before or during proceedings to the judge or justice who will preside at the proceedings.³²⁷ In making a determination for such an order factors among others that the judge or justice shall take into account include the age of the witness, the nature of the offence, the nature of the relationship between the witness and the accused, whether the witness has a physical or mental disability and any other circumstances that the judge or justice considers relevant.³²⁸

7.3.6 Testimony outside of court and screens

Section 486.2 of the Code makes provision for testimony to be given outside the court room on application of the prosecutor with the permission of the judge or justice if the witness is under the age of eighteen years or a witness who is able to communicate evidence but may have a difficulty doing so by reason of a mental or physical disability. In such cases the judge or justice may order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused unless the order would interfere with the proper administration of justice.³²⁹ Provision for such measures will also be made available to witnesses if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts which have brought about the complaint.³³⁰

An application for the alternative methods of giving evidence described above may be made before or

during proceedings to the presiding judge or justice.³³¹ In making a determination for such an order the judge or justice shall take into account the same factors referred to in the previous section for an order for a support person (Section 486.1 (3)). A witness will however not be permitted to testify outside the court room unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of a closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.³³²

In **R v Levogiannis**³³³ an accused challenged the constitutional validity of the use of screens on the grounds that it violated his right to a fair trial guaranteed by the **Canadian Charter of Rights and Freedoms**. The Canadian Supreme Court held that the provision was valid on the basis that its main objective was to better get at the truth by facilitating the giving of evidence by children and persons with disabilities. It recognised that such witnesses may react negatively to a face-to-face confrontation with the accused and may, as a result, require different treatment than other witnesses in the courtroom. Moreover, the fact that a complainant's testimony was facilitated by the use of a screening device in no way restricted an accused party's ability to cross-examine the witness. Nor did the provision contravene the accused's right to a presumption of innocence. A properly directed jury would not be biased by the use of such a device.

7.3.7 Cross examination of witnesses

Section 486.3 provides that an accused is not permitted to cross examine witnesses under the age of eighteen years unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross examination. No reference is made to witnesses with a mental or physical disability. However, Section 486.3 (2) makes provision for an accused

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not to be permitted to personally cross-examine any other witnesses if the judge or justice is of the opinion that such an order is necessary to obtain a full and candid account from the witness of the acts complained of. The factors to be considered in making such a determination by the judge or justice are the same as the factors to be taken into account when making an order for testimony to be given outside of court and the appointment of a support person.³³⁴ An application for such an order can be made before or during proceedings to the presiding judge or justice who will preside at the proceedings.³³⁵

7.3.8 Order restricting publication

Section 486.4 of the Code permits the presiding judge or justice to make an order directing that any information that could identify the complainant or witness should not be published in any document or broadcast or transmitted in any way in proceedings in respect of a number of named offences. This provision outlines a number of offences and includes Section 153.1 relating to sexual exploitation of a person with a disability as well as other sexual offences such as the offence of anal intercourse under Section 159. In proceedings in respect of such offences, the presiding judge or justice must inform the complainant concerned at the first reasonable opportunity of his or her right to make an application for the order.³³⁶ Moreover, if there is an application by the prosecutor, the complainant or any such witness relating to one of the named offences, there is a mandatory obligation on the presiding judge or justice to make the order.³³⁷

While the mandatory order on application only applies in respect of certain offences, Section 486.5 makes further provision for an order restricting publication upon application for other witnesses and victims. An applicant for such an order must set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.³³⁸ A hearing may be held in private by the judge or justice to determine

whether or not an order should be made.³³⁹ The factors amongst others that may be considered include, (a) the right to a fair and public hearing, (b) whether there is a real and substantial risk that the victim, witness, or justice system participant would suffer significant harm if their identity were disclosed and (f) any other factor that the judge or justice considers relevant.³⁴⁰

7.3.9 Identification evidence

The identity of the accused person in Canada can be proven by the following methods, none of which are necessarily determinative: eyewitness identification, line-ups or photo line-ups, video identification, dock identification and show-ups. While eyewitness identification evidence has been recognised in Canada as a critical tool for investigating and prosecuting criminals, eyewitness misidentification has been regarded as the leading cause of a wrongful conviction.³⁴¹ Dock identification is generally undesirable and unsatisfactory and adds little value to the proof of identity.³⁴² Line ups have proven to be a valuable source for identifying suspects and criminals, the key consideration being that the procedure is fair.³⁴³ Alternatively photographs of the suspect can be shown to the witness in what is called a 'photo-pack' or 'photo line-up'. In a 'show-up' identification, a witness is brought from the crime scene to the scene of the arrest, a method which is generally disfavoured. Video identification means that a witness can simply testify to the contents of a video establishing identity of the accused. The most practical identification methods for victims of crime with disabilities or vulnerable persons include video identification and photo line-ups. A witness can simply testify to the contents of a video or a photo establishing identity of the accused, a process which is far less intimidating for such persons. Moreover, both of these identification procedures can be facilitated in an environment conducive to the needs of vulnerable victims.

In 2005, the Public Prosecution Services of Canada

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implemented the 2005 Recommendations which are the reasonable standards and practices that should be integrated and implemented by all police agencies.³⁴⁴ In 2011, these recommendations were revised and are set out as follows:

“Recommendation (a) provides that an independent officer should be in charge of the photo line-up or photo pack presentation, (b) the witness should be advised that the actual perpetrator may not be in the line-up or photo pack, (c) the suspect should not stand out in the line up or photo pack as being different from the other suspects, (d) all of the witnesses' comments and statements made during the line-up or photo pack viewing should be recorded verbatim, either in writing or if feasible and practical by audio or videotaping, (e) if the identification process occurs on police premises, the witness should be removed upon completion of the line up to prevent cross contamination by contact with other witnesses and other police officers, (f) show-ups should only be used in rare circumstances, and (g) a photo pack should be provided sequentially and not as a package, thus preventing 'relative judgments'.”

Such recommendations are crucial for protecting vulnerable and intimidated victims participating in any of the identification procedures. While there are many methods of identification available to witnesses, it is the way in which such procedures are rolled out by the police services which is of most importance to protect vulnerable victims of crime. Such witnesses and victims need to be supported and encouraged throughout such a process.

7.3.10 Competency to testify and the admission of unsworn evidence

Section 13 of the **Canada Evidence Act** 1985 grants the judge or justice presiding over a case the power to administer an oath to every witness who is legally called to give evidence before the court. However, a witness may, instead of taking an oath, make a solemn

declaration and his/her evidence shall be taken and have the same effect as if taken under oath.³⁴⁵ Section 16 of the Evidence Act governs the issue of an adult witness whose mental capacity is challenged. Before permitting such a person to give evidence an inquiry must be conducted to determine: (a) whether the person understands the nature of an oath or solemn affirmation and (b) whether the person is able to communicate the evidence.³⁴⁶ Where a person does not understand the nature of the oath or the solemn declaration but is nonetheless able to communicate the evidence, he/she may testify upon promising to tell the truth.³⁴⁷ The minimum threshold test therefore for such a witness is a test of his or her ability to communicate (plus a promise to tell the truth). In other words, the judge should be satisfied the witness is able to communicate, and if the witness seems able to communicate (and promises to tell the truth) the case should be left to the trier of the fact. Focusing on the witness's ability to communicate is an accommodating, inclusionary test of competence. Obviously a prosecutor who is calling such a witness will expect him or her to provide evidence of relevance to the facts in issue, but this does not form part of the test of competence.

