Accommodations for witnesses with communication difficulties in Irish criminal proceedings: An examination in relation to Article 13.1

Catherine O’Leary
Accommodations for witnesses with communication difficulties in Irish criminal proceedings: An examination in relation to Article 13.1

Catherine O'Leary

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Under the supervision of Dr Michael Feely

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Date: 25th August 2016
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<tr>
<td>AAC</td>
<td>Alternative and Augmentative Communication</td>
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<tr>
<td>CGT</td>
<td>Constructivist grounded theory</td>
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<tr>
<td>CJS</td>
<td>Criminal justice system</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<td>GT</td>
<td>Grounded theory</td>
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<tr>
<td>HRBA</td>
<td>Human rights based approach</td>
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<td>ICD 10</td>
<td>International Classification of Disease 10</td>
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<td>ID</td>
<td>Intellectual disability/ies</td>
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<td>LRC</td>
<td>Law Reform Commission</td>
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<td>PwCD</td>
<td>People with communication disabilities</td>
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<td>PwD</td>
<td>People with disabilities</td>
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<td>The Act</td>
<td>Criminal Evidence Act 1992</td>
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<td>UN</td>
<td>United Nations</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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### An additional note on terminology:

Within legislation, outdated terminology and descriptions which do not align with this study’s conceptualisation of disability, are used. Examples include ‘mental handicap’ and ‘vulnerable people’. When the use of such words is necessary to accurately reflect the current legal context, they will be included between single quotation marks, to indicate that they are the words of others, and not of the researcher.
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In memory of my father, Sean. I'm still realising the things you taught me.
1. Introduction

1.1 Introduction

This chapter will introduce the Convention on the Right of Persons with Disabilities [CRPD] (United Nations, 2006) to the reader, with specific focus on the legal rights enshrined within. Ireland’s CRPD ratification status will be described as well as current accommodation practices for witnesses with communication difficulties in Ireland. Following this, the aims of the present study will be given.

1.2 UN CRPD and the legal rights of those with disabilities

The CRPD was adopted by the United Nations [UN] in December 2006 and was the first international human rights treaty of the 21st century (Quinn, 2009). In its preamble, the CRPD recognises that those with disabilities continue to face barriers to full participation in society, as well as violations of their human rights. It outlines the responsibility of State Parties to create societies which recognise the common humanity of those with disabilities and to adapt to accommodate natural diversity in ability (Chan, French, Hudson, & Webber, 2012). It declares rights for people with disabilities in many areas including education, employment and accessibility.

While Ireland was one of the first signatories to the CRPD, doing so on 30th March 2007, it has yet to ratify the Convention. According to Doyle and Flynn (2013), the prolonged wait is as a result of Ireland being a dualist State. This requires incompatible legislation in national law be amended before an international treaty adopted. According to Minister Finian McGrath, Ireland’s Minister with responsibility for disability, Ireland will be in a position to ratify the CRPD by the end of 2016 (Holland, 2016).

Articles 12 and 13 of the CRPD specifically address the barriers faced by those with disabilities in legal contexts. Article 12 outlines the right to equal recognition before the law and the right to exercise legal capacity. In practice, it signals a move from disabling guardianship arrangements to facilitated decision-making processes. This Article has been described as the most contested of the Convention (Dinerstein, 2011), it’s language as “deceptively simple” (Dinerstein, 2011, p. 8) and the path to its implementation as complex (Dinerstein, 2011; Doyle & Flynn, 2013). However, despite these challenges, Article 12 has been described as “the beating heart of the Convention” and the issue of legal capacity has successfully secured the attention of legislative reformers around the globe (Commissioner...
for Human Rights, 2012, p. 21). Ireland provides an example of such reform. Under the *Lunacy Regulation Act 1871* (*"Lunacy Regulation (Ireland) Act (Irl.),"* 1871), it is possible for those with intellectual disabilities and mental health needs to be made Wards of Court. This results in the removal of their legal capacity to make all decisions relating to their personal affairs. The Act was replaced with the passing of the *Assisted Decision Making (Capacity) Act 2015* (*"Assisted Decision-Making (Capacity) Act (Irl.),"* 2015) in December 2015. Once enacted, this will remove the Wardship system, assume capacity, and provide supports to aid decision-making as and when required.

While Article 12 addresses the area of legal capacity, Article 13 outlines the responsibility of State Parties to ensure effective access to justice for persons with disabilities on an equal basis with others. Access to justice has been defined as “peoples' effective access to the systems, procedures, information, and locations used in the administration of justice” (Ortoleva, 2011, p. 282). In Article 13.1, the Convention states:

> “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”

The inclusion of this Article in the CRPD reflects existing evidence that people with disabilities face multiple barriers in accessing the justice system. For example, people with disabilities are more likely to be victims of crime, less likely to report these offences and less likely to have the perpetrator successfully convicted (C. Edwards, Harold, & Kilcommins, 2012; Flynn, 2015; Law Reform Commission, 2013; Petersilia, 2000). The barriers to justice encountered by those with disabilities will be discussed in greater detail in Chapter Two.

The second and final component of this Article promotes the role of training for all individuals working in the justice system. Article 13.2 states:

> “In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff”
1.3 Accommodations in Irish courtrooms: a focus on communication difficulties

The provision of procedural and age-appropriate accommodations, as required under Article 13.1, is inextricably linked with Article 9 of the CRPD. Article 9 necessitates the provision of accessible environments to enable participation. Within the courtroom, the symbolic location of justice, it is recognised that a number of environmental barriers are present. According to Flynn (2015), physical barriers to participation exist in the traditional designs of courts. For example, the entrances to court buildings are, for symbolic reasons, often purposely placed at the top of flights of steps. Witnesses are questioned in raised and walled witness boxes for similar symbolic reasons. In Ireland, courts, as public places, are required to meet certain accessibility criteria under the Disability Act 2005 ("Disability Act (Irl.)," 2005). However, accessibility is not achieved solely with physical changes. According to Flynn (2015), once the challenges of the physical environment are addressed, the challenge remains to make the communication environment of courtrooms accessible. The communication demands of courtroom participants are high and are explored extensively in Chapter Two. Central to these demands is the courts adoption of a principle of orality, that is, the giving of live oral evidence. This benefits those who have the ability to clearly describe their circumstances (C. Edwards et al., 2012). Those with disabilities affecting communication are a distinct disadvantage during participation. Both Articles 9 and 13 outline the responsibility to provide accommodations to mediate this inequality.

Article 13.1 of the Convention applies to both civil and criminal proceedings, and to all roles within the justice system. However, in Ireland, accommodations are not universally available. Under Legal Aid Circular 2/2007 (Brady, 2007), very specific provisions are made for parents with intellectual disabilities in civil child care proceedings. In such cases, parents may be entitled to support from an appropriate person in order to assist in understanding the legal process and to give instructions to their legal representative. No other provisions are legislated for in civil proceedings. In criminal proceedings, while defendants are not entitled to the receipt of any accommodations, under the Criminal Evidence Act 1992 ("Criminal Evidence Act (Irl.)," 1992), specific categories of witnesses are. Under this Act, those with a ‘mental handicap’, along with children and alleged victims of violent or sexual abuse, are entitled to certain adaptations to criminal courtroom proceedings. These will be described in detail in Chapter Two.
1.4 The current study

In contrast to the area of legal capacity, Article 13, access to justice and courtroom accommodations have received little attention by Irish researchers, advocates and reformers. In its Roadmap to Ratification, the Irish Government set out the legislative measures it views as necessary in order to meet the requirements of the CRPD (Department of Justice and Equality, 2015). This document is silent on the issue of accommodations to support witnesses with communication difficulties in the courtroom. It is unclear whether this indicates Governmental satisfaction with current measures of the Criminal Evidence Act 1992 or an oversight of this issue when identifying areas for reform. No research studies have examined the current Irish accommodations for witnesses with communication difficulties in light of Article 13.1 of the CRPD. Given Ireland’s impending ratification, it is a critical time to address this gap and examine our practices in this area.

Therefore, the aim of this study was to explore the current accommodations for witnesses with communication difficulties in criminal proceedings in Ireland, and to examine these in light of Ireland’s obligations under Article 13.1 of the UN CRPD. More specifically, the study sought to explore the following research questions:

1. How effective do participants believe the accommodations of the Criminal Evidence Act 1992 are in supporting witnesses with communication difficulties in criminal proceedings?
2. How do participants view current Irish accommodation practices, when compared to the obligations of Article 13.1 of the UN CRPD?
3. What, if any, situational factors impact on the development of accommodations for witnesses with communication difficulties in the Irish criminal justice system?

In order to explore the above questions, the study collected data from professional disability advocates and legal professionals. This data was analysed to generate an understanding of participants’ interpretations of current accommodations, in comparison to Ireland’s upcoming obligations under Article 13.1. Data was analysed further to develop a theoretical understanding of factors affecting the provision of accommodations for witnesses with communication difficulties in criminal proceedings in Ireland. This was done from a socio-legal perspective.

Subsequent chapters provide a detailed account of this research. Chapter Two outlines relevant existing literature, which serves to place the study in context. Key topics considered
include barriers to justice experienced by people with disabilities, the specific challenges faced by people with communication difficulties in the courtroom and current Irish and international accommodation practices. Chapter Three provides an overview of the study’s methodology, outlining both the study’s philosophical standpoint and the practical steps taken throughout the study design, data collection and analysis stages. Chapter Four provides a synthesis of the study’s findings, which are discussed in light of the existing literature in Chapter Five. The Appendices contain supplementary information, including the study’s interview schedule, an example of an interview transcript and examples of each stage of the data analysis process.
2. Literature review

2.1 Literature search strategy

The literature for the current study was sourced through two mechanisms. As a result of her interest in the topic, the researcher had organically collected related literature over the course of a number of years preceding the commencement of the current study. This was used as a starting point, and the reference lists of these studies searched for other relevant material. Additionally, the databases Academic Search Complete and PsychARTICLES were searched. Combinations of key terms were searched using Boolean terms. These terms included victim, witness, crime, disab*, criminal*, prosecut*, “access to justice”, communicat*, prevalence, support, accommodation, CRPD and Article 13. Searches were restricted to results dated from 2000 onwards to identify the most recent research but to allow for literature published both before and after publication of the CRPD to be found.

2.2 Defining disability

The World Health Organisation [WHO] (2011) state that the meaning of disability is both complex and contested. Definitions differ significantly depending on the model of disability adopted by an individual or organisation. Arguably, the predominant model of disability in post-industrialised nations is the medical model. Garcia Iriarte (2015) describes the medical model as that which problematises the individual and their impairments, and not the environment in which they exist. It often uses ‘personal tragedy' terminology such as ‘sufferer' or ‘confined to a wheelchair', to describe disability. It relies on medical expertise over the expertise of people with disabilities. Critics lament the significant efforts to cure disability under this model. The WHO (2011) perceive a widespread move away from the medical model towards a more social conceptualisation of disability in recent years. The social model of disability problematises society and not the individual. It sees disability as a consequence of societal barriers to participation faced by those with disabilities, and not their impairments. This model has also faced criticism. It is said that the social model does not recognise the impact of an individual's specific impairment on their experience (Garcia Iriarte, 2015).

The medical and social models of disability are often considered the traditional dichotomous models of disability. However, more dynamic models exist. As a “workable compromise” between these medical and social models, the World Report on Disability adopted a bio-
psycho-social model of disability (World Health Organisation, 2011, p. 4). The bio-psycho-social model views disability as an interaction between health conditions and contextual environmental factors. However, as with all models, criticism exists. Critics have rejected the bio-psycho-social model as it continues to associate disability with health (Barnes and Mercer, as cited by Garcia Iriarte, 2015). In contrast, the human rights based approach [HRBA] to disability rejects any attempt to classify disability in health terms, and views the consequences of disability as deprivations of human rights. The HRBA is motivated by the principles of empowerment, participation, equality and non-discrimination (EAPN Ireland, 2007). Hurst (2003) encourages a combined consideration of the bio-psycho-social model and HRBA to disability. Together, Hurst claims, they can expand society’s view of disability as a multifactorial experience. It promotes an understanding that the negative consequences of disability are influenced by personal and environmental factors, and are rights-based issues. This is the conceptualisation of disability which will be used by the current study.

The CRPD falls short of the combined bio-psycho-social and HRBA conceptualisation of disability described by Hurst (2003), by not acknowledging the impact of individual medical circumstances on a person’s experience. The CRPD conceptualises disability as a hybrid of the social model and the HRBA (Ortoleva, 2011; Quinn, 2009; Stein & Lord, 2008). This view of disability has been described as transformative (Ortoleva, 2011) due to its ability to jointly advocate for the rights of people with disabilities, alongside the responsibilities of society to adapt. It is unfortunate that a clear definition of disability using this combined conceptualisation is not provided within the CRPD. According to Garcia Iriarte (2015) its’ authors resisted providing a definition, due to concerns that any such definition could result in the exclusion of those with specific disabilities who require the protection of the treaty.

