

### **Author Biography:**

Alan Cusack (BCL, LLM, PhD Candidate and IRCHSS Scholar) is an Academic Visitor at the Centre for Criminology at the University of Oxford and a PhD candidate in University College Cork conducting doctoral research in the area of access to justice for victims of crime with disabilities. Specifically, Alan's research assesses how traditional adherence to normative adversarial processes at each of the pre-trial, trial and post-trial stages of the Irish justice system inhibits participation by victims of crime with disabilities.

In 2013, Alan was awarded the prestigious Government of Ireland PhD scholarship from the Irish Research Council (IRCHSS), having also previously been offered a Faculty of Law PhD Scholarship from University College Cork. Prior to commencing his doctoral research, Alan qualified as a solicitor with Arthur Cox solicitors, an international law firm based in Dublin.

Alan is a professional member of The Law Society of Ireland and is also a member of The Centre for Criminal Justice and Human Rights at University College Cork and The Institute for Social Sciences in the 21st Century (ISS21) at University College Cork.

**Pre-Trial Cross-Examination for Vulnerable Witnesses:  
An Idea Whose Time Has Come  
12 October 2016**

Dear Editor,

Last month, in one of her first public acts as Lord Chancellor and Secretary of State for Justice, Elizabeth Truss launched a joint paper which sets out the Ministry of Justice's vision for the future of the English justice system.<sup>1</sup> The vision, according to the paper, is 'to modernise and upgrade our justice system so that it works even better for everyone, from judges and legal professionals, to witnesses, litigants and the vulnerable victims of crime'.<sup>2</sup>

One of principal reforms which is to be introduced as part of this ameliorative exercise is the admission of pre-trial cross-examination.<sup>3</sup> Under the scheme, vulnerable victims and witnesses will be spared the ordeal of having to appear in court. The scheme envisages that, rather than being required to undergo the orthodox practice of live cross-examination before a jury, such witnesses will instead undergo private cross-examination at an earlier stage in proceedings. A video recording of these exchanges will then be played for the jury at the eventual trial thereby sparing vulnerable persons the stress of reliving traumatic events in open court. The move to introduce this measure comes following the successful implementation of pre-trial cross-examination on a pilot basis in three Crown Courts in England.<sup>4</sup> According to the joint paper, the results of this pilot indicate that pre-trial cross-examination 'results in a better experience for witnesses, with the cross-examination taking place in around half the time compared to other cases, and also showed an increase in early guilty pleas by defendants'.<sup>5</sup>

When the scheme is rolled out nationally in England and Wales next year, it will mark a major shift in how criminal courts operate across the Irish Sea. For centuries, victims and witnesses have been expected to physically attend and, deliver their evidence live, in court in front of both members of the jury and the criminal accused. In enabling jurors to make judgements about the reliability of a witness's account based on his or her demeanour in court, the live delivery of testimony has long been seen as an important evidentiary safeguard within the adversarial model of trial justice. In other words, it was seen as an essential ingredient in securing a fair trial for the criminal accused. Moreover, there was a significant practical argument against conducting this process pre-trial. Essentially, it was felt that by staging cross-examination earlier in proceedings both police and prosecutors would encounter significant difficulties in meeting their disclosure obligations. Given that the legal representatives of an accused can only effectively cross-examine a witness once they have received full disclosure of

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<sup>1</sup> Ministry of Justice, *Transforming Our Justice System: By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals* (Joint Statement, Ministry of Justice September 2016).

<sup>2</sup> *ibid* 3.

<sup>3</sup> It should be noted that the use of pre-trial cross-examination has been statutorily prescribed in England and Wales since 1999 under section 28 of the Youth Justice and Criminal Evidence Act 1999. However, at the time of writing, this provision has yet to be legally implemented.

<sup>4</sup> The chosen Crown Courts for the pilot scheme were Liverpool, Leeds and Kingston-Upon-Thames. For a greater exploration of the formalities associated with the pilot, see Judiciary of England and Wales, *Judicial Protocol on the Implementation of Section 28 of the Youth Justice and Criminal Evidence Act 1999: Pre-recording of Cross-examination and Re-examination* (Protocol, September 2014).

<sup>5</sup> Ministry of Justice, *Transforming Our Justice System* (n 1) 8.

all prosecution evidence, expedited examination posed the obvious risk that some evidence may not have been disclosed to the defence by the scheduled interview date.<sup>6</sup>

It is almost certainly for these reasons that Irish policymakers have traditionally been reluctant to meaningfully entertain the prospect of reforming this area of trial practice. Thus, while we have seen some significant developments in Irish criminal process in recent years with a view to improving the experience of vulnerable witnesses - such as the admission of live tv link testimony, the introduction of intermediaries and the recognition of recorded examination-in-chief- the position nevertheless remains that vulnerable witnesses must be available to attend court on the day of trial for live cross-examination. Even for the most assiduous and indefatigable of witnesses this process can be intimidating, but for vulnerable witnesses- such as those who, for instance, are children or have an intellectual disability- the ordeal is arguably heightened.