In **R v DAI**³⁴⁸, the prosecution alleged that a young complainant was repeatedly sexually assaulted by the accused. At the time of the alleged assaults, the complainant was 19 years old, but she possessed the mental age of a three to six year old. At trial the prosecution sought to call her to give evidence and the issue arose as to whether she was competent to testify. As noted above, section 16(1) of the **Canada Evidence Act** 1985 provides that if the mental capacity of a proposed witness was challenged, the court had to conduct an inquiry to determine whether the person understood the nature of an oath or a solemn affirmation and whether the person was able to communicate the evidence. Section 16(3) of that Act provides that such a person who did not understand the nature of an oath or a solemn affirmation but who was able to communicate the evidence could,

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notwithstanding any statutory requirement for an oath or solemn affirmation, testify on promising to tell the truth. During the *voir dire* hearing on the complainant's competence the prosecution examination demonstrated that she understood the difference between telling the truth and lying in concrete situations. The trial judge then questioned the complainant on her understanding of the nature of truth and falsity, of moral and religious duties and of the legal consequences of lying in court. The complainant was unable to respond adequately to those subsequent questions and the trial judge held that she was incompetent to testify because she had 'not satisfied the prerequisite that she understands the duty to speak the truth'. At a second *voir dire* hearing to determine the admissibility of the complainant's out-of-court statements to her teacher the trial judge ruled that such statements were not admissible because of their unreliability. The case against the accused was accordingly dismissed. The prosecution appealed to the Ontario Court of Appeal, which upheld the trial judge's decisions. The prosecution then appealed to the Supreme Court of Canada on the issue of whether the trial judge had correctly interpreted the requirements of section 16 of the **Canada Evidence Act** 1985. The Supreme Court upheld the appeal, noting that the argument that the plain words of s 16(3) of the **Canada Evidence Act** 1985 had been supplemented by the requirement that an adult witness with intellectual disabilities who could not take an oath or affirm had to be able not only to communicate the evidence and promise to tell the truth, but additionally had to understand the nature of a promise to tell the truth, could not be accepted. The instant matter also brought into play two conflicting policy considerations, those being the social need to bring to justice those who sexually abused people of limited mental capacity and the need to ensure a fair trial for the accused. It was recognised that evidence had to meet a minimal threshold of reliability as a condition of being heard by a judge or jury. The requirement that a witness be able to communicate the evidence and promise to tell the truth satisfied that threshold. McLachlin CJ, issuing

the majority verdict, addressed the different competency test applied to witnesses with disabilities:³⁴⁹

“This lower threshold recognises that witnesses of limited mental ability, whether by reason of age or disability, understand and articulate events in the concrete terms of the world around them. The capacity to abstract from the concrete and draw generalisations about conduct unrelated to concrete situations typically develops at a later, more advanced stage of mental development. A child or adult with mental disabilities may be able to distinguish between what is true and false or right and wrong in a particular situation, yet lack the ability to articulate in general language the reasons for this understanding. To insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations, may result in the witness’s evidence being excluded, even though it is reliable.”

The justification for such an approach was provided as follows:³⁵⁰

“In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.... The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged

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victim and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardise one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunise an entire category of offenders from criminal responsibility for their acts and to further marginalise the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.”

McLachlin CJ also made the following observations which apply specifically in relation to the application of section 16(3) of the **Canada Evidence Act** 1985, but which may be of more general guidance. In any **voir dire** relating to competency, a witness should not be found incompetent ‘too hastily’.³⁵¹ Moreover, the primary source of evidence for a witness’s competence is the witness himself or herself. The learned judge noted: ‘Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner’.³⁵² It was also noted that the members of the proposed witness’s surrounding who are ‘personally familiar’ with him or her are those who best understand her everyday situation. They may be called as fact witnesses to provide evidence on his or her development.³⁵³ Expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.

7.3.11 The requirement of corroboration

The rules requiring corroboration or warnings in Canada with respect to certain types of dangerous testimony have changed significantly in the past number of years. Corroboration warnings which require the judge to tell the jury that it is dangerous to convict without corroboration have now been abolished in Canada.

However, some corroboration requirements still exist whereby the trier of fact is not permitted to convict on the basis of uncorroborated evidence. Some of these requirements still exist in the form of statutory requirements relating to treason, high treason, perjury and procuring a feigned marriage.³⁵⁴ Thus for offences under Sections 153.1 (sexual exploitation of a person with a disability) and Section 159 (act of anal intercourse) no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.³⁵⁵

The statutory requirement for corroboration for children's evidence was abolished in 1988. Section 659 of the Code states that any requirement whereby it is mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child is abrogated. There is no similar provision for persons with disabilities. Instead of corroboration rules which automatically apply in respect of certain categories of evidence, the case of **Vetrovec**³⁵⁶ established a rule that a warning should be given where the judge considers it warranted having regard to the particular circumstances of the case. A **Vetrovec** warning essentially refers to the special consideration that is required when examining the reliability of evidence that may be untrustworthy. The case of **R v Sauve**³⁵⁷ has established that a **Vetrovec** warning requires four characteristics:

- (1) the evidence of certain witnesses is identified as requiring special scrutiny;
- (2) the characteristics of the witness that bring his or her evidence into serious question are identified;
- (3) the jury is cautioned that although it is entitled to act on the unconfirmed evidence of such a witness, it is dangerous to do so; and
- (4) the jury is cautioned to look for other independent

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evidence which tends to confirm material parts of the evidence of the witness with respect to whom the warning has been given.

The **Vetrovec** approach to corroboration is balanced in that it avoids the blanket stereotyping of certain categories of witnesses, whilst also ensuring fairness of process in individual cases by permitting a warning to be given in appropriate circumstances.

7.4 The Post-Trial Process

Victims of crime are provided with a number of legal and service supports in the post trial phase of the criminal process in Canada, albeit there appears to be little policy recognition of specific categories of victimhood (such as those with disabilities). The Correctional Service of Canada (CSC), for example, is committed to ensuring that victims of crime have a voice in the federal corrections and criminal justice system.³⁵⁸ The CSC has published a document entitled **Victim Services**³⁵⁹ which describes the services that a victim can expect from the CSC. Dedicated victim service officers will provide the victim with information regarding offenders serving sentences for two years or more. Under federal legislation a person is considered a victim of crime if “they have been harmed or suffered physical or emotional damage as a result of someone committing a criminal offence, or if they are a spouse, conjugal partner, relative of, dependent of or are responsible for a victim who has died or is not able to act for himself or herself.” There is however no specific reference made to people with disabilities who are victims of crime. A victim can outline to the CSC any safety concerns that he or she may have about an offender. Such information will then assist the CSC when deciding an offender’s risk or security level. More importantly victims may request that certain conditions be imposed when an offender is being released.

The National Parole Board (NPB) is an independent

administrative tribunal. It makes decisions on the conditional release for offenders sentenced to federal penitentiaries and for offenders sentenced to provincial institutions in the provinces and territories where there are no provincial or territorial boards of parole.³⁶⁰ The NPB has produced the document **Victims Guide to Information Services**.³⁶¹ The NPB works in conjunction with the CSC to provide victims with information relating to the offender while that person is under the jurisdiction of the NPB. A victim may request to attend the offender's parole hearing as an observer and may also read a written statement. While no reference is made to victims of crime with disabilities in the NPB publication, victims who are not able to attend a parole hearing may submit a written statement or a video (DVD) or audio (CD) recording of their statement to be presented to board members during the parole hearing.³⁶²

The Office of the Federal Ombudsman for Victims of Crime (OFOVC) may also be of assistance if a victim believes a federal (as opposed to provincial) criminal justice agency at post-trial stage is not meeting its responsibilities. It also informs victims about the services available to them, and educates criminal justice and policy-makers about the needs and concerns of victims. The National Office for Victims was established in 2005 and focuses on victims of federally supervised offenders, including services offered to victims by the CSC and PBC. Among other things, it provides general information to victims and performs a referral function for specific information enquiries. It also develops information products for dissemination to victims, victim service providers and the general public, and promotes awareness of CSC's and PBC's services for victims of federally supervised offenders.

Specific legal provisions that are designed to facilitate and protect victims, and particularly people with disabilities, are documented in the remainder of this section.