In Ireland, there are a number of working definitions of disability in legislation. Arguably the most commonly used is that of the Disability Act 2005. It states that disability is “a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment”. The definition contained within the Disability Act 2005 falls short of acknowledging the role of society in causing disability. However, it acknowledges that disability is not solely due to impairment, but due to restricted participation in occupational, social and cultural life.
2.3 The link between disability and communication difficulties

The current study will focus on the experiences of those with disabilities affecting communication. The literature uses the term ‘communication disorders’ to describe conditions which interfere with communication. Given the medical connotations of the term ‘disorder’, the word difficulties will be used in its place in this study, to reflect the bio-psycho-social and HRBA models which influence the research.

Communication difficulties are defined as any challenge which interferes with a person successfully exchanging information and ideas (Owens, 2011). They can be due to difficulties understanding, difficulties using words and sentences, or difficulties with speech production. Deafness or hearing impairment are not considered as communication difficulties for the purpose of this study in recognition of the Deaf community’s belief that deafness is a communication difference, and not a difficulty (Davis, 2006). The International Classification of Disease (ICD 10) (World Health Organisation, 1992) recognises that communication difficulties have multiple aetiologies. Developmental communication difficulties include specific speech difficulties, as well as receptive and expressive language difficulties. Communication difficulties can also be a component of other diagnoses, including intellectual disability, autism, dementia and acquired impairments such as traumatic brain injury. The impact of communication difficulties on life outcomes are broad, with consequences including reduced literacy skills, low employability, increased risk of mental health difficulties and higher rates of criminal offending (Office of the Communication Champion, 2011).

The epidemiology of communication difficulties is not well developed. This is as a result of a tendency to collect statistics on the prevalence of specific diagnosed diseases, and not on the prevalence of communication difficulties which exist as a consequence (Threats, 2006). In Ireland, Census 2011 figures provide figures of the number of people experiencing specific categories of impairment (Central Statistics Office, 2012). 57,709 people were reported as having an intellectual impairment, 137,070 as having a difficulty in learning, remembering or concentrating, and 96,004 as having a psychological or emotional condition. It is not known how many of these individuals experience difficulties that fall within the definition of communication difficulties used in the current study.

In practice, much of the literature in the area of crime, access to justice and courtroom accommodations relate to the experiences of those with intellectual disabilities [ID]. However, this study will examine a broader range of communication difficulties than those
solely resulting from intellectual disability. This is in recognition of the common rights held by all individuals with communication difficulties, irrespective of their cause, to receive accommodations to support their participation in criminal proceedings. In the subsequent review of the literature, efforts have been made to frame the cited research appropriately, by sign-posting when research relates to those with intellectual disability and which related to other groups of those with communication difficulties.

2.4 People with disabilities as witnesses and victims of crime

Individuals become witnesses to criminal proceedings via two primary mechanisms, either by being a non-victim witness to a criminal event or by being an alleged victim of criminal behaviour. No research was found which explores the prevalence of those with disabilities witnessing crimes to which they have not been a victim. However, literature exists which suggests that individuals with disabilities are at increased risk of themselves being victims of crime. Sobsey, Lucardie, and Mansell (1995, as cited by Petersilia, 2000) report that individuals with developmental disabilities are four to ten times more likely to be victims of crime than non-disabled citizens. While increased rates have been found across a number of crimes including assault, robbery and financial abuse, rates of sexual assault are particularly inflated, with estimates at 10.7 times more than the general population (Fogden, Thomas, Daffern, & Ogloff, 2016; Petersilia, 2000). Studies also show that there is a higher probability that individuals with disabilities are subjected to repeat victimisation (Fogden et al., 2016; Nelson Bryen, Carey, & Frantz, 2003; Petersilia, 2000). According to Petersilia (2000), this can be explained by the fact that crimes against people with disabilities are often committed by individuals who hold ongoing, dominant roles in their lives such as care providers and family members.

Nelson Bryen, Carey and Frantz (2003) conducted a study which specifically focussed on experiences of crime by people with physical disabilities and who use an alternative and augmentative (AAC) system. AAC is defined as any non-oral method of communication which enhances communication ability. AAC systems can be unaided or aided. Unaided systems use only the body to support communication, as in the case of sign language. Aided systems use external devices to support communication. Examples include low-tech communication boards and high-tech voice-output communication devices (American Speech-Language-Hearing Association, 2016). In the study conducted by Nelson Bryen and colleagues, 45% of the forty respondents to the study’s survey reported being victims of crime. It was not possible to compare this rate to that of the general population. Therefore, it cannot be concluded that rates of crime victimisation are higher for AAC users than for non-
AAC users. However, the study established that the most common type of crimes against participants who use AAC was theft, followed by threats of physical harm, actual physical harm, and sexual assault.

Fogden, Thomas, Daffern and Ogloff (2016) suggest caution when making final conclusions regarding rates of victimisation amongst people with disabilities. While the literature is suggestive of higher rates, they cite differing definitions of disability across studies, a limited amount of research, and an over-reliance on self-reported retrospective data which is dependent on memory and recall from individuals who may find such skills challenging.

2.5 Barriers to accessing criminal justice experienced by those with disabilities

Irrespective of the reason for a person’s involvement, be it as a victim, witness or accused, accessing criminal justice not a singular event. It is a process which involves interaction with multiple agencies. In Ireland, this includes the Gardaí Síochána, the Courts Service and the Director of Public Prosecutions [DPP]. It also involves engagement in a series of activities which includes obtaining and instructing legal representation, providing a statement and testifying in court (C. Edwards et al., 2012). People with disabilities face difficulties navigating many aspects of the complex process of criminal justice. This results in an unequal ability to access justice (Ortoleva, 2011). While a comprehensive review of all barriers to accessing justice is beyond the scope of the current study, attention is now drawn to key issues.

In order to initiate engagement with the criminal justice system, victims and witnesses must report the crime to law enforcement. When the victim of a crime has a disability, studies have shown that rates of reporting are low. In one study, it was estimated that between 40-70% of crime against people with intellectual disability went unreported, and the more severe a person’s disability, the less likely it was that their crime would be reported (Petersilia, 2000). Bartlett and Mears (2012) analysed data on sexual violence against people with a variety of types of disability. They found 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 the authorities. Edwards at al. (2012) signal the need to interpret such figures with due consideration of the recognised under-reporting of crime amongst the general population. However, they accept that even when this is taken into account, rates of reporting are still lower amongst those with disabilities. The literature cites a number of contributory factors. A lack of knowledge of criminal behaviour, of legal rights and of how to report a crime have been found amongst those with disabilities (C. Edwards et al., 2012;
Flynn, 2015). These are linked with the poor availability of legal information in accessible formats (Flynn, 2015; Ortoleva, 2011). Additionally, Fogden et al. (2016) state that as crimes against people with intellectual disabilities are more likely to be perpetrated by those in positions of power in their lives, such as carers and family members, victims are unable to access usual support structures to assist in reporting a crime.

In instances where a crime is successfully reported, a process of investigation is initiated and legal representation is required. People with disabilities can find it difficult to obtain legal representation. Issues of availability and affordability of representation exist across all marginalised groups (Ortoleva, 2011), while individuals with disabilities face the additional challenge that many legal professionals are not experienced in working with people with disabilities (C. Edwards et al., 2012). On securing representation, clients are required to instruct their lawyer. This requires an understanding of the subject matter in question and an ability to express their views regarding the facts of the case (Bartlett, Lewis & Thorold, as cited by Flynn, 2015), activities which may be challenging for those with disabilities affecting communication. Interactions with police services are also an essential component of the investigative process. Police recognition of disability can be inconsistent (Burton, Evans, & Sanders, 2007; Douglas & Cuskelley, 2012; C. Edwards et al., 2012; J. Jones, 2007) and negative perceptions regarding the reliability of claims by complainants with disabilities may result in claims not investigated further (C. Edwards et al., 2012). For people with ID who are questioned about alleged illegal activity, understanding legal cautions can be problematic and acquiescence during interviewing commonplace (J. Jones, 2007).

In cases which overcome the challenges of the reporting and investigative stages of criminal justice, the pursuance of a prosecution is a further hurdle. In the Irish context, public prosecutors are required to consider whether the reliability of evidence is affected by ‘physical or mental illness’ or ‘infirmity’ and, in the case of ‘mentally handicapped witnesses’, if they are ‘capable of giving an intelligible account of events which are relevant to the proceedings’ (Office of the Director of Public Prosecutions, 2010, p. 18). The language used is outdated and disabling, and according to the Edwards et al. (2012), projects the opinion that the evidence of those with disabilities is considered substandard, an assumption which they reject. In fact, those with ID and autism have been found to capable of remembering specific details of crime and of being less open to distortion of facts, key requirements for reliable testimony (Petersilia, 2000). In Ireland, data is not available which speaks to the prevalence of alleged crime against people with disabilities or the percentage of these cases which are taken to trial (Kilcommins, Edwards, & O’Sullivan, 2013). This does not allow the measurement of the impact of prosecutorial barriers to achieving justice. However, Inclusion
Ireland, the national advocacy body for people with intellectual disabilities, has stated that it is aware of many cases which have failed to proceed to prosecution as a result of alleged victims having disabilities (Inclusion Ireland, 2011).

Finally, for cases which overcome prosecutorial barriers, attendance at a criminal trial may be necessary. For individuals who attend courtroom proceedings, whether they have a disability or not, the experience is highly affecting. Acting as a witness is recognised as a ‘terrifying’, ‘intimidating’ and ‘confusing’ ordeal (Burton et al., 2007). Defendants have described the experience as ‘stressful’, ‘nerve-wracking’, ‘frightening’ and ‘shocking’ (Talbot, 2008). However, given the principle of orality within courtroom proceedings, it is particularly challenging for those who have disabilities affecting communication.

2.6 Communication demands of courtroom participation

Participation in courtroom proceedings draws on a wide range of linguistic and non-linguistic communication skills. The challenges experienced vary from person to person, depending on their communication profile and the circumstances of their involvement.

2.6.1 Comprehension difficulties

For those with comprehension difficulties, understanding announcements, instructions to the jury, verdicts and written documents may be challenging (Flynn, 2015). Talbot (2008) offers an insight into such challenges by sharing the following quote from an offender with learning difficulties:

“I didn’t know what was going on and there’s no one to explain things to you. They tell you to read things and in court you can’t just ask for help. The judge thinks you can read and write just because you can speak English.”

(Talbot, 2008, p. 22)

Court proceedings expose participants to large amounts of unfamiliar legal vocabulary such as ‘criminal’, ‘evidence’, ‘defendant’. ‘guilty’ and ‘objection’. In a study of adults with developmental disabilities, statistically significant differences were found in the understanding of 33 out of 34 legal terms when compared to non-disabled peers (Ericson &
Perlman, 2001). Talbot (2008) highlights the potential consequences of such challenges in the following quote provided by a prisoner:

‘I didn’t understand really. I pleaded guilty straight away. I didn’t know what he meant when he said custodial.’

(Talbot, 2008, p. 22)

In addition to difficulties understanding legal processes and legal vocabulary, direct questioning regarding the case at hand places comprehension demands on participants. Understanding questions asked by legal professionals relies on semantic and morphosyntactic skills. Understanding of time concepts, such as ‘earlier’, ‘after’, and ‘before’, are often vital in the provision of evidence, time-lines and alibis, and can prove challenging (Hanna, Davies, Henderson, & Hand, 2013). Research has shown that questions in cross-examination use highly complex syntax, semantics and sequential language (Zajac & Hayne, 2006). Brennan and Brennan (as cited by Nair, 2009) draw attention to the frequent presence of double negatives and rhetorical questions during questioning. The use of tag questions and clauses often occur in cross examination, and these present particular confusion (Hanna et al., 2013).

Tag question: “Mum told you something happened to her, didn’t she?”

Subordinate clause: “You knew that, if you told somebody that Bob had touched you, then Bob would get into trouble”

(Hanna et al., 2013, p. 20)

Cross-examination techniques are confrontational in nature, given the adversarial nature of the criminal justice system (Nair, 2009; Zajac & Hayne, 2006). Questions can be asked repeatedly in order to obtain the desired answers (The Advocate's Gateway, 2015), a process which has been described as harassing, intimidating and misleading (Nair, 2009). Of particular concern is the use of leading questions, which are a key tool of cross examination. Research involving those with intellectual disabilities has found increased vulnerability to suggestion which, it is hypothesised, is due to language comprehension difficulties, as well as acquiescence, susceptibility to influence by figures of authority and concentration difficulties (Milne & Bull, 2001). Lawyers interviewed by LaVigne and Van Rybroek (2013) reported that those with language difficulties whom they encountered often claimed to understand when it was clear that they didn’t. A participant with learning difficulties interviewed by Talbot (2008) stated:
“I couldn’t understand but I said ‘yes, whatever’ to anything because if I say, ‘I don’t know’ they look at me as if I’m thick.”