Owing to their limited cognitive development, such witnesses can encounter significant difficulties in understanding, recalling and communicating the details of a criminal event.<sup>7</sup> These difficulties, research has shown, are in turn compounded by the intimidating setting and formality of the courtroom.<sup>8</sup> On a moralistic level then, it is difficult to justify Ireland's enduring subscription to this process. Nor, it would seem, can this procedural imperative be justified on instrumental grounds. In insisting that cross-examination be delayed until the formal trial date, traditional adversarial practice not only poses the serious risk of narrative distortion (given the likelihood of a vulnerable witness's memory degrading over time), but it also poses a significant risk of attrition (given the likelihood of a witness dis-engaging with the criminal process over time due to mounting anxiety at the prospect of going to court).

Moreover, the evidentiary concerns routinely cited to justify our continued subscription to live cross-examination appear to be over-stated. Consistent research by Graham Davies in England, for instance, suggests that the medium of presentation of evidence has no material impact of the overall decision-making process of the jury.<sup>9</sup> With regard to the traditional disclosure argument, the experience of the police and Crown Prosecution Service in England, who participated in the pilot scheme, suggest that this fear is unfounded. Indeed, in the Ministry of Justice's formal process evaluation of the pilot (which too was launched last week), it was found that '[d]espite the concerns held

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<sup>6</sup> For greater discussion of this disclosure concern see JR Spencer, 'Introduction', in JR Spencer and Michael Lamb (eds.), *Children and Cross-Examination: Time to Change the Rules?* (Hart 2012) 13.

<sup>7</sup> Marguerite Ternes and John Yuille, 'Eyewitness Memory and Eyewitness Identification Performance in Adults with Intellectual Disabilities' (2008) 21 *Journal of Applied Research in Intellectual Disabilities* 519; Mark Kebell and others, 'People with Learning Disabilities as Witnesses in Court: What Questions Should Lawyers Ask?' (2001) 29 *British Journal of Learning Disabilities* 98. See also Andrew Sanders and others, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (Oxford 1997).

<sup>8</sup> Claire Edwards, Gillian Harold and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (UCC 2012). See also Rosie McLeod and others, *Court Experience of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 3: At Court* (Ministry of Justice Research Series 10/10, 2010).

<sup>9</sup> Graham Davies, 'The Impact of Television on the Presentation and Reception of Children's Testimony' (1999) 22 *International Journal of Law and Psychiatry* 241; Graham Davies and others, *Videotaping Children's Evidence: An Evaluation* (Home Office 1995) and Graham Davies and Elizabeth Noon, *An Evaluation of the Live Link for Child Witnesses* (Home Office 1991).

by the police, third party disclosure did not appear to be a substantial problem for CPS prosecutors, defence advocates of judges'.<sup>10</sup>

Ireland, it is submitted, should follow the lead of our Commonwealth neighbours on this issue. With our approaching (and long overdue) transposition of the Victims' Directive, we have a unique opportunity to re-examine the formalities of the Irish criminal trial with a view to yielding a more inclusionary paradigm.<sup>11</sup> Article 23(2)(a) of the Directive compels Member States to put in place, for vulnerable victims, 'measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of communication technology'. The first step in meeting our obligation under this instrument is to establish pre-trial cross-examination on a statutory basis in this jurisdiction. In heeding the overwhelmingly positive reports emerging from the Ministry of Justice's pilot scheme, the Irish framework should, at a minimum, replicate the scheme poised for introduction in England and Wales in 2017. However, Irish policymakers should also be emboldened to take this reformative exercise one step further by providing the measure to both vulnerable witnesses and vulnerable defendants alike. To restrict the benefit of pre-trial cross-examination solely to witnesses and victims- as is the case, for instance, in England and Wales<sup>12</sup>- would not only be to deprive Irish courts of a vulnerable defendant's best evidence but it would also, arguably, be to infringe the sacrosanct due process principle of equality of arms.

Pre-trial recording of the cross-examination of vulnerable witnesses is not a new idea. Back in 1989, the Pigot Committee advocated the implementation of such a scheme in England and Wales.<sup>13</sup> While more recently in Ireland, the Irish Council for Civil Liberties recommended in a 2013 report that 'provision...should be made to permit video recorded cross-examination or re-examination of vulnerable witnesses'.<sup>14</sup> It is high time that these calls for reform were acknowledged and responded to by Irish policymakers. After all there is a strong public interest in empowering vulnerable witnesses to give their best evidence in court, not only in the moral sense of ensuring that the legitimate expectations of all court users are equally met within our criminal justice process, but also in the instrumental sense of making sure that those who prey on some of the most vulnerable members of our society are brought to justice.

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Alan Cusack

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<sup>10</sup> John Baverstock, *Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28)* (Ministry of Justice Analytical Series, Ministry of Justice 2016) 30.

<sup>11</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57 (Victims' Directive). The Victims' Directive was adopted in October 2012 and entered into force on 15 November 2012, giving Ireland three years to implement the provisions.

<sup>12</sup> Section 16 of the Youth Justice and Criminal Evidence Act 1999 expressly directs that accused persons are ineligible for applying for a special measures direction. For a convincing criticism of the uneven provision of special measures on a statutory basis in England and Wales, see Laura Hoyano, 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' [2015] *Criminal Law Review* 107.

<sup>13</sup> Home Office, *Report of the Advisory Group on Video Evidence* (Home Office 1989).

<sup>14</sup> Shane Kilcommins, Claire Edwards and Tina O'Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (Irish Council for Civil Liberties 2013) 227.