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7.4.1 Victim impact statements

Victims have a right to make a victim impact statement (VIS) under Section 722 of the **Criminal Code of Canada**. Once a VIS is filed and the defence counsel and sentencing judge have received copies of it, it is to be considered by the judge before imposing a sentence.³⁶³

For the purposes of this section a victim means a person to whom harm has been done or who suffered physical or emotional loss as a result of the commission of the offence.³⁶⁴ However, further provision is made for a victim who is dead, ill or otherwise incapable of making a VIS. In such cases the meaning of a victim includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependent of that person.³⁶⁵ The Code sets out the procedure for the VIS which must be prepared in writing. It further provides that a victim may petition the court to read a statement prepared in accordance with the procedure set out under the Code or to present the statement in any other manner that the court considers appropriate.³⁶⁶

Research has revealed that in practice only a small minority of victims avail of the opportunity to deliver a VIS orally to the court.³⁶⁷ Academic literature suggests that rates of participation and statement submission in Canada are as low as 23%.³⁶⁸ It has been suggested that potential obstacles to the systematic use of VIS that have been identified include difficulties in explaining to victims the purpose and nature of a VIS; insufficient assistance provided to such victims throughout the VIS process; literacy or linguistic barriers to understanding VIS-related materials; and a lack of awareness on the part of victims on their right to submit VIS.³⁶⁹

7.4.2 An offence against a person with a disability as an aggravating factor in the crime

Section 718(2) of the Code provides that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. Under the Code such aggravating or mitigating factors include evidence that the offence was motivated by bias, prejudice, or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any similar factor.³⁷⁰ A further aggravating factor of relevance provided for under the Code is evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.³⁷¹ While an offence against a person with a disability is therefore an aggravating factor under the **Criminal Code of Canada**, the fundamental principle is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.³⁷²

7.5 Conclusion

Canada provides for a very comprehensive range of offences protecting persons with disabilities. This includes a provision in relation to disability hate propaganda. Though there is little evidence of specific policy commitments to witnesses with disabilities, a whole series of accommodations have taken place at trial stage in Canada. These include provisions for the reception of out of court evidence, video evidence and television link evidence from witnesses with disabilities that are not offence specific; express provision permitting a victim with a disability to have a support person of his or her choice present while he or she testifies; corroboration warnings that are not category specific; restrictions on cross-examination by the accused party; and the use of video identification and photo line-ups. Moreover, focusing on the witness's ability to communicate is an inclusionary approach to the test of competence. The

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guidelines provided by the Canadian Supreme Court are also helpful, 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. At post-trial stage of the criminal process, notable practices include the employment of alternative mechanisms for victims to provide information to parole board or correctional institutions rather than having to attend in person. Financial assistance to help victims in attending such meetings is also useful, as is the operation of a centralised ombudsman complaints system for dealing with complaints against federal criminal justice agencies. The express provision of hate based on disability as an aggravating factor at sentencing stage is a provision that has been employed in a number of jurisdictions that have been examined.

7.6 References

305 Section 153.1 (2), Criminal Code of Canada.

306 Section 153.1 (3), Criminal Code of Canada.

307 Section 159 (2), Criminal Code of Canada.

308 Section 159 (3)(ii), Criminal Code of Canada.

309 Section 2, Criminal Code of Canada.

310 Section 318 (4) Criminal Code of Canada .

311 VictimsInfo.ca available at <http://www.victiminfo.ca/>

312 VictimLinkBC, available at <http://>

- 313 VictimLinkBC, available at <http://www.victimlinkbc.ca/vlbc/index.page?>
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- 314 Canadian Anti-Fraud Centre, available at <http://www.antifraudcentre-centreantifraude.ca/english/home-eng.html>
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- 315 Ibid.
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- 316 Canadian Crimestoppers Association, available at <http://www.canadiancrimestoppers.org/>
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- 317 It should be noted that a study in 2009 revealed that that victims with disabilities in Canada have a less favourable perception of the criminal justice system than other victims. Perreault, S (2009) **Criminal Victimization and Health: a profile of victimisation among persons with activity limitations or other health problems** (Ottawa, Canadian Centre for Criminal Justice Statistics, 2009), available at <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2009021-eng.pdf>
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- 318 Office of the Federal Ombudsman for Victims of Crime, available at <http://www.victimfirst.gc.ca/abt-apd/www-qsn.html>
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- 319 Office of the Federal Ombudsman for Victims of Crime, **Giving a Voice to Victims**, available at http://www.csc-scc.gc.ca/victims-victimes/pdf/VICTIMS_Brochure_e_V4.pdf
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- 320 Department of Justice (2003) **Canadian Statement of Basic Principles of Justice for Victims of Crime**, available at <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/pub/03/princ.html>
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- 321 Department of Justice, Policy Centre for Victims

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Issues, **A Crime Victims Guide to the Criminal Justice System** available at <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/guide/evaluation.pdf>

322 Department of Justice, Policy Centre for Victims Issues, **A Crime Victims Guide to the Criminal Justice System** available at <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/guide/evaluation.pdf>

323 Section 710 (1) & (2), Criminal Code of Canada.

324 Section 711, Criminal Code of Canada.

325 Section 714.6, Criminal Code of Canada.

326 Section 486.1 (2), Criminal Code of Canada.

327 Section 486.1 (2.1), Criminal Code of Canada.

328 Section 486.1 (3), Criminal Code of Canada.

329 Section 486.2 (1), Criminal Code of Canada.

330 Section 486.2 (2), Criminal Code of Canada.

331 Section 486.2 (2.1), Criminal Code of Canada.

332 Section 486.2 (8), Criminal Code of Canada.

333 [1993] 4 SCR 475.

334 Section 486.3 (3), Criminal Code of Canada.

335 Section 486.3 (4.1), Criminal Code of Canada.

336 Section 486.4 (2) (a), Criminal Code of Canada.

337 Section 486.4 (2) (b), Criminal Code of Canada.

- 338 Section 486.5 (5), Criminal Code of Canada.
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- 339 Section 486.5 (6), Criminal Code of Canada.
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- 340 Section 486.5 (7), Criminal Code of Canada.
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- 341 **R. v. Hanemaayer** [2008]
234 C.C.C. (3d) 3 (Ont. C.A.).
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- 342 **R. v. Izzard**, [1990], 54 C.C.C. (3d)
252 (Ont. C.A.), at pp. 255-6.
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- 343 **R. v. Shermetta** [1995], 141 N.S.R. (2nd) 186.
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- 344 **The Path to Justice: Preventing Wrongful Convictions** Report of the Federal/
Provincial/ Territorial Heads of Prosecutions
Subcommittee on the Prevention of Wrongful
Convictions, 2011 available at <http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/ch5.html>
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- 345 Section 14, Canada Evidence Act.
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- 346 Section 16(1) (a) & (b), Canada Evidence Act.
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- 347 Section 16(3), Canada Evidence Act.
-
- 348 [2012] 2 LRC 633.
-
- 349 [2012] 2 LRC 633 at 651-652.
-
- 350 [2012] 2 LRC 633 at 653.
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- 351 [2012] 2 LC 633 at 654.
-
- 352 [2012] 2 LC 633 at 654.
-
- 353 [2012] 2 LC 633 at 655.
-
- 354 Section 133 of the Criminal Code of Canada,

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for example, states that no person shall be convicted of an offence of perjury on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

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- 355 Section 274, Criminal Code of Canada.
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- 356 **Vetrovec v The Queen**, [1982] 1 S.C.R. 811.
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- 357 **R v Sauve** [2004] 182 CCC (3d) 321 (Ont CA).
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- 358 Correctional Service Canada available at <http://www.csc-scc.gc.ca/victims-victimes/gpr/vs-eng.shtml>
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- 362 Ibid at p. 4.
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- 363 Section 722 (1), Criminal Code of Canada.
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- 364 Section 722(4)(a), Criminal Code of Canada.
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- 365 Section 722(4)(b), Criminal Code of Canada.
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370 Section 718(2)(a)(i), Criminal Code of Canada.

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Australia

8.1 Introduction

This chapter will examine the provisions that are available within Australia to protect people with disabilities who are victims of crime. The Australian Constitution of 1901 established a federal system of government, under which powers are distributed between the federal government and the states or territories. The states and territories have independent legislative power in all matters not specifically assigned to the federal government. Where there is any inconsistency between federal and state or territory laws, federal laws prevail. Federal laws apply to the whole of Australia.

8.2 The Pre-Trial Process

This section will outline the array of criminal law provisions that specifically exist for the protection of people with disabilities. It will also examine the support mechanisms that are in place for such victims to report a crime and to be assisted in the early stages of the criminal process.

8.2.1 Offences criminalising conduct which exploits persons with disabilities

Section 330(1) of the **Western Australia Criminal Code** contains a provision which makes it an offence to engage in any sexual act with an incapable person. An incapable person is referred to as a person who is so mentally impaired as to be incapable of understanding the nature of the act or of guarding himself or herself against sexual exploitation.