(Talbot, 2008, p. 21)

2.6.2 Expressive speech and language difficulties

In addition to those who experience difficulties with language understanding, participants with expressive language difficulties also face challenges in the courtroom. This is due to the requirement to give evidence *viva voce*, meaning orally and in person. Narratives are the initial basis of testimony, which are later questioned and challenged in order to reveal specific details (Nair, 2009). To provide a cohesive and accurate narrative, a wide range of skills are required. Memory recall, expressive vocabulary, morpho-syntactic proficiency, knowledge of narrative structure, sequencing skills, and ability to use conjunctions, clauses, causal and temporal terms are all required (Milne & Bull, 2001; Segal & Pesco, 2015; Spencer, Kajian, Petersen, & Bilyk, 2013; Wetherell, Botting, & Conti-Ramsden, 2007).

For those whose difficulties do not relate to language, but to speech production, challenges to participation also exist. Phonological, articulation and motor speech difficulties affect speaker intelligibility and the ability to communicate messages clearly to lawyers, jurors and judges. Dysfluency, commonly referred to as stammering or stuttering, is closely related to environmental demands, including linguistic, cognitive and emotional demands (Adams, 1990; Byrd & Gillam, 2011). The higher the demands, the less capacity which remains to produce fluent speech. Therefore, the demands of the courtroom environment are likely to increase dysfluent behaviour and reduce communication capacity.

2.6.3 Pragmatic language difficulties

Pragmatic language difficulties are those which facilitate successful communication in social contexts. They relate to the unspoken rules of conversation such as taking conversational turns, being aware and responsive to conversational partners’ needs, initiating and maintaining conversation topics, and practicing culturally appropriate eye contact and personal boundaries (Owens, 2011). Pragmatic difficulties are most commonly associated with autism spectrum disorder, as their presence is a criterion for diagnosis (American Psychiatric Association, 2013). Difficulties with pragmatic language can result in communication behaviours which are negatively interpreted by judges and juries, such as interrupting barristers, speaking at length about topics irrelevant to proceedings or averting their gaze from their questioner (Allely, 2015; The Advocate's Gateway, 2013).
2.7 Current accommodations for witnesses in Irish criminal proceedings

The criminal trial process was not originally designed to facilitate those with the communication difficulties (Law Reform Commission, 2013). However, specific adaptations were introduced by the Criminal Evidence Act 1992, suggesting a level of awareness of the differing needs of certain participants in the justice system. Under this Act, witnesses who are children, who have a 'mental handicap', or who are alleged victims of sexual abuse, are entitled to certain accommodations. Firstly, legal professionals remove wigs and gowns to deformalize proceedings. Secondly, the giving of primary evidence (termed evidence-in-chief) in a pre-recorded video interview is permitted. Thirdly, witnesses are facilitated to give further evidence and be cross examined via video link from outside the courtroom. Fourthly and finally, the Act provides for an intermediary system. While no Irish definition of an intermediary exists, in England and Wales, they have been defined as a person whose responsibility is “to enable complete, coherent and accurate communication to take place between a witness who requires special measures and the court” (Ministry of Justice, 2015, p. 8). They are typically professionals with a relevant specialisations such as psychology or speech and language therapy (O’Mahony, 2010).

While the above adaptations offer a level of accommodation for qualifying witnesses, concerns have been expressed that they do not adequately address the barriers faced by witnesses with communication difficulties (C. Edwards et al., 2012; Kilcommins et al., 2013). The removal of wigs and gowns, as well as the ability to give live evidence via video link, have been explained as attempts reduce witness’ exposure to the hostile courtroom environment (C. Edwards et al., 2012). However, these adaptations do little, if anything, to address the communication demands of participation, as they do not alter the linguistic elements of the process. Concerns have also been expressed that alleged victims with disabilities in sexual assault cases have been denied the opportunity to access such accommodations, as if deemed they are deemed eligible for this support, their ‘vulnerability’ in the eyes of the law would be proven. This, it has been said, would influence the jury in the consideration of charges under the Criminal Law (Sexual Offences) Act 1993 (“Criminal Law (Sexual Offences) Act (Irl.),” 1993) which make it illegal to have sexual intercourse with a person who is ‘mentally impaired’ (Kilcommins et al., 2013).

There is more positive regard for the ability to pre-record a witness’ evidence-in-chief. This measure allows the questioner to take time to attune to the communication of the witness by
developing an awareness of their levels of comprehension and expression before the interview, something which is not possible within the courtroom process (Delahunt, 2015). It also allows evidence to be collected closer to the time of the alleged incident, leading to greater detail to be recorded (Law Reform Commission, 2013). However, the necessity for witnesses to be cross-examined on this evidence during the live-trial is not addressed by this measure (C. Edwards et al., 2012).

The use of intermediaries is recognised as a potentially useful means of reducing courtroom communication demands. However, it is seldom used. While the intermediary system has been provided for since 1992, it is reported to have only been used once in the Irish courts ("Father forced son to have sex with mother, court told.," 2016). Concerns have also been expressed that the use of an intermediary could introduced bias into the proceedings, by advertently or inadvertently pressurising a witness to respond in a particular manner (C. Edwards et al., 2012). In practice, the availability of intermediaries in Ireland has been described as “ad hoc” (Law Reform Commission, 2013, p. 108) and their existence lacking in “legislative detail and procedural guidance” (Delahunt, 2015, p. 65).

In summary, while a number of adaptations to procedures exists for witnesses who have a ‘mental handicap’, legal commentary has questioned whether these go far enough to empower and enable participation of those with communication difficulties.

2.8 International accommodation practices

The accommodations provided for by the Criminal Evidence Act 1992 in Ireland are commonly seen in other jurisdictions. Kilcommins at al. (2013) reviewed practices in Ireland, England and Wales, Northern Ireland, Scotland, New Zealand, Canada and Australia. Across these seven jurisdictions, live evidence is permitted via video link in seven countries and the provision of pre-recorded evidence-in-chief is permitted in five countries. Intermediaries are available in three jurisdictions. In addition to these accommodations, the literature contains examples of further accommodations which are not available in Ireland. Those which are most pertinent to the communication environment of the courtroom and the communication demands of witness participation are now briefly reviewed.
2.8.1 Overcoming the demands of the adversarial process

As previously mentioned, the adversarial nature of cross-examination can result in psychologically and linguistically demanding situations for witnesses with communication difficulties. In New South Wales, Australia, procedural accommodations in the Evidence Act 1995 ("Evidence Act (NSW) (Austl.)," 1995) allow witnesses to give evidence through free narration (Nair, 2009). This means that witnesses provide their evidence to the court without the questioning, interrupting or direction of a lawyer. This process cushions the adversarial process and alleviates the abrasiveness of the process (Nair, 2009). A similar adaptation is available in England and Wales, but only at the investigative phase and not in courtroom proceedings (Home Office, 2002). However, in English and Welsh courtrooms, the court has an legal responsibility to intervene in cases where it is deemed that the witness is being mistreated during cross-examination, taking into account their personal needs and disability.

Procedural accommodations to the adversarial process are also available in Israel (Flynn, 2015). In cases of sexual abuse involving witnesses with intellectual and psychosocial disabilities, witnesses’ testimony can be supported, directed and interpreted by experts with therapeutic backgrounds. This differs from the previous mentioned role of an intermediary, as the support person becomes directly involved in interpreting the meaning of the person’s evidence. This process amends the requirement for objectivity in evidence and as the person is from a therapeutic, not a legal, background, they can again ‘cushion’ the confrontational nature of questioning from barristers.

As previously mentioned, the recording of evidence-in-chief prior to the commencement of the trial is one measure seen in Ireland and elsewhere to support evidence-giving. In Ireland, this does not negate the requirement to be cross-examined on this evidence during trial. In England, Wales, Northern Ireland and Australia, qualifying witnesses are also permitted to be cross-examined in advance of the trial via recorded video (Kilcommins et al., 2013). This has similar benefits to the pre-recording of evidence-in-chief; it allows counsel to attune to the communication of witnesses before commencing questioning and reduces the hostility of cross-examination. There have been calls to also allow such cross-examination to occur in advance of the trial in Ireland, however this is not yet the case (Delahunt, 2015; Law Reform Commission, 2013).
2.8.2 Supporting comprehension and expression

As previously described, intermediaries are rarely used in Ireland. In contrast, intermediaries are more widely used in the United Kingdom. The role was introduced by the Youth Justice and Criminal Evidence Act 1999, piloted in 2004 and rolled out nationally in 2007 (O'Mahony, 2010). As part of this implementation process, a system has been developed to train and register intermediaries. This process has been described by Cooper (2012). Cooper states that the Ministry of Justice recruit individuals with relevant professional backgrounds. These individuals attend a week long University-run training course and are schooled on legal procedure. Upon qualification, they are bound by Codes of Practice and of Ethics. Between 2004 and 2012, 144 intermediaries were trained in such a manner. 5300 requests for the service were received. 100% of those interviewed by Hamlyn, Phelps, Turtle and Sattar (2004) who received the service, found it helpful. However, as only twelve participants were interviewed, and no detail as to the communication needs of those involved is available, the results should be interpreted cautiously.

In other jurisdictions, including England, Wales, Northern Ireland and Scotland, provision is made to permit witnesses with communication difficulties to use communication aids to support their testimony (Kilcommins et al., 2013). Flynn (2015) states a concern that courts can be preoccupied with verifying the validity of such forms of communication. Scope (2009), challenge this view by seeing AAC as part of a person’s voice, and not as a separate entity. Flynn shares the argument of Baggs (2007, as cited by Flynn, 2015), in which he rejects society’s expectation that disabled people adapt their communication to a means which is more familiar to society, but instead argues that society, and in this case, the courts, should adapt and learn their form of communication. Irish law is currently silent on the right to be assisted by communication aids, but it’s introduction has been called for by Kilcommins et al. (2013).

Finally, as previously described, the literature has identified that questioning practices place high communication demands on witnesses with communication difficulties. Judges and legal professionals in the United Kingdom have been said to lack knowledge of appropriate and inappropriate questioning techniques (Kebbell, Hatton, Johnson, & O’Kelly, 2001). A guidance document for those involved in the questioning of ‘vulnerable witnesses’ has been created in the United Kingdom to address this perceived knowledge deficit (Home Office, 2002). The extent to which the legal profession in the United Kingdom are aware of this guidance or to which this has been implemented in practice is not known.
2.9 Conclusion

Communication difficulties are a common characteristic of disability. Statistics have shown that people with disabilities are at increased risk of being victims of crime. When this occurs, they face numerous barriers to accessing justice, including recognising criminal behaviour, reporting the crime, making a statement and overcoming prosecutorial bias. For cases which proceed to trial, testifying in the courtroom can prove particularly challenging given the high communication demands of the process. While a number of accommodations exist for ‘vulnerable’ witnesses in Ireland, the literature questions whether these are sufficient to empower and enable the participation of all witnesses with communication difficulties. Examples of positive international practices have been highlighted in order to frame the issue within a global context, and to offer a comparison of Ireland’s accommodations to that of other countries.
3. Methodology

3.1 Researcher’s standpoint

In qualitative research, the researcher is the mechanism of data collection. This is termed ‘researcher-as-instrument’ by Hammersley and Atkinson (1995, as cited by Pezalla, Pettigrew, & Miller-Day, 2012). Through their active role in shaping the information gathered, a qualitative researcher’s unique perspectives and experiences influence the collection of data (Malterud, 2001; Pezalla et al., 2012). While positivists question whether this introduces bias into data collection, Malterud (2012, p. 484) presents an alternative perspective. She states that “preconceptions are not the same as bias, unless the researcher fails to mention them”.

The current researcher acknowledges her professional background as a speech and language therapist and her current enrolment in a Masters in Disability Studies, which examines disability from sociological and human rights based perspectives. The researcher acknowledges that both of these life experiences have inevitably been drawn upon during her work on this study.

The researcher has clinical and academic expertise in the diagnosis and management of communication difficulties, which influences how she perceives data provided by the participants. It also influences her interpretation of ‘procedural and age-appropriate accommodations’, as outlined in Article 13.1, given her knowledge of support strategies used with people with communication difficulties. Additionally, on the basis of her professional experience, the researcher is convinced of the value of the social model of disability, and is committed to creating supportive communication environments, where barriers which restrict the participation of people with communication difficulties are removed. She recognises the impact that this has had on her research.

Prior to engaging in research design, data collection and data analysis, the researcher held a number of beliefs regarding the topic at hand. Firstly, that current accommodations in criminal courts, while addressing ‘vulnerability’, do not address communication challenges. Secondly, that the intermediary system in the United Kingdom has shown evidence of benefits to those with communication difficulties and this resource is under-utilised in Ireland. Thirdly and finally, through previous informal conversations with disability and legal colleagues, that differing perspectives exist between the groups.
3.2 Research paradigm

At the outset, the philosophical beliefs which underpin a research study should be outlined. According to Guba and Lincoln (1994), ontological, epistemological and methodological questions about the current study should be answered in order to clearly frame the research paradigm.