Section 330(2) provides that a person will be guilty of an offence under this section if he/she sexually penetrates a person who the offender knows is an incapable person or ought to know he or she is an incapable person. Subsection 3 further provides that a person will be guilty of an offence if he/she knowingly procures, incites or encourages a person who is incapable to engage in sexual behaviour. Where a person is guilty of crime under

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subsection 2 or 3, he/she is liable to imprisonment for 14 years and where the incapable person is under the care, supervision or authority of the offender, 20 years.³⁷³

Subsections 4 and 5 prohibit a person who indecently assaults an incapable person or otherwise incites, procures or encourages a person to do an indecent act where the offender knows or ought to know that the person is an incapable person. Section 330(6) also makes it an offence for a person to indecently record a person whom he/she knows is an incapable person or ought to know same. For the purposes of this section a reference to a person indecently dealing with an incapable person includes a reference to the person (a) procuring or permitting the incapable person to deal indecently with the person or, (b) procuring the incapable person to deal indecently with another person or, (c) committing an indecent act in the presence of an incapable person.³⁷⁴ Any person guilty of a crime under subsections 4, 5 or 6 will be liable to imprisonment for 7 years or where the incapable person is under the care, supervision or authority of the offender, 10 years.³⁷⁵ The only defence that is available to any of the offences provided for under Section 330 is to prove that the accused was lawfully married to the incapable person.³⁷⁶

Section 337 criminalises the unlawful detention or custody of persons who are mentally ill or impaired. Under this section any person who detains, or assumes the custody of a person suffering from mental illness or mental impairment is guilty of a crime and liable to imprisonment for 2 years. A person with a mental illness is defined under Section 4 of the **Mental Health Act** 1996 as a person who suffers from a disturbance of thought, mood volition, perception or orientation that impairs judgment or behaviour to a significant extent.

Similar offences have been enacted in other jurisdictions within Australia.³⁷⁷ Interestingly however, in New South Wales specific offences have been enacted under the

Crimes Act 1900 to address the vulnerabilities of victims of sexual assault who suffer from a cognitive impairment. Such offences regulate people in a particular position, for example those who have a role in caring for the person.³⁷⁸ Similarly in Victoria the same offences under Section 51 of the **Crimes Act** 1958 regulate providers of medical or therapeutic services.

Western Australia makes provision for a unique set of substantive hate crime offences under the Western Australia Criminal Code. However, these provisions which are referred to as “racial-vilification” offences only cover race and there is no reference made to persons with disabilities.³⁷⁹ There are also offences of serious vilification within other states in Australia such as New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory.³⁸⁰ Race and ethnicity is the only ground covered in all of the Australian jurisdictions. New South Wales have extended their hate crime legislation to include homosexuality, transgender and HIV/AIDS.³⁸¹ It is interesting to note that such an extension did not include persons with disabilities.

8.2.2 Reporting

The Western Australia Police Service (WAPS) offers web based guidance on how to report a crime. The WAPS offers detailed guidance on how to report a broad range of crimes such as a missing person, rape or sexual assault, online fraud or stealing, for example.³⁸² In cases which are life threatening or where time is critical, victims or any concerned persons are advised to call 000. Alternatively, victims who are hearing or speech impaired are advised to call TTY106.³⁸³

SMSAssist³⁸⁴ is a valuable text messaging service which is offered to people who are deaf, hard of hearing or speech impaired in order to contact the WAPS, to report a crime and to obtain further assistance and resources. SMSAssist is an exclusive service offered to those

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persons with communication difficulties and applies even if a disability is temporary or if it only occurs at certain times. While people with disabilities are encouraged to register for this service, there is no obligation to do so.

Crimestoppers³⁸⁵ also offers a telephone hotline for reporting information about any criminal or suspicious activity. Crimestoppers does not require a person to give his/her name or any details. A person is merely identified by a unique code number. The success of the service lies in the fact that the anonymity of callers is maintained at all times combined with the fact that calls are not recorded or traced. Crimestoppers also offers a service to report crimes online.³⁸⁶ This requires a person to submit a Crime Stoppers Information Report with any information they may have about any criminal act or suspicious criminal activity.

Under the Law Enforcement Power and Responsibilities Regulation 2005, New South Wales, people with disabilities are classified as 'vulnerable persons'.³⁸⁷ If it is established that a person has a disability, the person should have the right to a support person when being interviewed by the police, whether they are a victim or offender. The support person can be a carer, case worker, legal representative, guardian or interpreter. The availability of a support worker may encourage persons with disabilities to report crime and make the process a more comfortable experience.

A similar service called **The Independent Third Person Programme**³⁸⁸ is available in the state of Victoria. This is a service provided to people with a cognitive disability or mental illness during interviews with police. ITPs are volunteers trained by and registered with the Office of the Public Advocate in Victoria and provide communication support to individuals, as well as help them understand their rights. The service is available to victims of crime as well as offenders.

In New South Wales Cleartalk was established. Cleartalk is a project which was developed through research involving police officers and other stakeholders in New South Wales to improve the communication of police with people with learning disabilities. The outcome of the project was a set of modules to train police to effectively communicate with persons with intellectual disabilities.³⁸⁹ Such modules will ultimately make the reporting process between persons with intellectual disabilities and police officers a much more efficient service for all concerned.

The Disability and Abuse Hotline³⁹⁰ is a national service that is made available to people with disabilities who can call a dedicated hotline or email to report cases of abuse or neglect. Such persons with disabilities will be assisted to find the most appropriate ways of dealing with the reports. The hotline is funded by the Australian Government through the Department of Families, Housing, Community Services and Indigenous Affairs, but is operated by People with Disability Incorporated.

8.2.3 Policy prioritisation

The Commonwealth Director of Public Prosecutions (CDPP) has published a Victims of Crime Policy document.³⁹¹ The CDPP is committed to treating all victims with courtesy, dignity and respect. Moreover, the CDPP makes provision for the views of any victims to be taken into account, for example, when deciding whether or not to commence a prosecution. There is, however, nothing in the way of specific commitments to people with disabilities.

The Department of the Attorney General Court and Tribunal Services in Western Australia offers a Victim Support Service to promote the rights and to address the needs of victims of crime. The Victims Support Service has published a Court Support Brochure³⁹² which explains the special assistance measures that are provided by a dedicated group of volunteers who are trained by the

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Victim Support Services. The Victims Support Service helps and supports victims of crime throughout the criminal justice process. There is however no specific reference to victims of crime with disabilities. The Courts and Tribunal Services of Western Australia similar to other court services within Australia does however offer web based guidance to sensitive or vulnerable witnesses going to court.³⁹³ Special measures such as screens that are available to vulnerable and sensitive witnesses are outlined and well as the provision of general advice for such witnesses when giving evidence in court.

The Charter of Rights³⁹⁴ that is available to victims of crime in New South Wales to protect and promote their rights is worthy of mention. The Charter outlines 18 rights for victims of crime in New South Wales. While the Charter initially only applied to Government agencies, its application has been extended to a wider range of service providers such as non-government agencies and contractors funded by the state. The rights set out in the Charter are general in nature and include, for example, that all victims are to be treated with respect. None of the rights make any reference to persons with disabilities. However, the New South Wales Government has published two additional booklets explaining the Charter of Rights, especially for victims with a cognitive disability. One of the booklets is illustrated and goes through each of the 18 rights under the Charter with explanations in English while the second booklet contains an A3 poster that explains in cartoon format the 18 rights of the charter.³⁹⁵

In Queensland, the **Fundamental Principles of Justice** outline the treatment that victims of crime have a right to receive from a government agency. These principles are based on the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Chapter 2 of the **Victims of Crimes Assistance Act** 2009 sets out the fundamental principles which victims of crime can expect the relevant government entities to comply with. Of most relevance

is the fundamental principle that the victim must be treated fairly and shown dignity, respect, compassion and courtesy. Section 8 of the Act specifically states that the relevant government agency must take into account and be responsive to the particular needs of the victim including, for example, needs relating to the victims' age, sex, sexuality or impairment. While 'disability' is not directly referred to, the inclusion of 'impairment' makes provision for the needs of victims' with a mental or intellectual impairment to be considered. Moreover, the Victims Charter of Victoria specifically states that investigatory agencies, prosecuting agencies and victims' services agencies must take into account and be responsive to the particular needs of people with disabilities as victims of crimes.³⁹⁶

8.3 The Trial Process

The laws of evidence within Australia differ in each jurisdiction. It was hoped that the **Commonwealth Evidence Act 1995** would lead to a uniform legislation throughout the states of Australia but this has not happened to date. The **Commonwealth Evidence Act** applies if the legal proceedings are in a Federal Court or courts in the Australian Capital Territory. The evidence laws of New South Wales, Tasmania and Victoria mirror the Commonwealth Evidence Act and its admissibility requirements. In all other jurisdictions the evidence laws vary. This section will proceed to examine the **Evidence Act 1906** of Western Australia combined with reference to evidence laws within other Australian jurisdictions.