3.2.1 Ontology

This study will be informed by the relativist ontology which believes there are multiple realities in existence and that reality is constructed in an intersubjective manner (Cohen & Crabtree, 2006). Therefore, the results of this study will be an authentic representation of a reality perceived by the researcher, based on her own interpretations and those of the participants. It is acknowledged that different combinations of researchers and participants would result in the reporting of an alternative reality, given their alternative experiences.

3.2.2 Epistemology

In line with this ontological standpoint, the subjectivist and constructivist epistemologies will inform the study, as they hold that knowledge is not concrete and unchanging, but influenced by both the participants’ and researcher’s perspectives (Lincoln, Lynham, & Guba, 2013).

3.3 Methodology

This study adopted a grounded theory [GT] methodology. GT was originally developed by Glaser and Strauss (1967) as a method of developing theory from experimental data. In grounded theory, researchers abandon preconceived ideas regarding the research topic, and allow theory to emerge from the data (Mills, Bonner, & Francis, 2006b). It is influenced by symbolic interactionism (Cutcliffe, 2000; Starks & Trinidad, 2007) and according to Suddaby (2006, p. 633), was developed by Glaser and Strauss as “a reaction against the extreme positivism that had permeated most social research” at that time. In GT, research is a non-linear process. Data collection and data analysis are not successive steps, but occur simultaneously. Key to both processes is the concept of theoretical sampling, whereby the researcher gathers initial data to generate tentative ideas regarding the topic at hand, and uses these to inform further data collection and knowledge acquisition. Analysis uses the constant comparative method, an iterative process which continually compares data, categories and concepts with each other, in order to refine analysis and generate
progressively more theoretical understandings of situations (Charmaz, 2006; Glaser & Strauss, 1967).

A GT methodology was selected for this study due to its capacity to generate rich data and theoretical understandings through a systematic process (Charmaz, 2006; Hussein, Hirst, Salyers, & Osuji, 2014). It was also chosen for its ability to allow the researcher to react to data which emerges during data collection period. This was valued given the paucity of previous research in this area.

Numerous versions of GT have developed since it first emerged, each influenced by different epistemological and ontological standpoints (Mills et al., 2006b). This study adopted the constructivist grounded theory [CGT] methodology of Charmaz (2006). In contrast to early grounded theory, the constructivist turn discards the previously held notion of a neutral researcher and acknowledges the role which the researcher plays in understanding social processes and constructing theories (Charmaz, 2006). It was specifically selected for this study as it aligns with the researcher’s philosophical standpoint. It also places a greater emphasis on reflexivity than traditional GT (Nagel, Burns, Tilley, & Aubin, 2015).

Limitations to the methodology must be acknowledged. Critiques of GT as an approach are described by Hussein, Hirst, Salyers and Osuji (2014). They state that given the complexity and non-linear nature of GT, there is a high risk of methodological error by researchers. The risk of error is increased by the existence of multiple versions of the methodology. Secondly, the generalizability of results is limited, given the constructivist and/or interpretivist nature of the findings. Finally, there are significant practical limitations to using this methodology, linked with its time-consuming and laborious research process. Specifically, with regard to CGT, the methodology has been developed and described as a technique primarily by one researcher, Kathy Charmaz. In an indication of her perceived possession of the methodology, she has referred to it as “my version of grounded theory” (Charmaz, 2008, p. 398). The level of scrutiny of the technique by other researchers is low, resulting in lower level of objectivity and a higher risk of overlooked methodological limitations. Nagel, Burns, Tilley and Aubin (2015) also offer a useful critique of the method. They state that as a relatively new methodology, there are few explicit exemplars available in literature.
3.4 Methods

3.4.1 Participant recruitment

Purposive sampling was utilised for this study. Purposive sampling is commonly used in qualitative research in order to obtain a sample of informants with the requisite experience and knowledge to answer the research questions (Tongco, 2007). It is particularly suited to small-scale, in-depth studies (Ritchie, Lewis, & Elam, 2003) although as a non-probability method, the ability to generalise research findings is restricted (Herek, 2016). The desired sample size for the current study was eight to ten people. Participants were eligible for inclusion in the study if they met either of the following criteria.

a. Have academic or professional experience within the field of disability advocacy and/or lobbying of at least two years’ duration, and knowledge of current accommodations for vulnerable witnesses in criminal proceedings in Ireland.

b. Are a barrister, solicitor or judge working within criminal law for at least two years and have knowledge of current accommodations for vulnerable witnesses in criminal proceedings in Ireland.

Participants were not required to have prior knowledge of Article 13.1 of the CRPD, as the interview design included the opportunity to introduce this to participants. Due to the specific research questions being asked and the terms of the ethical approval granted, participants were not eligible if they were self-advocates i.e. a person with an intellectual or communication difficulty. Participants were recruited via two mechanisms: directly and using gatekeepers.

The researcher did not know the individuals approached whom she approached directly in either a personal or professional capacity. However, in many cases she was aware of their professional work through her knowledge of the fields of disability advocacy and legal reform. Those identified in this manner were initially contacted by email. Participant information sheets (Appendix 1) were attached to these emails. These contained information regarding the study’s aims and methods, as well as detailed information regarding the rights of potential and confirmed participants. At this time, those contacted were invited, without intended coercion, to consider participation in the study. They were encouraged to respond to the researcher with questions. If individuals did not wish to participate, they were given the
alternative option of supporting the study by acting as a gatekeeper, and facilitating recruitment of other eligible participants.

In addition to direct recruitment, the researcher identified a number of individuals with whom she had professional links to act as potential gatekeepers. When initially emailed, gatekeepers were provided with information about the study and the role of a gatekeeper (Appendix 2). They were also invited to ask questions before making a decision as to whether they wished to support the study. Gatekeepers were deemed to have provided implied consent, through their actions to support participant recruitment. Gatekeepers emailed potential participants on behalf of the researcher, including participant information sheets.

When a potential participant expressed interest in taking part in the study, a face-to-face meeting was arranged. At the beginning of these face-to-face meetings, the researcher again presented the study’s information sheet to potential participants and invited questions regarding the study. The participant was then asked if they would like to take part in the study. If they did, they were asked to sign the study’s consent form (Appendix 3). The participant was provided with the opportunity to complete the interview at that meeting, or at a later date.

3.4.2 Data collection

Interviewing was selected as the method of data collection for the current study. Wimpenny and Gass (2000) state a concern that within qualitative research, interviews are seen as a generic method of data collection, without due consideration to their suitability for the study’s methodology. Interviewing is a recommended method of data collection for CGT due to its ability to gather in-depth information from the perspectives of participants (Charmaz, 2006; Patton, 1990). Interviews were semi-structured which allowed for a specific probing of the study’s central topics, but a retention of flexibility in the interview’s structure (R. Edwards & Holland, 2013). For this study, flexibility was required to:

- Allow, during interviews, for exploration of issues which were not included in the original interview schedule, but raised by participants.
- Allow the researcher to use the contributions of earlier participants to develop questioning for later participants.
These are key actions which support the theoretical sampling and constant comparative principles of CGT.

Interviews followed an interview guide created by the researcher (Appendix 4). Interview questions were presented in a progressive manner, beginning with introductory questions before moving on to questions which could be perceived as more challenging (Gill, Stewart, Treasure, & Chadwick, 2008). Interviews began with questions which probed participants’ professional background, in order to frame their subsequent contributions. Following this, the definition of ‘communication difficulties’ as adopted in this study, was presented to participants, and a written card with its definition given to them (Appendix 5). A question was then presented which probed any direct experiences which the participants had of the topic at hand. However, it was recognised that some participants, while possessing valuable information regarding the topic, may not have experiential information from criminal proceedings to draw upon. This was particularly anticipated for disability advocates. Therefore, an alternative method of extracting data was available in such instances. Three scenarios were constructed by the researcher, each of which depicted a person with a different disability and a different set of communication challenges. These scenarios were informed by the literature reviewed in preparation for this study. These scenarios allowed those with broader knowledge of disability to apply their knowledge to the courtroom context. Following experiential and/or scenario based questions, Article 13.1 of the UN CRPD was introduced to participants and the text was given to them on a card (Appendix 5). Questioning moved to examining participant’s interpretation of this Article, and their perceptions of the Article in comparison to current practice in Ireland.

A pilot interview was conducted in order to test the interview schedule. Pilot investigations are recommended in order to foresee potential methodological issues and to hone the researcher’s skills (Sampson, 2004). As a result of this study’s pilot interview, changes were made to the pacing of the interview and the wording of a number of questions. Positive feedback regarding the interview’s supporting materials was obtained.

Mills, Bonner and Francis (2006a) emphasise the importance of a good researcher-participant relationship for the co-construction of meaning. In order to foster such a relationship, interviews were scheduled at a time and place of the participants choosing, to facilitate their being at ease. To develop trust with participants, the researcher shared relevant personal details and background information about herself, and was responsive but non-judgemental to participants’ contributions. Participants were given the option of having their interviews audio recorded or documented in written notes. These options were
presented in neutral terms, with no pressure to select either option provided. Where consent to audio record interviews was obtained, this was done using the Super Voice Recorder application for Samsung Galaxy Tab 4.

3.4.3 Data transcription

Different styles of transcription exist, from the broad transcription of words to the narrow transcription of paralinguistic information such as intonation. When selecting an approach to transcription, Lapadat (2000) recommends the researcher reflects on the type of data which is to be collected and the purpose of subsequent analysis. If narrow transcription is not required during analysis, it can detract attention from the content of what is said (Forrester, 2010; Lapadat, 2000). In the current study, the content of participants’ contributions was of the utmost importance, and paralinguistic elements less relevant. Therefore, broad transcription was selected over narrower transcription methods. The use of broad transcription is also in line with established practice for grounded theory studies (Forrester, 2010).

Further transcription decisions were informed by the study’s philosophical standpoint. Outside the positivist paradigm, transcription is not seen as a direct transformation of information from the spoken word to the written word. It is a subjective process, whereby the transcriber makes a series of choices (Davidson, 2009). The researcher acknowledges her influence on the transcription process, and considers the act of transcription as both a constructivist and interpretivist act (Lapadat, 2000). However, in order to ensure consistency in how the researcher approached the transcription of each interview, a transcription protocol, based on that of McLellan, MacQueen and Neidig (2003), was followed (Appendix 6). An example of a transcribed interview is included (Appendix 7).

3.4.4 Data analysis

Data was analysed using the guidelines of Charmaz (2006). As previously described, analysis in constructivist grounded theory research is non-linear. It uses a constant-comparison method, described originally by Glaser and Strauss (1967) as the simultaneous collection and analysis of data to generate a progressive more theoretical understanding. In practice, this was achieved using concurrent memo-writing, coding, theoretical sampling and theory-building.
As each interview was conducted, memo-writing was utilised as a debriefing tool to provide a record of the researcher’s reflections on the content of that individual interview. These early memos were also used as a tool to document the researcher’s early thought processes and emerging theories regarding the data (Appendix 8). As interviews were conducted and transcribed, they were subjected to segment-by-segment initial coding (Appendix 9). In line with the recommendations of Charmaz (2006), initial coding used gerund phrases to identify processes and actions emerging from study’s data. These codes were treated as provisional and the researcher returned to revise codes later in the research process as analysis deepened. As previously mentioned, theoretical sampling, that is, the act of seeking relevant data to develop an emerging theory, is a key component of grounded theory studies (Charmaz, 2006). As questions and tentative theories began to emerge following early memo-writing and initial coding, interview questions and probes for subsequent interviews were revised. Questions were purposively asked in order to explore emerging theories further (Appendix 10).

Following initial coding, analysis progressed to focussed coding. This is a more selective and conceptual form of coding (Charmaz, 2006). Through multiple readings of the initial codes, a series of focused codes were devised (Appendix 11). Again, recognising coding as an emergent process, the researcher remained open to the revision of these codes throughout this phase of analysis. Twenty-three focused codes emerged from the study’s data (Appendix 12). Each interview was then re-coded using these focused codes (Appendix 13). Collated focused code data sets were created (Appendix 14), which allowed the researcher to become immersed in individual codes. Multiple readings of these documents aided the researcher to conceptualise how codes related to each other and advanced memo writing was used to document emerging theories (Appendix 15). Reviewing of these advanced memos resulted in the establishment of the study’s findings.

3.5 Trustworthiness

In selecting methods to ensure the rigour and trustworthiness of the current study, consideration has been given to the study’s research paradigm. Lincoln and Guba (1985, 1986) question the applicability of conventional measures of rigour, such as internal validity and reliability, to more naturalistic research paradigms. They propose four alternative considerations for those engaged in such research: credibility, transferability, dependability and confirmability (Lincoln & Guba, 1985).
3.5.1 Credibility

According to Charmaz (2006), credibility in qualitative research ultimately concerns itself with the quality of the data obtained. A number of methods were employed to maximise the quality of study data. As recommended by Shenton (2004), an established methodology was employed. The study’s research tools, including the interview schedule, transcription protocol and analysis procedures were subjected to scrutiny by the study’s supervisor, an experienced qualitative researcher, and revised based on his feedback. Following transcription, transcripts were sent to interviewees, who were invited to complete a member check to confirm that their contributions had been accurately recorded.

3.5.2 Transferability

Recognising that the research design of the study does not allow for unqualified transferability of findings, thick description of the research context is provided. As a result, clear boundaries on placed on the research (Shenton, 2004). Key concepts, such as “communication difficulties” are defined, and explicit attention brought to excluded situations. Rich accounts of the study’s participants are provided, which includes their professional roles and relevant background experience. The findings are presented as an in-depth understanding of this study’s specific context only. Challenges in using this study's findings to understand associated contexts are stated.

3.5.3 Dependability

Dependability concerns itself with the robustness of the research process (Lincoln & Guba, 1986). An established research methodology, CGT, was utilised and the research process outlined by Charmaz (2006) adopted for the current study. It is described in sufficient detail in order for it to be both replicated by another researcher, and scrutinised by peers. In response to concerns regarding the complexity of the GT and CGT research processes (Hussein et al., 2014; Nagel et al., 2015), the researcher and research supervisor received external guidance on the methodology from a colleague with experience of using it in research practice. This increased the dependability of the process.

3.5.4 Confirmability

Confirmability concerns itself with the trustworthiness of the research results (Lincoln & Guba, 1986). While the relativist paradigm rejects the notion of one universally held
outcome, the confirmability of research findings can be established in relativist studies by making explicit the process of analysis and the emerging theories of the researcher. (Shenton, 2004).

The systematic approach to data analysis described in constructivist grounded theory maximised the rigor and trustworthiness of results (Hussein et al., 2014). Throughout the data analysis process, memo-writing was used. Memos, as well as being a tool of reflexivity and analysis, acted as an audit trail of emerging theories, contributing to the confirmability of the study’s findings (Shenton, 2004). Second coding of three segments of interview data was completed by the research supervisor. The goal of this action was not to confirm the validity of the researcher’s coding, as this is against the interpretivist-constructivist position of the study. Instead, it was used to enrich the researcher’s ability to understand the data and illuminate previously unconsidered dimensions (Cohen & Crabtree, 2006). Negative case analysis was also conducted at the focused coding stage to account for any negative instances in emerging theories.

3.6 Ethical considerations

The study received ethical approval by the Research Ethics Committee in Trinity College Dublin on 9th June 2016. During all stages of the research process, the four core ethical considerations outlined by the Committee were considered: informed voluntary consent, confidentiality and anonymity, data retention, protection and destruction, and limitation of risk.

3.6.1 Informed voluntary consent

Potential participants were invited to partake in the study in neutral terms, with no intentional coercion applied. They were provided with a participant information sheet detailing the particulars of the study, and invited to ask questions via email, telephone and/or in person, prior to consenting to take part in this study. When individuals indicated that they wished to be interviewed, a written consent form was completed.

3.6.2 Confidentiality and anonymity

The confidentiality and anonymity of research participants, and any other individuals whom they discussed, were of primary importance during the research process. Documents which
contained names and contact information of potential and confirmed participants were stored in password protected files on the researcher’s laptop. All raw data obtained from participants, including audio files of interviews, were stored under a pseudonym. The master list, which linked participants’ real names with their pseudonyms, was also stored in a password protected file. During interview transcription, the names of third parties were anonymised and any identifiable information, such as names organisations or employers, were removed and described in general terms.

3.6.3 Data retention, protection and destruction

In line with department guidelines, raw research data will be kept until exam boards confirm the student’s dissertation results. Prior to this, it will be protected via the means described above. Following the confirmation of results, it will then be destroyed. Anonymised interview transcripts will be held for two years from the date of the exam board. It will then be destroyed.

3.6.3 Limitation of risk

As the study’s participants were from a non-vulnerable population and the subject matter of a non-personal nature, it was deemed that negligible risk to participants or the researcher existed.
4. Findings

4.1 Introduction

As previously described, the aim of this study was to explore the current accommodations for witnesses with communication difficulties in criminal proceedings in Ireland, and to examine these in light of Ireland’s obligations under Article 13.1 of the UN CRPD. More specifically, the study sought to explore the following research questions:

1. How effective do participants believe the accommodations of the Criminal Evidence Act 1992 are in supporting witnesses with communication difficulties in criminal proceedings?
2. How do participants view current Irish accommodation practices, when compared to the obligations of Article 13.1 of the UN CRPD?
3. What, if any, situational factors impact on the development of accommodations for witnesses with communication difficulties in the Irish criminal justice system?

Eight participants were recruited to take part in the study. Four participants were sourced directly by the researcher and four were sourced with the assistance of three gatekeepers. Participants came from a variety of professional backgrounds. Four were practicing barristers. The remaining participants were a law academic with a specific interest in disability issues, a legal professional working in a law reform agency, a paralegal professional who had recently established an organisation related to disability issues in the criminal justice system, and a disability advocate. More detailed descriptions of participants’ backgrounds are available in Appendix 16.

Six interviews were audio-recorded and two were documented in written notes at the request of participants. Upon completion, transcripts were sent to participants to be reviewed for accuracy and confidentiality. Minor corrective feedback was obtained regarding one transcript, which was addressed before analysis began.

During interviews, participants provided contributions at a number of levels. Participants offered opinions regarding the effectiveness of the Criminal Evidence Act 1992 in supporting witnesses with communication difficulties, as well as offering a more general analysis of Ireland’s compliance with Article 13.1 in the context of such witnesses. Finally, they looked outside both the CRPD and the Criminal Evidence Act 1992, and explicitly or implicitly identified specific issues within the Irish justice system which impact on the country’s ability
to meet the obligations of Article 13.1. Each of these will be addressed in turn. The findings will firstly be described below, before moving on to a more theoretical consideration in the discussion chapter.

4.2 Identifying shortcomings of the Criminal Evidence Act 1992

As the legislative source of accommodations for witnesses in criminal proceedings, participants spent time discussing the provisions of the Criminal Evidence Act 1992. The removal of wigs and gowns during proceedings received little attention from participants, suggesting that it is considered irrelevant to supporting witnesses with communication difficulties. The giving of evidence-in-chief in a video-recorded interview and the giving of further evidence via video link were discussed in more detail. Paul, a practicing barrister, described a case where he successfully prosecuted a man accused of raping a woman with Down Syndrome. In this case, the victim was not required to give her initial evidence live. Instead, a video recording of her evidence was played to the court. This evidence had been collected by specialist Garda interviews early in the investigative process, a method which was positively regarded as it facilitated the victim giving a more complete narrative of the alleged incident. While this removed the necessity to provide initial evidence during the trial, Paul highlighted the fact that it was still necessary for the victim to be cross examined at this time, a process which has high communication demands. The victim in the case was cross examined using the video-link provision. Paul believed that this provision benefitted the victim psychologically, as she did not need to see her assailant in court. However, he did not state any perceived communication benefits from the use of a live video-link. John echoed the belief that pre-recorded or live video evidence is beneficial for psychological reasons.

Of all provisions contained in the Act, the use of intermediaries received the most scrutiny from participants. Claire stated a belief that this is the only provision in the Criminal Evidence Act 1992 which addresses the needs of participants with communication difficulties. The majority of participants were supportive of the concept of intermediaries as a means of facilitating witnesses to understand legal questioning, and, in a wider sense, to achieve justice.

“The concept of an intermediary is an important thing if that is necessary”
(Paul)
The use of the word ‘concept’ by Paul, whether intentional or otherwise, alludes to the concerns of participants that this accommodation exists only in legislation, and not in reality, in Ireland. Claire described intermediaries as "utterly theoretical" and while Niamh valued intermediaries highly as a support, she rejected them as an effective accommodation in Ireland for this reason. Participants considered why this accommodation is not utilised. Claire placed the responsibility on the Department of Justice, who, she believed, did not consider what was required to successfully implement this accommodation once it had been included in legislation. She also felt that the administration of an intermediary system does not fit within any established legal structure, such as the Director of Public Prosecutions, the Victims’ Support Service or the Attorney General’s office. This, she believed, may be contributing to the laxness in implementation. Participants regretted that no official training for intermediaries has been set up, meaning that no suitably trained individuals exist in Ireland to carry out the role. Additionally, participants expressed frustration that no codes of practice have been developed. They believed that this omission is not conducive to satisfying the courts of the reliability of the process. Finally, according to Niamh, legal professionals have not been educated regarding the role of intermediaries and this has led to a lack of understanding regarding their place in the legal system. Overall, while participants were open to exploring the use of intermediaries, they saw multiple barriers to their effective use in Ireland.

In addition to offering analysis of individual accommodations within the Act, participants perceived wider shortcomings. The Act specifies the availability of accommodations for participants with a 'mental handicap'. Claire did not believe that a person with no intellectual impairment, but physical speech difficulties, would qualify for the accommodations as a result. Furthermore, Niamh believed that the provisions of the Act do not provide the required level of individual support for witnesses with a variety of communication needs. This was echoed by Sarah who sees the route to successful access to justice outside of the existing Act.

“I think it’s really going to be on a personal level. It’s not going to be something you get out from the 1992 Act. I mean a video link; I’ve met witnesses to whom it makes no difference.”

(Sarah)

Sarah recognised that the accommodations which are offered automatically under this Act, are not always beneficial to their recipients. Paul deepened the discussion by stating:
“So it provides the broad headings, but as for the nitty gritty, it doesn’t get into it at all. I don’t actually really have a whole problem with that because sometimes when the Oireachtas tries to get too detailed into what it tells a court to do, it causes more problems than it tries to solve.”

(Paul)

Paul foresaw situations whereby the overall fairness of trials would be affected through the introduction of additional mandatory supports under a revised *Criminal Evidence Act 1992*. He instead advocated for the development of a set of accommodation options which a judge could be compelled to consider on an individual, case-by-case basis. He was a strong advocate for deferring to the discretion of the judge to make decisions about individual circumstances.

When asked to consider the current Irish context in light of Article 13.1, the majority of participants did not believe that Ireland is in a place whereby the country could meet its obligations following ratification. John stated that the analysis of his law reform agency is that the country is not compliant and further legislative reform is required in order to achieve this. Cliona believed that adults with disabilities are treated as children in Irish courts, which goes against the Convention’s requirement to provide age-appropriate supports. Niamh, who is aware of examples of international practice, made the case that while we are not the worst example globally, current accommodation practices in Ireland do not go far enough. She offered an interesting legal comparison of the text of the Article and Irish practices:

“What I think is interesting about 13.1 is that it is a requirement to provide procedural accommodation, not reasonable accommodation, and [academic colleague] (and I) have tried to argue that that means that it doesn’t have to meet the threshold of reasonableness. As long as you need it, and it’s a procedural accommodation, it should be provided. I think Ireland is quite far from that. I don’t think we even recognise reasonable accommodation in these kinds of proceedings”

(Niamh)

Paul felt that Ireland has the capabilities in place to meet the requirements of this Article but is unsure whether we currently do in each case. He expressed particular concern that cases may not be being properly managed outside the expertise of Dublin and the Central Criminal Court. Sarah, whose stance was generally against reform in the area, felt that Ireland is in
“reasonably good shape” but appeared unsure in her analysis by expressing a hope that she would not be proved wrong.

In summary, when considering the provisions of the *Criminal Evidence Act 1992*, participants identified a range of issues. While the use video-link during trial were mentioned to some degree, it was felt that the benefit of this accommodation was psychological, and not communication related. Participants were largely positive about the ability to pre-record evidence and the potential of intermediaries to support people with communication difficulties. However, the intermediary accommodation was seen as ineffective in the Irish context due to a lack of implementation. Participants recognised a number of additional shortcomings in the Act including the exclusion of certain witnesses from receiving accommodations depending on their specific difficulties and the inability of the sweeping accommodations of the Act to provide the level of personalised support required by witnesses. The predominant view was that further legislative reform was need in order to become compliant with Article 13.1 of the CRPD, although Paul issued a warning that legislative over-reaching can prove detrimental to the achievement of justice. He suggested the creation of a battery of additional accommodations which can be applied as and when necessary.

### 4.3 Situational factors

Through their contributions, participants provided insights into the workings of the legal system in Ireland. When analysed, these illuminate a number of challenges in meeting the obligations of Article 13.1 of the CRPD.