8.3.1 Special witnesses

Section 106R of the **Evidence Act 1906** makes provision for a judge to make an order declaring that a person who is to give evidence is a special witness and that special arrangements are to be made for the giving of such evidence. The grounds on which an order are made by the court to treat a person as a special witness include (a)

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any physical disability or mental impairment that would make the witness unlikely to be able to give evidence or to give evidence satisfactorily, (b) that the witness concerned would be likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant.³⁹⁷ An order for such measures to assist special witnesses, which will be examined below, may be made on application by a party to a proceeding, on notice to other parties or of the court's own motion.³⁹⁸

Most jurisdictions within Australia provide special measures or special arrangements for special witnesses or other witnesses in sexual offence proceedings. However, the **Criminal Procedure Act** 1986 of New South Wales is interesting as it makes provision for the giving of evidence for 'vulnerable witnesses'. Such provisions are similar to those which exist under English and Welsh legislation. For the purposes of this section a vulnerable person means a child or a cognitively impaired person.³⁹⁹ A cognitive impairment includes an intellectual disability, a development disorder, a neurological disorder, dementia, a severe mental illness or a brain injury.⁴⁰⁰

The special arrangements for the provision of giving evidence are broadly similar within the Australian jurisdictions. However, there are some variations. For example in Western Australia alternative arrangements for the giving of evidence "may" be ordered by the court⁴⁰¹ while in other jurisdictions these special arrangements are something to which the complainant maybe automatically entitled to subject to exceptions.⁴⁰²

8.3.2 Support person/communicator

Arrangements may be made under Section 106R(4) (a) of the **Evidence Act** 1906 for a special witness to

have a support person who is court approved near him/her while giving evidence. Similarly, a special witness may avail of a communicator while giving evidence under Section 106(R)(4)(b). Where an arrangement for a communicator is directed to be made, section 106F automatically applies to the special witness even though the provision is actually child specific.⁴⁰³

Under Section 106F where a special witness is to give evidence, the court may appoint a person that it considers suitable and competent to act as a communicator for the special witness. The function of the person appointed will be to communicate and explain to the witness questions put to him/her and to communicate the evidence of the witness to the court.⁴⁰⁴

Most of the other Australian jurisdictions permit a complainant who is considered a special witness for the purpose of proceedings to have a support person present with them while giving evidence in court. For example in Tasmania the statutory provisions for special witnesses are almost identical to the provisions in Western Australia.⁴⁰⁵

8.3.3 Video links/screening

Section 106R(4)(c) also provides that further arrangements may be made for special witnesses in any proceedings for an offence of the kind described in Section 106(N)(2) and (4). Subsections 2 and 4 make provisions for video links or screening arrangements for the purposes of giving evidence.

Subsection 2 provides for evidence to be given outside of the courtroom but within the court precincts and for the evidence to be transmitted to the courtroom by means of a video link. Alternatively, the accused may be held in a room apart from the courtroom while the witness is giving evidence and the evidence is to be transmitted to that room by means of a video link.⁴⁰⁶ For the purposes of

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this section a video link means facilities (including closed circuit television) that enable, at the same time, a court at one place to see and hear a person giving evidence or making a submission at another place and vice versa.⁴⁰⁷

Subsection 4 provides that where the facilities and equipment referred to in subsection 2 are not available, that a screen, one way glass or other device may be erected so that when the witness is giving evidence he/she cannot see the accused but the judge, jury, the accused and his/her counsel can see the affected witness. While subsections 2 and 4 are child specific, provision has been made under Section 106R(4a) for such arrangements to be made available to cases involving special witnesses.

There are also a wide range of measures available to special witnesses within other Australian jurisdictions dealing with the giving of contemporaneous evidence by closed circuit television (CCTV) or video-link, or through the use of screening to restrict contact between the witness and the defendant. Such provisions are evident for example within statutes in New South Wales and Victoria.⁴⁰⁸ However, not all jurisdictions expressly permit the use of screens.⁴⁰⁹

In New South Wales alternative arrangements are made available for vulnerable witnesses for giving evidence when closed circuit television facilities are not available. Such alternative arrangements may include planned seating arrangements or the adjournment of proceedings to other premises.⁴¹⁰

8.3.4 Pre-recorded evidence

Pre-recorded evidence refers to any evidence recorded before the trial and replayed at the trial. Pre-recorded evidence that is generally admissible in criminal proceedings includes the initial interview between the witness and the police and other evidence given by the witness. Section 106HB of the **Evidence Act** 1906

provides that in any proceeding for an offence a visual recording of an interview may be admitted as the whole or as part of the evidence in chief of a witness irrespective of the age and maturity of the witness at the time and even if the witness is capable of giving evidence at the time of the proceeding. However, subsection (1a) provides that a visual recorded interview with a person with a mental impairment is not to be admitted in the proceedings unless the witness is a special witness. Thus in the case of a special witness a visually recorded interview will be admissible to the same extent as if statements made in it by the witness were given orally in the proceedings in accordance with the usual rules and practice of the court concerned.⁴¹¹ Moreover, if a visually recorded interview is admitted under this section, the witness does not have to be present in court or be visible to anyone in the court (other than a case in a trial by a jury) while the recording is being played.⁴¹²

An order may also be made for the visual recording of evidence in criminal matters under Section 106RA. The grounds on which such an order may be made are that (a) the witness has been declared a special witness as per Section 106R(1)(a) or, (b) that it is likely the witness will be out of the State at the time of the proceeding for the offence and will not be able to give evidence at the proceeding by means of a video link or an audio link. Such an order may be made on application by a party to the prosecution, on notice to the other parties or of the courts own motion.⁴¹³

The **Criminal Procedure Act** of New South Wales also makes provision for a vulnerable person to give evidence in chief in the form of a recording.⁴¹⁴ Under this provision if the vulnerable person is not the accused person he/she must be available for cross examination and re-examination orally in the courtroom. Similarly, the **Criminal Procedure Act** 2009 of Victoria makes provision for the recorded evidence in chief of cognitively impaired witnesses in sexual offences and assault

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matters.⁴¹⁵ Most legislation within the Australian jurisdictions actually makes provision for pre-recorded evidence in criminal hearings and trials.⁴¹⁶ Generally such provisions apply to child witnesses and witnesses who are cognitively or intellectually impaired.

8.3.5 Identification evidence

The **Commonwealth Evidence Act** governs the admissibility of identification evidence in criminal proceedings under Part 3.9. Part 3.9 mirrors the identification provisions under the **Evidence Act 1995** of New South Wales. In order for visual identification evidence to be admissible under the acts, the identification of the accused must have taken place at an identification parade.⁴¹⁷ It will however be presumed unreasonable to hold an identification parade if it would have been unfair for the defendant for such a parade to be held.⁴¹⁸

Picture identification is also permitted under the Acts subject to certain requirements.⁴¹⁹ Picture identification means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.⁴²⁰ The limitations under this section for the admissibility of picture identification evidence seek to protect the accused. For example picture identification evidence adduced by the prosecutor is not admissible if the pictures examined suggest that they are pictures of persons in police custody.⁴²¹

Warnings will also be issued by a judge in cases where there is a question over the reliability of identification evidence. For example Section 116 of the **Commonwealth Evidence Act** provides that when identification evidence has been admitted, the judge must inform the jury that there is a special need for caution before accepting such evidence.

In Tasmania and Western Australia however, the

Evidence Acts fail to make provisions for the regulation of identification parades and the legislation also fails to outline the conditions for the use of police photographs. The Evidence Act of Tasmania does however include a warning with respect to identification evidence under Section 116.

8.3.6 Competency to testify

Under Section 97 of the **Evidence Act** 1906 there is a general requirement that every witness must give evidence on oath. However, Section 100A provides that the oath requirement may be dispensed with in certain cases. The oath will be dispensed with if the judge is satisfied that the witness does not understand the nature or obligation imposed by an oath or affirmation, but does understand, (a) that he is required to speak the truth and to tell what he knows about the matter to which the testimony relates; and (b) that he will be liable to punishment if he does not do so.

Section 106(B)(3) is disability specific and provides that a person with a mental impairment is competent to take an oath or make an affirmation if the court is satisfied that the person understands that, (a) the giving of evidence is a serious matter, and (b) that he/she in giving the evidence has an obligation to tell the truth. Mental impairment has the meaning given to that term by section 8 of the **Criminal Law (Mentally Impaired Accused) Act** 1996 as an intellectual disability, mental illness, brain damage or senility. Section 106(B)(2) provides that if a person with a mental impairment is competent within the meaning of Section 106(B)(3) that he/ she may give evidence on oath or after making an affirmation.