![Diagram of Situational Factors](image)

**Figure 1: Situational Factors**
4.3.1 An experience and knowledge deficit

A number of participants suggested that legal professionals lacked experience interacting with people with disabilities. Emma and Mary felt that legal professionals were not exposed to disability in their working lives, or also, in many cases, in their personal lives. Specifically relating to communication difficulties, Niamh said:

“A lot of legal professionals don’t have experience in communicating with people who communicate differently.”

(Niamh)

Participants had differing opinions on the professions’ overall level of disability awareness. From within the profession, Sarah felt her colleagues’ awareness of communication difficulties was better that that of the general population, as communication is a central component of their work. John believed it to be similar to the general population, in that some individuals had good levels of awareness and others, more limited. However, the three participants with the closest links to the disability community, Mary, Emma and Niamh, had different opinions. Both Emma and Niamh felt that legal professionals lacked experience in communicating with people with disabilities and did not have the required skills to do so. Mary perceived a gap in disability awareness which she described in strong terms:

“I think it’s ignorance really. I think it’s ignorance. Unless you’re exposed to it you’re not going to know.”

(Mary)

Claire highlighted the direct impact of reduced disability awareness on achieving justice. She described a case where a judge stated that he could not grant a witness an intermediary as he required more recent medical reports to establish if she still had an intellectual disability. This shows a lack of understanding of the permanent nature of the person’s disability. Claire shared another instance where the DPP made a decision to diminish the charges brought against an alleged offender based on the false belief that trying a case in the Circuit Court, and not the High Court, would be an easier experience for the victim who had a communication difficulty, despite the fact that the demands of both courts are indistinguishable.
A reduced level of disability awareness also appears to contribute to negative attitudes towards witnesses with communication difficulties which exist within the legal profession. Claire, a barrister, felt her colleagues would describe such witnesses as ‘not very bright’. A number of participants from legal backgrounds described individuals as ‘vulnerable’, ‘suffering’, and ‘labouring under a disability’. Mary, Niamh and Emma, the three participants with closest links to the disability community, believed that the profession automatically assumed that witnesses with disabilities could not testify, a stance which Mary and Emma rejected and Niamh described as dangerous.

“(They) automatically assume because somebody has got an intellectual disability that they aren’t able to take part in whatever the process is”

(Emma)

Sarah, a barrister, reported that she was once worried about putting a boy who had autism on the stand:

“But there were very serious worries about whether we should proceed with the case because there was a fear that he wouldn’t be able to give his evidence.”

(Sarah)

When given the opportunity to testify, Sarah reported that the boy gave “excellent evidence”, showing that original perceptions were unfounded. Claire and Sarah, both barristers, believed that participants with communication difficulties would only be called in the case of particularly serious crimes. In cases where other witnesses were available, it was felt that they would be called upon instead. Together, these contributions indicate a perception that witnesses with communication difficulties are viewed as second class within the legal profession.

A second consequence of reduced disability knowledge is the tendency for legal professionals to treat those with disabilities as, or like, children. Sarah explained that almost all the general public have experience of interacting with children, a group who are not yet able to communicate to the fullness of their ability. In comparison, peoples’ exposure to disability is less. Therefore, people use the strategies they employ when communicating with children with those with disabilities. This then transfers to the way cases are handled within the justice system. In Paul’s case involving an adult woman with Down Syndrome;
“She was effectively treated as though she was a child”

(Paul)

In discussing accommodations for adults, some barristers inadvertently gave examples of accommodations which are more suitable for children, such as the provision of guardians ad litem (a support for children), balls, plastic toys and teddies. According to Cliona and Claire, both practicing barristers, this inappropriate attitude exists widely within their profession.

Niamh recognised that the justice system adapts more readily to the needs of children, and highlighted that while it is not appropriate to treat these witnesses as one and the same, there were lessons to be learned from the flexible approach which is taken to working with children. Speaking of judges in the UK, Niamh said:

“I think where they had learned or experienced that in youth justice, that kind of transitioned, and they were able to bring that experience and that flexibility into working with adult offenders with various labels and diagnoses”

(Niamh)

In exploring the reasons behind the professions’ reduced disability knowledge, participants who were barristers explained that they had received no instruction on disability when training in the Honourable Society of Kings Inns. Niamh also highlighted that no compulsory training on disability issues exists for judges. While Niamh hypothesised that non-mandatory training opportunities may be available, Cliona and Emma perceived a culture of resistance to training in the judiciary, suggesting this is not accessed.

“You don’t train judges.”

(Emma)

Emma advocated for training that would address the communication skills needed by professionals to work with people with communication difficulties. Sarah described an optional training programme for barristers with which she is involved. This training programme addresses advocacy in a legal context, that is the act of presenting a legal argument. It includes practical training on questioning witnesses. Sarah sees transferable benefits to witnesses with disabilities by increasing the awareness of lawyers of the way in which they ask questions. However, this training was not said to draw on any specific disability expertise from outside the legal profession.
The training described by Sarah also does not address issues of reduced disability awareness. A number of participants, generally those outside the profession, recognised the potential benefits of this training for legal professionals. Mary is a particularly strong advocate for such training and sees education as the key to addressing the previously mentioned “ignorance” she sees within the profession:

“I do think it’s about education, and I do think its ignorance. I think the more you expose yourself to something, the more you understand.”

(Mary)

When considering training models and approaches, Mary, Paul and Cliona all proposed the concept of specialisation for lawyers who work with clients with disabilities.

“No more than a barrister or solicitor specialising in family law or criminal law or, if they specialise in defending people with, or prosecuting people with disabilities, with whatever, then they should make themselves aware of what is involved in that.”

(Mary)

Paul and Cliona, as barristers, recognised that while this could be compulsory for those working in a prosecutorial capacity, it could not be so for defence barristers, as it could not interfere with a person’s right to select their own representation.

“I wouldn’t say that it’s mandatory that they have it before they deal with a case like this, because at the end of the day, people should be free to choose who they wish, but it would be something that if people choose to do on a voluntary basis that they could use as a kind of a unique selling point.”

(Paul)

In summary, participants both within and outside the profession, believed that legal professionals do not have the skills required to work effectively with people with disabilities, including those with communication difficulties. In addition to a skill deficit, it emerged that a lack of disability knowledge contributes to limiting attitudes regarding the capability of people with disabilities to be effective witnesses and a tendency to equate adults with disabilities to children. Disability training is seen as key to combat these issues, both to develop specific skills in communicating with people with disabilities, and to increase awareness and positive attitudes towards disability.
4.3.2 Conflicting perspectives

Through their contributions, participants depicted a range of conflicts which exist between the justice system and the aims of the Convention (Figure 2).

**Figure 2: Conflicting perspectives**

4.3.2.1 The conflict between an inflexible system and individual supports

“One person’s disability is very different from another”

(Mary)

As previously mentioned, participants described dissatisfaction with the *Criminal Evidence Act 1992* due to its offering of standard accommodations and its lack of ability to adapt to the
needs of individual witnesses. This call for personalised and individualised accommodations is in conflict with participants’ portrayal of the criminal justice system as a largely inflexible entity.

Participants of all backgrounds, explicitly or implicitly, suggested that the courtroom processes and procedures operate in a rigid manner. Emma is an experienced disability advocate who tries to be creative in the methods she uses when working with people with different needs. She expressed frustration that the justice system failed to adapt its’ methods to help those with communication difficulties. She described a case of a man with autism and selective mutism being questioned in court:

*Well, if we think about the gentleman I supported who was being charged with motoring and other offences, he was a selective mute. And so, he could be seen as not being co-operative. But there are ways in which you could work with him to get answers to questions. But that wasn’t going to happen in court.*

*(Emma)*

Niamh described an air of resistance to procedural changes in the legal system. She advocated for a more flexible approach to courtroom procedures, including the use of different formats, the provision of regular breaks and adaptation of questioning styles. She explained that such changes are seen as interfering with the adversarial ethos of the criminal justice system and the provision of a fair trial, and are therefore fought. Sarah rejected these concerns stating:

*“To adapt the system to allow them to give better evidence and to be gentler in terms of their experience, does not affect a fair trial”.*

*(Sarah)*

Sarah cited the UK experience whereby adaptations to evidence giving procedures were introduced to make the process less intimidating for ‘vulnerable witnesses’. In the time since these measures have been introduced, she stated that conviction rates have not changed. This, she believes, quashes any concerns that more flexible procedures interfere with the rights of the accused.

The role of judges was seen as significant by participants. It was recognised that judges have responsibility for managing cases and makings rulings regarding the permissibility of
accommodations. Participants provided examples of occasions when judges took a rigid approach to accommodating the needs of witnesses. In Paul’s case where the alleged victim was a woman who had Down Syndrome, the judge did not permit for transcripts of the woman’s pre-recorded evidence to be given to the jury to aid their understanding of her speech. Niamh encountered a judge who believed that he could not offer any supports to a person with mild difficulties, despite this not being stated in legislation. Niamh believed him to be imposing unnecessary limits on how flexible he could be. Emma, a disability advocate, has had judges refuse to read supporting material which she provided about her clients’ needs and threaten to eject her from the court.

Niamh perceived that judges thought in concrete ways, and that they wanted prescribed actions to take, should a person with a particular disability be in their court.

“I think what judges would really like is ‘persons with X disability behave Y way’. And then they would know, people with autism can do this and therefore in the courtroom I should do…."

(Niamh)

While she appreciated the reason why judges may want such guidance, she rejected it as an effective means of supporting people with individual needs. On occasions where judges operated with more flexibility, the outcome for witness was described as more successful. Emma described a situation during a civil proceeding whereby a judge recognised that the noise of the courtroom was proving challenging for a witness she was supporting, and rescheduled the case to be heard when the court was not full. Paul, the barrister who prosecuted a rape case involving a woman with Down Syndrome, explained that he presented the judge with a set of twenty ground rules for all parties in that case. These included an agreement not to use legalese, to facilitate the woman to take breaks if required and the giving of sufficient time to process and answer questions. The judge granted the majority of these requests, which contributed to better experience for the witness.

In conclusion, participants described a conflict between the need to provide individual supports for witnesses with different needs, and a legal system which is disinclined to adapt its procedures. This poses a challenge to meeting the obligations of the CRPD. The role of the judge is seen as critical in facilitating the required flexibility on a case-by-case basis.
4.3.2.2. Communication support as an interpretative act, threatening objectivity

Participants describe the legal system as a cautious entity that is built on principles of objectivity, validity and proof.

“I suppose the court are naturally eh, cautious and cynical.”

(Paul)

Such principles were seen as necessary in order to uphold the integrity of the criminal justice process. In practice, Niamh stated that this results in a heavy reliance on medical evidence. When accommodations are requested for witnesses with disabilities;

“There would be some expert report saying the person needs that, and that would be their basis for granting it.”

(Niamh)

With objectivity, validity and proof of primary concern to the legal system, John described caution regarding processes that do not meet these standards. Communication is not an objective process. It is an interpretive act which depends on personal interpretation of meanings. When communication is supported by an intermediary, it becomes an even more interpretive act. Paul questioned the objectivity of intermediaries if they were to interpret the responses of witnesses with communication difficulties for the court.

“The danger with explaining the answer is that you might get a jaundiced view from the intermediary (of) what their (the witness’) opinion is.”

“I would be fairly uncomfortable (with), especially a professional witness who doesn’t have any personal dealings with the witness, deciding what it is that they’re saying. Because they come from a protectionist side so they already have their views on the world and it’s a dangerous enough thing”

(Paul)

Paul repeated the world danger, indicating his perception that any move away from a reliance on objectivity could threaten the achievement of justice or, as stated by John, undermine the integrity of the process. Emma stated that AAC systems, such as Talking Mats and high-tech communication devices are rejected by the court as invalid forms of
communication. Such systems are often used during facilitated communication, whereby a person receives support from another to operate their AAC system. The potential for purposefully misinterpreting and introducing bias in such a process was a concern for Cliona and mentioned as a source of international legal debate by Niamh.

The conflict between the desire for objectivity in the court and the interpretive nature of communication support is a challenge to the introduction of accommodations for witnesses with communication difficulties.

4.3.2.3 The conflict between protectionism and empowerment

Participant’s contributions revealed a conflict between the legal system’s historical focus on protectionism and paternalism and the CRPD’s focus on empowerment. John and Paul use the area of sexual offences to discuss the law’s focus on protectionism. Both recognise that current laws in this area were designed to protect those with disabilities from sexual abuse, but in turn, restricted their freedoms.

“I suppose it’s a balance between society trying to protect people of that type, but also allowing them to have sexual expression, if that’s what they choose to do. So it’s a complicated issue.”

(John)

John recognises that the Convention moves beyond this protectionist stance in its Articles, and is more concerned with principles of empowerment. The accommodations of the Criminal Evidence Act 1992 were introduced to protect ‘vulnerable’ groups, children and those with a ‘mental handicap’. While there are benefits to protecting people from the rigours of the process, John acknowledges that the issue of accommodations needs to be reframed as a means to empowering a person to give their best evidence. He does not feel that this attitudinal change will occur quickly:

“It is a kind of psychological movement away from paternalistic approach to an empowered approach that the Convention envisages. That will take a bit of time I think.”

(John)
Are accommodations resource dependant or a human right?

A final conflict arises from the CRPD’s belief that access to justice is a human right, whereas the legal representatives saw the need to justify the provision of accommodations financially. Sarah, a barrister, began her interview by immediately framing the issue at hand in terms of prevalence.

“I can tell you that it is very, very rare for someone, with, particularly with significant communication difficulties, to come into contact with the criminal justice service.”

(Sarah)

Sarah uses this low prevalence to question whether investment in accommodations, such as intermediaries, is warranted:

“It’s a bit like the Government being asked to resource some particular piece of medical equipment that is going to help five people. They’re thinking, why would we spend money on this because it’s only going to help such a tiny fraction of the number of people?”

(Sarah)

Sarah explicitly states that she does not believe that the criminal justice is inherently biased toward people with disabilities, and therefore, costly accommodations are not required. This contrasts sharply with the perspective of the Convention, which recognises the barriers to legal participation faced by witnesses with disabilities and sees the provision of accommodations as a human rights issue. Emma, a disability advocate, clearly identifies with this argument:

“It has to be taken on as a rights issue.”

(Emma)

When framed as a human rights issue, issues of financial justification are irrelevant in the decision to provide accommodations. To lobby for reform in this area, Niamh suggested that a moral argument for change needs to be made, one which includes the personal stories of people with communication difficulties and examples of situations where their rights were not upheld. However, participants expressed the view that this issue is not seen as a priority by
Government, the legal profession or the disability rights community, which poses a barrier to such a path to change.

4.4 Conclusion

In conclusion, the study revealed concerns that the current accommodations of the Criminal Evidence Act 1992 are not sufficient to meet the needs of witnesses with communication difficulties or to meet the obligations of Article 13.1 of the CRPD. Shortcomings identified include the lack of implementation of the intermediary provision, ineligibility of certain witnesses from accessing existing accommodations and a lack of personalised responses to the needs of individual witnesses. Inadequate disability knowledge amongst the legal profession was discovered, in addition to an absence of mandatory training on disability issues. This lack of knowledge and training results in inappropriate actions and attitudes towards witnesses with communication difficulties. Finally, a series of conflicts between the legal system and the CRPD were revealed. The legal system was described as an inflexible entity, concerned with principles of objectivity and validity, as well as the protection of ‘vulnerable’ people. The CRPD, in contrast, advocates for flexible, individual supports, and the empowerment of people with disabilities. Additionally, the CRPD sees the availability of courtroom accommodations as a right. Therefore, from this perspective, they should be provided irrespective of the incurred costs. The legal system has an alternative view, and issues of justification based on the level of demand for accommodations emerged.
5. Discussion

5.1 Introduction

In this chapter, the study’s findings will be discussed in relation to the existing literature and the research questions posed at the outset. The implications of this research for legal reform will be explored and areas for future research identified. As with all research, limitations to this study exist, and these will also be described.

5.2 The Criminal Evidence Act 1992

Previous research has questioned whether the provisions of the Criminal Evidence Act 1992 are sufficient to meet the needs of participants with a variety of communication difficulties and disabilities (C. Edwards et al., 2012; Kilcommins et al., 2013). The current study echoed these concerns and found an overall dissatisfaction with the ability of the Act to effectively support witnesses with communication difficulties.

With regard to the individual accommodations of the Act, the study found that the giving of evidence-in-chief in a pre-recorded format is positively regarded, as it is believed to result a more complete narrative being shared with the court by a person with communication difficulties. The literature offers explanations, stating benefits to the questioner being able to take time to tune into the witness’ communication style outside of the rigours of the courtroom (Delahunt, 2015), as well as the ability to obtain a greater level of detail when questioning occurs closer in time to the alleged incident (Law Reform Commission, 2013). In comparison, the removal of court garments and the use of video-link were reported to have psychological, as opposed to communicative, benefits, a view which is echoed in previous research (C. Edwards et al., 2012).

Of all accommodations in the Act, the use of intermediaries is seen as the most, if not only, effective provision to support witnesses with communication difficulties during live participation in trials. Despite being in legislation for twenty-four years, the intermediary system in Ireland has been described as “ad hoc” (Law Reform Commission, 2013, p. 108). Participants in the current study went a step further, describing the existence of intermediaries in Ireland as merely theoretical, and therefore ineffective. The lack of intermediary training in Ireland, the absence of a panel of registered individuals, and the lack
of formal codes of practice are highlighted by this study. This study found a lack of follow through by the Department of Justice and Equality in implementing this accommodation, both initially and in the intervening twenty-four years. The Department of Justice and Equality’s plan to facilitate ratification of the CRPD, its ‘Roadmap to Ratification’, is silent on the practical failings of the intermediary system (Department of Justice and Equality, 2015). This study found a concern that the provision of effective accommodations for witnesses is viewed as a peripheral issue for Government, the legal system and people with disabilities. Unless this issue is the subject of sustained lobbying from legal and disability groups, it is unlikely that the implementation of a formalised intermediary system in Ireland will occur.

In assessing the effectiveness of the Act in supporting witnesses with a variety of communication needs. the study revealed concerns regarding the eligibility of witnesses to access the accommodations of the Act. The Act takes a narrow conceptualisation of disability, stating the eligibility of those who have a ‘mental handicap’, a term which is not defined by the Act but generally associated with intellectual disability. Delahunt (2015) states that even in cases of witnesses with intellectual disability, inconsistency in rulings of eligibility have been noted in the courts. The current research broadened the examined cohort to witnesses with a range of communication difficulties. The findings revealed concerns that witnesses with communication difficulties of physical origin with no cognitive element, such as motor speech disorders, may not be eligible to access the existing provisions of the Act.

Finally, the study found concerns that the Act, with its limited number of sweeping provisions, does not provide sufficiently nuanced or individualised support to meet the needs of witnesses with a variety of disabilities and communication needs. Personalised supports have been defined as those which address the unique needs of the individual by focusing on their strengths and abilities (McConkey, Bunting, Ferry, Iriarte, & Stevens, 2013). They are flexible, responsive, and most importantly, determined by the recipient (National Federation of Voluntary Bodies, 2013). The existing literature on Irish courtroom accommodations is silent on the need to provide personalised supports. The provisions of such accommodations would prove a challenge to the inflexibility of the legal system. However, this is clearly called for by this study.

In summation, the findings of the current study indicate dissatisfaction with the ability of the Criminal Evidence Act 1992 to support witnesses with communication difficulties. Issues with the implementation of intermediaries in this jurisdiction, as well as a dissatisfaction with the lack of individualised supports on offer are key factors.
5.3 Disability knowledge and training within the legal profession

This study found an insufficient level of disability awareness within the legal profession. This results in the presence of limiting attitudes towards witnesses with communication difficulties and leads such witnesses to be unnecessarily side-lined in legal proceedings. These findings add to the existing Irish literature which has reported concerns regarding the levels of disability knowledge of legal professionals and the presence of negative assumptions regarding people's capacity to act as witnesses (C. Edwards et al., 2012; Kilcommins et al., 2013). A lack of familiarity with disability within the legal sector was also found to contribute to the treatment of adults with disabilities like children, a response which is in conflict with Article 13.1’s requirement to provide age-appropriate accommodations.

This study found that in order the meet the obligations of Article 13.1, the provision of disability training to legal professionals is essential. This reflects Article 13.2 of the CRPD. Delahunt (2015) reports that training on the examination of witnesses with an intellectual disability is recognised as an on-going need in the legal training institutes, the Honourable Society of Kings Inns and the Law Society. However, disability training must address both the profession's skill deficit in questioning people with communication difficulties and it's limiting attitudes towards people with disabilities. In this study, details of an ongoing training initiative on legal advocacy and questioning were shared. However, this is delivered from a legal perspective only. Training which collaborates with those who have expertise in communicating with those with disabilities does not appear to exist. Disability awareness training which challenges disabling attitudes and stereotypes, and promotes social and rights based approaches to disability also does not appear to exist. Both of these training needs must be addressed in order to increase the skills of legal professionals and challenge the way disability is viewed within the justice system.

This study found that members of the legal profession often lack experience in interacting with people with communication difficulties and other disabilities. According to Kanter (2011, p. 474), opportunities to interact with people with disabilities challenge legal professionals to confront their "assumptions, biases, and fears about people who are different from themselves". Therefore, any disability training offered should use the expertise of self-advocates and involve interaction with people with disabilities (Ortoleva, 2011).

This study found that the role of judges is particularly vital in facilitating the participation of witnesses with communication difficulties. This study found a desire for a wider range of accommodations for witnesses, which can be used as necessary on a case-by-case basis.
Ultimately, it is the trial judge who would have the discretion to grant or deny requests for such accommodations. Judges’ flexibility and openness would be essential in order for such an approach to be successful. As a result, disability training for judges is particularly important.

5.4 Conflicting perspectives

The study found a series of conflicting perspectives between the foundations of the Irish legal system and the CRPD (Figure 2). These have been presented individually in the previous chapter, but will now be considered together from a wider, socio-legal perspective.

As described previously, the view of disability taken by the CRPD moves decisively towards social and human rights based interpretations of disability (Ortoleva, 2011; Quinn, 2009; Stein & Lord, 2008). In contrast, this study found that the legal system embodies a medical model of disability, in both its attitudes and actions. Garcia Iriarte (2015) describes the medical model as that which problematizes the individual and not the environment in which they exist. Additionally, it relies on medical expertise over the expertise of people with disabilities. This study found both of these characteristics within the Irish legal system. This results in a legal system which is inflexible to the needs of people with communication difficulties and one which relies heavily on medical proof more so than the expertise of those with disabilities. Another characteristic of the medical model is the use ‘personal tragedy’ terminology (Garcia Iriarte, 2015). The use of outdated, disabling and tragic terminology within legislation and the legal profession was noted by this study. According to Kanter (2011, p. 433), “word choice can reveal values that reflect the speaker’s beliefs about disability as well as human worth, in general”. The terminology used in the legal system embodies the view of people with disabilities as ‘vulnerable’ and in need of protection. This is a barrier to the profession pursuing the empowerment of witnesses with communication difficulties through the development of appropriate accommodations.

The law has the ability to either contribute to societal barriers for people with disabilities or be a source of social change (Kanter, 2011). While more progressive views undoubtedly exist within the profession, and many were held by participants of the current study, the picture painted of the legal system as a whole is one incompatible with the principles of the CRPD. The integrity of the legal system is clearly a primary consideration for those within the profession. The natural caution and suspicion of the courts described in this study can be justified in an attempt to protect the system from inappropriate interference, as can the need
to protect the rights of the defendant. However, a system which disables, instead of empowers, witnesses with communication difficulties and fails to adjust its practices sufficiently to ensure their human rights are achieved, cannot be deemed just. Ultimately, as described by Jones and Basser Marks (2000), if the law aims to treat all citizens equally, it should reflect this in its actions towards witnesses with communication difficulties.

5.5 Conclusions: Is Ireland meeting its’ CRPD obligations?

According to Delahunt (2015), it is difficult to establish how Ireland is faring in relation to our obligations under Article 13.1. This study aimed to add to the understanding of one specific aspect of Article 13.1, the provision of accommodations to witnesses with communication difficulties in Irish criminal proceedings, using the expertise of those in the legal and disability fields.

When the current Irish context was considered alongside Ireland’s CRPD obligations, incompatibilities were identified. The study found concerns regarding the eligibility of witnesses with different communication difficulties to access the existing provisions of the Criminal Evidence Act 1992. The current accommodations of the Act were found to be insufficient and a desire for more personalised support for witnesses with communication difficulties was found. While the intermediary provision under the Act was positively regarded in principle, it was deemed ineffective due to a lack of proper implementation.

Insufficient disability awareness among the legal profession was found to result in inappropriate actions when dealing with witnesses with communication difficulties. Particularly significantly in relation to Article 13.1, it was found that this often resulted in witnesses being treated in an infantile manner. This is against the CRPD’s requirement to provide age-appropriate supports to witnesses. Disability awareness training was highlighted by this study as a necessary step in supporting access to justice for witnesses with communication difficulties.

A series of conflicts between the principles of the legal system and the CRPD were discovered, which pose challenges to both the legal profession and disability community in moving forward together to address Ireland’s shortcomings under Article 13.1. While the integrity of the legal process is of vital importance, the right to justice for people with communication difficulties is equally important. Both groups will need to invest time to understand the others’ perspectives and values, before identifying accommodation practices
which are both effective and mutually acceptable. The study revealed a perception that this issue is not of primary importance to either the legal profession or the disability community however, and without sustained lobbying on the part of the disability rights’ movement, the issue is unlikely to generate sufficient public and political pressure to force reform.