The **Western Australian Evidence Act** can be compared to the Commonwealth Evidence Act of 1995. While Section 12 sets out the basic rule that all witnesses are presumed competent to give evidence, Section 13 sets out a number of qualifications to this general proposition.

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Section 13 specifically states that a person with a mental, physical or intellectual disability will not be competent to give evidence if, (a) the person does not have the capacity to understand a question about the fact or, (b) the person does not have the capacity to give an answer that can be understood to a question about the fact. The test of competence to give sworn evidence under Section 13(3) provides that a person must be capable of understanding that he/she is under an obligation to give truthful evidence.

The Australian Law Reform Commission noted in 2006 that it favoured an approach to competence that was 'less exclusionary' and not overly restrictive. It noted:

"The central proposal was that there is a test of general competence founded on basic comprehension and communication skills. The test is to be applicable to the giving of both sworn and unsworn evidence. The recommended standard for general competence to give sworn or unsworn evidence is that the person can understand a question about a fact and can give an answer which can be understood to a question about that fact. A person who does not possess general competence in relation to some facts will be incapable of giving evidence about those facts, but not necessarily others...Such a test also applies in England under the **Youth Justice and Criminal Evidence Act 1999** (UK)...The Commissions favour a test of general competence substantially based on the English provision, which focuses on the ability of the witness to comprehend and communicate. Such a test is flexible, clear and unambiguous. It increases the possibility that a witness' evidence is heard, requiring mainly that they understand and answer simple questions and communicate what happened."⁴²²

8.3.7 The admission of unsworn evidence

A person with a mental impairment who is not competent to give evidence within the meaning of Section 106(B) (3) of the **Western Australia Evidence Act** may also

give unsworn evidence if the court is satisfied before the evidence is given, that the person is able to give an intelligible account of events which he or she has observed or experienced.⁴²³

Similarly, Section 13(5) of the **Commonwealth Evidence Act** provides that a person is competent to give unsworn evidence if the court has told the person that, (a) it is important to tell the truth and (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

8.3.8 The requirement of corroboration

Under Section 50 of the **Evidence Act** 1906 in Western Australia, corroboration warnings are generally not required. For the purposes of this section a corroboration warning means a warning to the effect that it is unsafe to convict the person who is being tried on the uncorroborated evidence witness.⁴²⁴ Section 50(2) of the Act makes it clear that the judge is not required to give a corroboration warning to the jury in relation to any offence of which a person is liable to be convicted on indictment. However, a corroboration warning may be given if the judge is satisfied that such a warning is justified in the circumstances.⁴²⁵

While Section 106(D) expressly states that there is to be no corroboration warning to be given on the evidence of a child, there is no similar provision for persons with disabilities. With the exception of Queensland, all of the Australian jurisdictions have enacted similar legislation prohibiting the judge from warning or suggesting to the jury that children may be classified as

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unreliable witnesses.⁴²⁶ However, legislation has been enacted in New South Wales, Victoria, the Northern Territory and the Australian Capital Territory whereby a judge is not permitted to warn or lead the jury to believe in any way that it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards a certain class of complainants as unreliable.⁴²⁷ Such provisions will ultimately prevent judges from stating or suggesting that complainants with disabilities are an unreliable class of victims.

8.4 The Post-Trial Process

Victims of crime also have a number of needs and concerns at the post trial stage of the criminal process. They may, for example, want information about release dates. A number of states in Australia operate victim notification schemes. They provide information about the court and management of an offender to victims of crime once the offender is under the supervision of the Corrective Services. The information may include details about the offenders' sentence, any escapes from custody and recapture, impending release dates and the results of any appeals against the sentence. A victim may also be given the opportunity to make a submission in writing to the Adult Parole Board about the prisoner's potential release on parole. A victim may also be given the opportunity to make a submission in writing to the courts or the Adult Parole Board when the offender is subject to a post-sentence detention order or supervision order. Forensic Patient Victims Registers also permit victims to elect to be notified of all Tribunal hearings and determinations. When leave or release is being considered, registered victims may choose to request that non-association and/or place restriction conditions be attached. Other relevant provisions include the use of victim impact statements and express enhanced sentencing mechanisms when a crime is motivated by hatred (against a person with a disability).

8.4.1 Victim impact statements

In Western Australia, victim impact statements (VIS) have been put on statutory footing. Part 3, Division 4 of the **Sentencing Act** 1995 makes provision for a victim to make a VIS. The purpose of the VIS is to assist the court in determining the proper sentence for the offender.⁴²⁸ Section 24(2) of the Act makes further provision for a victim who because of age, disability or any other reason is personally incapable of giving a VIS. In such circumstances another person may give the VIS on the victim's behalf if the court is satisfied that it is appropriate for that other person to do so. The VIS is a written oral statement that, (a) gives particulars of any injury, loss, or damage suffered by the victim as a direct result of the offence and, (b) describes the effects on the victim of the commission of the offence.⁴²⁹ Section 26(1) permits the court to make a written VIS available to the prosecutor and the offender, on such conditions as it thinks fit. The court does however have discretion to rule the whole or any part of the VIS as inadmissible.⁴³⁰

South Australia has also made similar provisions for a victim to make a VIS under Section 7A of the **Sentencing Act** 1988. Provision is also made for a court to order assistance for a person to read out a VIS where there is good reason to do so. In such circumstances the court will, (a) allow an audio or audio visual record of the person reading the statement to be played to the court or, (b) exercise any other powers that it has with regard to a vulnerable witness.⁴³¹

8.4.2 An offence against a person with a disability as an aggravating factor in the crime

Sentence aggravation models permit prejudicial motive to be taken into account at sentencing stage. While sentence aggravation models are in operation internationally across many different jurisdictions, race and religion appear to be the most common grounds covered. Sentence aggravation

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provisions have been in operation in New South Wales since 2003 and the Northern Territory since 2006.⁴³²

In New South Wales it is an aggravating factor at sentencing if the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).⁴³³ It is important to note that this is merely a discretionary power for the judge to exercise and although such an aggravating factor is relevant and known to the court, this does not necessarily require the court to increase or reduce the sentence for the offence.⁴³⁴

While the New South Wales legislation identifies various groups of people against whom a crime may be motivated or aggravated by hate, the legislation of the Northern Territory does not identify such groups and thus fails to make specific reference to groups of people with disabilities. Section 6A(e) states that if an offence is motivated by hate against a group of people, that such circumstances may be regarded as an aggravating factor for the purposes of sentencing.

The Sentencing Act of Western Australia however, fails to make any reference to offences motivated by hatred and merely states that aggravating factors are factors which, in the court's opinion, increase the culpability of the offender.⁴³⁵ Instead Western Australia uses a penalty enhancement model which is evident within the 1913 **Criminal Code**.⁴³⁶ With such a model certain offences have additional penalties on specified pre-existing offences if the conduct is motivated by racial prejudice or hostility. The only ground covered however is race.

8.5 Conclusion

There are a number of interesting developments in Australia relating to people with disabilities who are

victims of crime. At pre-trial stage, these include a comprehensive range of offences that protect persons with disabilities; specialised numbers and text messaging service designed to help victims with disabilities to report a crime; provision for a support person to be present with a witness with a disability during police interviews (as exists in Queensland and Victoria) who can provide support including communication support; the employment by the police of a set of training modules designed to improve their communication with person's with learning disabilities; the use of support organisations dedicated to victims with disabilities (such as the Disability and Abuse hotline); and illustrated explanations of the Victim's Charter of Rights (in New South Wales, for example).

At trial and post trial stages, the increasing accommodation of witnesses with disabilities is evident in express provisions for the use of support persons (and communicators) in court, screening, and the reception of out of court statements. It is also evident in the prohibition of corroboration warnings based solely on stereotyping, in Law Reform Commission proposals to adopt a more inclusionary competence test, and in provisions that permit an offence against person with a disability to be viewed as an aggravating factor at sentencing if the offence was motivated by hatred for or prejudice against such a person.

8.6 References

373 Section 330(7) **Criminal Code** (Western Australia).

374 Section 319(3) **Criminal Code** (Western Australia).

375 Section 330(8) **Criminal Code** (Western Australia).

376 Section 330(9) **Criminal Code** (Western Australia).

377 Section 66(F) **Crimes Act** 1900 (New South Wales), Sections 51-52 **Crimes Act** 1958 (Victoria),

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Section 216 **Criminal Code** (Queensland), Section 49(6) **Criminal Law Consolidation Act 1935** (SA), Section 126 **Criminal Code** (Tasmania), Section 130 **Criminal Code** (Northern Territory).

378 Section 66(F)(2) **Crimes Act 1900** (New South Wales).

379 Section 80A – 80B **Criminal Code Amendment (Racial Vilification) Act 2004** (Western Australia).

380 For example, Section 20D **Anti-Discrimination Act 1977** (New South Wales), Section 4 **Racial Vilification Act 1996** (SA), Section 67 **Discrimination Act 1991** (ACT), Section 131A **Anti-Discrimination Act 1991** (Queensland) and Sections 24-25 of the **Racial and Religious Tolerance Act 2001** (Victoria).

381 Sections 20D, 38T, 49ZTA, 49ZXC **Anti-Discrimination Act 1977** (New South Wales).

382 Western Australia Police, available at <http://www.police.wa.gov.au/Yoursafety/Reportacrime/tabid/1016/Default.aspx>

383 Ibid.

384 Western Australia Police, SMSAssist Service available at <http://www.police.wa.gov.au/YOURSAFETY/SMSAssist/tabid/982/Default.aspx>

385 Crimestoppers available at <http://www.police.wa.gov.au/ABOUTUS/CrimeStoppers/tabid/932/Default.aspx>

386 Crimestoppers online reporting service available at <https://wa.crimestoppers.com.au/help-solve-crime/crime-stoppers-information-report>

387 New South Wales Police Force, available at <http://www.police.nsw.gov.au/>

- 388 The Independent Third Person Programme available at <http://www.publicadvocate.vic.gov.au/services/108/>
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- 389 Brennan, M and Brennan, R (1994) **Cleartalk: police responding to intellectual disability.** (New South Wales: Charles Stuart University), available at <http://www.criminologyresearchcouncil.gov.au/reports/25-92-3.pdf>
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- 390 The National Disability Abuse and Neglect Hotline, available at <http://www.disabilityhotline.net.au/>
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- 391 Director of Public Prosecutions, **Victims of Crime Policy** available at <http://www.cdpp.gov.au/Publications/Victims-of-Crime-Policy/CDPP-Victims-of-Crime-Policy.pdf>
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- 392 Government of Western Australia, Department of Attorney General, Court and Tribunal Services **Court Support** available at http://www.courts.dotag.wa.gov.au/_files/VSS_Court_Support.pdf
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- 393 Government of Western Australia, Department of Attorney General, Court and Tribunal Services available at <http://www.courts.dotag.wa.gov.au/W/witnesses.aspx?uid=2246-8635-5487-7481>
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- 394 New South Wales Government, Charter of Rights available at http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_victimrightscharter2
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- 395 New South Wales Government, Charter of Rights for persons with a cognitive disability available at http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_victimrightscharter2
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- 396 Section 6(2) of the **Victims Charter Act 2006** available at <http://www.justice.vic.gov.au/victimsofcrime/home/resources/documents/victims+charter+act+2006+-+%28pdf%29>
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- 397 Section 106R(3) **Evidence Act 1906** (Western Australia).
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- 398 Section 106(R)(2) **Evidence Act 1906** (Western Australia).
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- 399 Section 306M(2) **Criminal Procedure Act 1986** (New South Wales).
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- 400 Ibid.
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- 401 Section 106R **Evidence Act 1906** (Western Australia).
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- 402 For example, Section 294B **Criminal Procedure Act 1986** (New South Wales) and Section 13 **Evidence Act 1929** (Southern Australia).
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- 403 There is evidence to suggest that there are not used that much. See Jackson, H. (2003) 'Child Witnesses in the Western Australian Courts', Paper presented to the Child Sexual Abuse Conference, Australian Institute of Criminology, Adelaide, 1-2 May 2003, available at http://www.aic.gov.au/media_library/conferences/2003-abuse/jackson.pdf
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- 404 Section 106(F)(2) **Evidence Act 1906** (Western Australia).
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- 405 Section 8 of the **Evidence (Children and Special Witnesses) Act 2001** (Tasmania).
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- 406 Section 106(N)(2)(b) **Evidence Act 1906** (Western Australia).
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- 407 Section 120 **Evidence Act** 1906 (Western Australia).
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- 408 Division 3 & 4 of the **Criminal Procedure Act** 1986 (New South Wales) and Section 362 & 364 of the **Criminal Procedure Act** 2009 (Victoria).
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- 409 Tasmania, for example, does not make provision for the use of screens.
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- 410 Section 306ZH **Criminal Procedure Act** 1986 (New South Wales).
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- 411 Section 106HB(4) **Evidence Act** 1906 (Western Australia).
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- 412 Section 106HB(6a) **Evidence Act** 1906 (Western Australia).
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- 413 Section 106RA (3) **Evidence Act** 1906 (Western Australia).
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- 414 Section 306U Criminal Procedure Act 1986 (New South Wales).
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- 415 Division 5 of the **Criminal Procedure Act** 2009 (Victoria).
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- 416 Section 15YM **Crimes Act** 1914 (Cth), Section 306S(2) and 306U(1)-(2) **Criminal Procedure Act** 1986 (New South Wales), Section 21A and 21AI-21AI-21AO **Evidence Act** 1977 (Queensland), Section 13 and 13A Evidence Act 1929 (SA), Sections 366-368 **Criminal Procedure Act** 2009 (Victoria), Section 106A, 106HA, 106HB, 106K **Evidence Act** 1906 (Western Australia), Part 4, Division 4.2A and 4.2B **Evidence (Miscellaneous Provisions) Act** 1991 (ACT) and Section 21B **Evidence Act** 1939 (Northern Territory).
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- 417 Section 114 **Evidence Act** 1995 (Cth) and Section 114 **Evidence Act** 1995 (NSW).
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- 418 Section 114(3) **Evidence Act** 1995 (Cth).
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- 419 Section 115 **Evidence Act** 1995 (Cth) and Section 115 **Evidence Act** 1995 (NSW).
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- 420 Ibid.
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- 421 Section 115(2) **Evidence Act** 1995 (Cth).
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- 422 Australian Law Reform Commission, (2006) **Uniform Evidence Law** (ALRC Report 102) (Sydney, ALRC), paras 4.49-4.56.
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- 423 Section 106(C) **Evidence Act** 1906 (Western Australia).
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- 424 Section 50(1) **Evidence Act** 1906 (Western Australia).
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- 425 Section 50(2) **Evidence Act** 1906 (Western Australia).
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- 426 Section 165A **Evidence Act** 1995 (Cth), Section 165A **Evidence Act** 1995 (New South Wales), Section 165A **Evidence Act** 2008 (Vic), Section 12A **Evidence Act** 1929 (SA), Section 164(4) **Evidence Act** 2001 (Tasmania), Section 70 **Evidence (Miscellaneous Provisions) Act** 1991 (ACT) and Section 9C **Evidence Act** 1939 (Northern Territory). Section 632(2) Criminal Code (Queensland) s 632(2) provides only that a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
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- 427 Section 294AA **Criminal Procedure Act** 1986 (New South Wales), Section 61 **Crimes**

Act 1958 (Victoria), Section 69 Evidence (Miscellaneous Provisions) Act 1991 (ACT), Section 4(5) Sexual Offences (Evidence and Procedure) Act 1983 (Northern Territory).

428 Section 24, Part 4 Division 4 of the **Sentencing Act 1995** (Western Australia).

429 Section 25 **Sentencing Act 1995** (Western Australia).

430 Section 26 (2) **Sentencing Act 1995** (Western Australia).

431 Section 7A(3A) **Sentencing Act 1988** (Southern Australia).

432 Section 21A (2)(h) **Crimes (Sentencing Procedure) Act 1999** (New South Wales) and Section 6A of the **Sentencing Act 1995** (Northern Territory) as amended by Section 6 of the **Justice Legislation (Group Criminal Activities) Act 2006** (Northern Territory).

433 Section 21A(h) **Crimes (Sentencing Procedure) Act 1999** (New South Wales).

434 Section 21A (5) **Crimes (Sentencing Procedure) Act 1999** (New South Wales).

435 Section 7(1) **Sentencing Act 1995** (Western Australia).

436 For example see Section 313 of the **Criminal Code** (Western Australia). The maximum term of imprisonment for an offence of common assault is 18 months, while the maximum penalty for the same offence in circumstances motivated by racial aggravation is three years imprisonment.

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Recommendations

People with disabilities who are victims of crime experience marginalisation at a number of different levels in the Irish criminal process including policy emphasis, the requirements of the adversarial process, the criminalisation of conduct, the language employed by the criminal law, and service provision. In this final section, the recommendations generated by the research are highlighted. A series of general recommendations are made in relation to victims with disabilities, before more specific recommendations are suggested for various aspects of the trial process. As a preliminary, however, there are a number of obvious points that can be made. The objective in respect of such victims must be to secure their best evidence whilst also maintaining the integrity of a fair criminal process. It is clear in this regard that there is a strong need to mainstream disability awareness within the training programmes of all relevant criminal justice agencies. Such training should encompass the range of disabilities (developmental, learning, etc) that may be encountered. There is also a need to tackle the discriminatory potential embedded in the adversarial process. As Endicott has noted: “[T]he law has traditionally concentrated on ways to establish formally the things that a person with a disability **cannot** do. The law has not demonstrated adequate capacity to find ways in which the person's special needs can be accommodated so that he or she can participate in ordinary human activities, including the activity of doing justice in society.”⁴³⁷

The twin principles of orality (that memory improves with time and that a stressful formal legal environment can enhance a witness's capacity to recall)⁴³⁸ and cross-examination (with its emphasis on a combative approach that seeks to discredit witnesses through, *inter alia*, highlighting inconsistencies and lack of recollection) can prove particularly challenging for some witnesses with disabilities. The testimony of such witnesses may need to be elicited carefully, maintaining respect for fairness of process but also accommodating equal

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access to justice. The over emphasis on adversarialism has in some instances ensured that a proper balance has not been struck. It is also the case that the competence test for witness testimony has not been constructed in a manner that is designed to maximise access to justice for some people with disabilities. The calendar of criminal law offences protecting people with disabilities in Ireland is also in urgent need of reform so as to provide a proper network of legal protections that neither under nor over criminalise.

9.1 General Recommendations

9.1.1

Criminal justice agencies should be required to consider their communications with people with disabilities to ensure that all relevant information is gathered from them. In particular such agencies should be required to collect data on people with disabilities who are victims of crime to facilitate accountability and evidence-based decision-making.

9.1.2

Appropriate language should be employed in policy documents and legislation to bring about a cultural change. Terminology such as 'mental handicap' should not be employed in legislation or policy statements and should be replaced by more appropriate language.

9.1.3

All criminal justice agency documents should be monitored and reviewed by the respective agencies to remove any discriminatory or exclusionary references to people with disabilities.

9.1.4.

The working assumption for all criminal justice agencies should be that people with disabilities are entitled, as a minimum, to the same rights of access to the Irish criminal justice system as other victims

or witnesses. A decision to dismiss or reject a crime complaint by such a witness should not be taken lightly.

9.1.5

People with disabilities should be strategically identified as a specific victim group with particular needs and concerns at all stages of the criminal process by all relevant criminal justice agencies. Strong commitments should be given by criminal justice agencies in Ireland to identify people with disabilities as victims of crime.

9.1.6

A structured and continuous enhanced service mechanism should exist for such victims, where required, as they pass through the criminal process, ensuring that each agency is aware of their needs and can provide a clear and consistent level of service.

9.1.7

All agencies having contact with people with disabilities should provide training on the particular needs of such victims. A modular programme of training in handling vulnerable complainants should be put in place for all criminal justice agencies as part of their core training. This training should pay particular attention to common problems and solutions including the possible communication requirements of such witnesses (slowing down speech rate, avoiding interruption, etc), their ability to recall information, and the difficulties they may have with certain types of questions (jargon, double negatives). People with disabilities and disability organisations should be consulted on and involved in such training.

9.2. The Pre-Trial Process

9.2.1

A broader range of criminal offences should be provided for that strikes a much better balance between under and over criminalisation. Criminalisation in Ireland should cover a much more extensive range of exploitative

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conduct. For example, the jurisdiction of England and Wales criminalises a much more comprehensive range of exploitative sexual activity against persons with disabilities. These include offences such as sexual activity with a person with a 'mental disorder' impeding choice, causing or inciting a person with a 'mental disorder' impeding choice to engage in sexual activity, engaging in sexual activity in the presence of a person with a 'mental disorder' impeding choice, and causing a person with a 'mental disorder' impeding choice to watch a sexual act. It also includes sexual offences that do not require that the choice of the persons concerned has been impeded, rather that their agreement in each case has been obtained by threat, inducement or deception. Certain specified sexual offences also specifically relate to cases where the defendant concerned is a care worker.

9.2.2

The **Incitement to Hatred Act** 1989 should include hatred against persons with a disability. Such a provision would have both a symbolic and protective appeal. 9.2.3. A specialised victim support organisation (as exists in Scotland) – or a particular section of a national support organisation – should specifically cater for vulnerable witnesses including people with disabilities. Such an organisation can ensure that that people with disabilities are provided with adequate information about the process and the services available to them. It could also act as an important focal point, raising awareness about the needs of such witnesses, particularly with relevant criminal justice agencies.

9.2.4.

In order to facilitate the reporting of crime among this category of victims, the authorities should consider the adoption of an emergency text messaging service (as exists in Australia, New Zealand, and England and Wales). Such a service would be particularly useful for victims who cannot use a phone, or who may become confused or distressed during prolonged or stressful circumstances.

9.3. The Trial Process

9.3.1

A special measures package 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.

9.3.2

Provisions for the reception of television link evidence, the use of intermediaries, and the video recording of evidence (as provided for under the Criminal Evidence Act 1992) should not be limited to offences involving violence or sexual offences.

9.3.3

Express provision should be made providing for the use of screening in court to protect vulnerable witnesses such as people with disabilities in court. Ireland is one of the few countries that does not expressly provide for the use of such a measure. Screens have the advantage of helping vulnerable witnesses to focus on their evidence rather than on their stress and anxieties. It also blocks out the distractions of the courtroom. Such a measure has not been found to breach fairness of procedures in other jurisdictions.

9.3.4

Greater clarity is needed on corroboration warnings and judicial directions as they relate to witnesses with disabilities.

9.3.5

Consideration should be given to introducing an express provision permitting people with disabilities to have a support person near them when giving evidence in court in criminal cases (as occurs in New Zealand and Canada).

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9.3.6

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.

9.3.7

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).

9.3.8

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.

9.3.9

An express statutory provision should be enacted **restricting cross-examination by an accused party** (who represents himself or herself) of a vulnerable witness at trial, unless the court is of the opinion that the proper administration of justice requires the accused to personally conduct the cross examination. Where the accused has been denied the opportunity to personally cross examine a vulnerable witness, he or she should be provided with a legal representative who may conduct such an examination.

9.3.10

Identification practices should **employ video identification by electronic means**, where possible. This would be a welcome development for vulnerable witnesses such as people with disabilities given that the use of a video is less threatening to such victims who would no longer have to attend an identification parade where the perpetrator of the crime may be present.

9.3.11

Express provision should also be made placing the use of **aids to communication** in the trial process on a statutory footing.

9.3.12

Provision should also be made to permit **video recorded cross-examination or re-examination** of vulnerable witnesses (as exists in England and Wales and Northern Ireland, albeit on a pilot basis). Such a special measure may be the only means to ensure that the testimony of certain vulnerable witnesses is not lost.

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9.4 The Post-Trial Process

9.4.1

A **comprehensive victim notification system** should be established that informs victims of the possibility of 'opting in' to receive notification of periods of temporary release, parole board hearings, prison transfers, and the prisoner's final discharge from the Victim Liaison Officer in the Irish Prison Service. The purpose and manner of a victim submission to the parole board needs to be clarified. Victims should also be notified of Mental Health (Criminal Law) Review Board hearings and should be permitted to make submissions. The Board is responsible for reviewing the detention of patients in a designated centre — currently the only designated centre is the Central Mental Hospital — who have been referred there by a court, having been found either unfit to stand trial or not guilty of an offence by reason of insanity.

9.4.2

An express statutory provision should be enacted which provides that an offence committed against a vulnerable person such as a person with disability may be considered **an aggravating factor at sentencing stage**. A trial judge in these circumstances should be provided with discretion to increase the sentence for the offence.

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