5.6 Limitations of the current study

This study utilised a small, purposive sample. Those who agreed to partake in the study did so because they have an interest in the research topic. Therefore, participants cannot be said to represent the views of their professions as a whole. Additionally, while the research was framed as examining the accommodations for witnesses with a variety of communication challenges, many participants focused largely on intellectual disability in their responses. For these reasons, the generalisability of results is low and should be done with caution.

Time limits in conducting the current study truncated the researcher’s ability to utilise the theoretical sampling principle of grounded theory to its fullness. It was not possible to conduct second interviews with original participants or to recruit additional participants to test emerging theories. While this was mitigated through the widespread use of the principle during successive interviews, it has reduced the confirmability of the research findings.

5.7 Areas for further research

In the current research, it was not possible to hear the direct experiences of people with communication difficulties who have been witnesses in criminal proceedings. In order to deepen the understanding of accommodation practices in Ireland and learn from those who have experiential knowledge, this is essential.

Research into courtroom accommodations in Ireland is limited, and that which does exist, almost exclusively focuses on witnesses in criminal proceedings, due to the existence of the Criminal Evidence Act 1992. During data collection, the contributions of participants revealed significant concerns regarding the lack of accommodations available for defendants in criminal cases, as well as for all participants in civil cases. The experiences of other participants in criminal and civil proceedings should also be researched, and their need for accommodations explored. Participants also felt strongly that the criminal justice system is a
process which involves multiple stages and agencies. They expressed concerns regarding the ability of other agencies, such as the Gardaí Síochána and the DPP, to support the needs of those with communication difficulties. Further research in this area is required.

Finally, the lack of disability knowledge among legal professionals, and the perceived implications of the same, have been discussed at length. This study identified the need for training to increase the awareness of barristers and judges of disability related issues. However, the effectiveness of any such training in changing both attitudes and actions cannot be presumed and should be established through empirical research.

5.8 Reflection on the learning process

The topic chosen for this study is one which has been of longstanding interest to me, combining personal and professional experiences. Throughout the research process, which was both enriching and draining, I learned that being invested in the topic was crucial. It gave me the passion and motivation needed to pursue the research enthusiastically.

The experience of conducting this research brought issues I have discussed theoretically into reality; nowhere more so than at the ethical approval stage of the process. I originally wished to study the lived experiences of people with communication difficulties of courtroom accommodations, convinced of the importance of hearing the voices of people who are traditionally silenced by research. During the ethical approval process, I encountered those with different, and more conservative, views to research involving those with disabilities. Initially, this challenged me to work harder to prove the necessity of my proposed study. When I was ultimately advised that using participants with disabilities would not be possible for the current small scale study, I was challenged to rethink my research. I did so as I believe firmly in the ‘nothing about us, without us’ principle. I recognised the need to identify alternative questions which could be appropriately answered by professionals. Ultimately, the disappointment of early research hurdles provided me with an opportunity to demonstrate the values I had spoken of during the previous year’s theoretical discussions.

Finally, in addition to the learning gleaned from navigating the research process, there has undoubtedly been learning in listening to the contributions of the study’s participants. The differing, yet equally valid, perspectives of participants have illustrated the importance of listening to a range of views in order to develop deep understandings of complex issues.
Disability interacts with every facet of life, and the importance of combining expertise in
disability with expertise in other areas is apparent to me as a result of this research.
6. Bibliography


Disability Act (Irl.), (2005).


Lunacy Regulation (Ireland) Act (Irl.), (1871).


Scope. (2009). *No voice, no choice: A sustainable future for alternative and augmentative communication (AAC)*. Retrieved from London:


7. Appendices

Appendix 1: Participant information sheet

Research study information sheet:

Access to justice for witnesses with communication difficulties in Irish criminal proceedings: An examination in relation to Article 13.1

Lead researcher: Catherine O’Leary, MSc Disability Studies student, Trinity College Dublin

My name is Catherine O’Leary and I am a MSc Disability Studies student in Trinity College Dublin. I would like to invite you to take part in a research study that has received ethical approval by the Research Ethics Committee in Trinity College Dublin. I am completing this research as part of the course requirements for my Masters qualification.

Please take time to read the following information carefully, as before you decide whether you would like to take part, you need to understand why the research is being done and what it would involve for you. You are encouraged to ask questions if anything you read is not clear or if you would like more information.

What is this study about?

For those with communication difficulties, such as difficulties understanding words or constructing narratives, acting as a witness in a criminal trial is a challenging experience. Concerns have been expressed that current Irish accommodations for such witnesses are not sufficient to facilitate their participation and communication. This issue will come into increased focus when Ireland ratifies the United Nations’ Convention on the Rights of Persons with Disabilities, which is due to occur in late 2016. Article 13.1 of this Convention states the requirement for State Parties to enable ‘access to justice’ by providing accommodations to support those with disabilities taking part in the justice system, including to those involved in the capacity of a witness. This study aims to explore the meaning of ‘access to justice’ as described in Article 13.1, with specific focus on how the article applies to witnesses with communication difficulties in criminal proceedings.
What would taking part involve?
If you decide you would like to take part, you will be asked to provide informed consent. Following this, you will complete a face-to-face interview with me. You can choose either to have this interview audio-recorded or for written notes to be taken. The interview will last approximately 1 hour, and will take place in a private room in a location of your choosing. You can withdraw your consent to participate at any time before or during the interview. Following your interview, you can withdraw permission for your data to be used in the study within two weeks. In this case, the material will be deleted. You can also choose not to answer any specific question within your interview.

During the interview, we will discuss the following:
- ‘Access to justice’ and accommodations for people with communication difficulties who act as witnesses in criminal proceedings
- Your perceptions of existing accommodations used to support witnesses
- Your views on meeting the obligations of Article 13.1 for witnesses with communication difficulties following Ireland’s ratification of the United Nations’ Convention on the Rights of Persons with Disabilities

You are not required to have previous specific knowledge of Article 13.1 of the Convention on the Rights of Persons with Disabilities, as the wording of this will be provided during the interview. You may be asked to do a second interview at a later time in order to explore some contributions in greater detail. You will be free to agree or disagree to completing a second interview and your rights in regard to this second interview would the same as in your first interview.

Why have you been invited to take part in my study?
You have been invited to take part as you are either:
- An academic or professional with experience in the field of disability advocacy and/or lobbying of at least two years’ duration, and having knowledge of current accommodations for witnesses with communication difficulties in criminal proceedings in Ireland.
- A barrister, solicitor or judge working within criminal law for at least two years and have knowledge of current accommodations for vulnerable witnesses in criminal proceedings in Ireland.

Professionals from both of these groups have been selected to partake in this study in recognition that collaboration between both groups and a shared focus has historically been
required to bring about disability-related law reform. By including both groups, a variety of perspectives will be gathered, and information about how these perspectives align will be obtained.

**Do you have to take part in this study?**
You are under no obligation to take part in this study. You have the right to refuse participation, to refuse to answer any question and to withdraw at any time without any consequence whatsoever.

**Are there any known risks to taking part?**
There are no known risks associated with taking part in this study.

**How will the confidentiality of your data be protected?**
Your confidentiality and anonymity are of paramount importance and will be protected at all times. The confidential information I will have about you (your name, contact information, basic demographic information and audio recordings of your voice) will be stored securely in password protected files on the lead researcher’s computer, and will be accessible by only the lead researcher and her supervisor. Your demographic information and transcripts of your interviews will be stored under a pseudonym which you will choose.

Extracts from your interview may be quoted in the lead researcher’s dissertation and any subsequent conference presentations and published journal or magazine articles. However, in the reporting of results, you will not be referred to by name and all identifying information about you and where you work will be removed. Your pseudonym will be used and your occupation will be referred to in general terms e.g. a criminal barrister working in Dublin. Should you make reference to other people or identifiable situations in the course of your interview, all identifiable information will also be removed about these both interview transcripts and the reporting of findings.

The only exception to the above will be if the researcher has a strong belief that there is a serious risk of harm or danger to you or another individual or if a serious crime has been committed. I may have to report this to the relevant authorities. I will discuss this with you first but may be required to report this with or without your permission.

**How long will the data be kept and can you access it?**
Raw data will be kept until exam boards confirm the researcher’s results for her dissertation. Anonymised interview transcripts will to be retained for two years from the date of the exam
board. You are entitled to review the transcripts of your interviews for accuracy at any time. You are also entitled to ask to review any direct quotations used from your interviews, to ensure that they reflect accurately what you have said and are used in their proper context. Under the Freedom of Information Act 2014, you are entitled to access any information you have provided at any time while it is in storage.

**What will happen to the results of the study?**
The results of the study will be submitted as part of the researcher’s MSc course requirements. It may also be submitted for consideration for presentation at conferences or for publication in relevant disability and law journals or magazines.

**Where to get more information about this study:**
Please do not hesitate to contact me to ask any questions, or to indicate your initial interest in learning more about the study. My supervisor, Dr Michael Feely, can also be contacted.

Catherine O’Leary:  **Email:** coleary5@tcd.ie  **Tel:** 083 485 9558  
Dr Michael Feely:  **Email:** mfeely@tcd.ie  **Tel:** 01 8964101

I sincerely thank you for giving consideration to participating in my research study. I look forward to hearing from you.

Yours faithfully,

[Signature]

Catherine O’Leary
Appendix 2: Gatekeeper information sheet

Mr/Mrs ……

Research study: Access to justice for witnesses with communication difficulties in Irish criminal proceedings: An examination in relation to Article 13.1

Dear Sir/Madam,

My name is Catherine O’Leary and I am a MSc Disability Studies student in Trinity College Dublin. I would like to invite you to assist me in conducting a research study, which has received ethical approval by the Research Ethics Committee in Trinity College Dublin. I would be grateful if you took time to read the following information carefully before you decide whether you can assist me, as it explains why the research is being done and what it would involve for you and for the participants.

What is this study about?

For those with communication difficulties, such as difficulties understanding words or constructing narratives, acting as a witness in a criminal trial is a challenging experience. Concerns have been expressed that current Irish accommodations for such witnesses are not sufficient to facilitate their participation and communication. This issue will come into increased focus when Ireland ratifies the United Nations’ Convention on the Rights of Persons with Disabilities, which is due to happen in late 2016. Article 13.1 of this Convention states the requirement for State Parties to enable ‘access to justice’ by providing accommodations to support those with disabilities taking part in the justice system, including to those involved in the capacity of a witness. This study aims to explore the meaning of ‘access to justice’ as described in Article 13.1, with specific focus on how the article applies to witnesses with communication difficulties in criminal proceedings.

Who do I wish to take part in my study?

I wish to recruit a total of 8-10 participants, consisting of professionals from two groups: those working within the field of disability advocacy and of legal professionals working within the area of criminal law. These groups have been selected in recognition that both have
important, but potentially alternative perspectives on law reform in the area of disability, and that collaboration and a shared vision between both groups has historically been required to bring about change.

Participants will be eligible if they meet the following criteria:

1. Aged 18 years or over
2. Meet either (a) or (b):
   a. Have academic or professional experience within the field of disability advocacy and/or lobbying of at least two years’ duration, and self-reported knowledge of current accommodations for vulnerable witnesses in criminal proceedings in Ireland.
   b. Are a barrister, solicitor or judge working within criminal law for at least two years and have self-reported knowledge of current accommodations for vulnerable witnesses in criminal proceedings in Ireland.

Participants are not required to have prior knowledge of Article 13.1 of the United Nations’ Convention on the Rights of Persons with Disabilities. Given the specific scope of the current study, on this occasion, participants will not be eligible if they are a self-advocate i.e. a person with an intellectual or communication difficulty.

**If you identify a potential participant, what would they have to do:**

You would be asked to send information about the study, which I have prepared, to the person. However, they would be under no obligation to take part. If they contact me and express interest in hearing more about the study, I would then meet them or speak with them by telephone to discuss the study in greater detail. After this, if the participant wishes to take part and gives informed consent, they will complete an interview with me where we will explore the following:

- ‘Access to justice’ and accommodations for people with communication difficulties who act as witnesses in criminal proceedings
- Their perceptions of existing accommodations used to support witnesses
- Their views on meeting the obligations of Article 13.1 for witnesses with communication difficulties following Ireland’s ratification of the United Nations’ Convention on the Rights of Persons with Disabilities
Some participants may be asked to do a second interview at a later time in order to explore some contributions in greater detail. Participants will be free to agree or disagree to a second interview.

**Who will have access to the data:**
The raw data collected will be accessed by only me, the researcher, and my supervisor, Dr Michael Feely. The information gathered will be anonymised before being included in the final study report.

**What will happen to the results of the study:**
The results of the study will be submitted as part of the researcher’s MSc course requirements. It may also be submitted for consideration for presentation at conferences or for publication in relevant disability and law journals or magazines.

**What I need your assistance with:**
If you agree to assist me, you will be asked to reflect on whether there are any people known to you who meet the study’s criteria. You will be asked to send information about the study, which I have prepared, to those you identify, on my behalf. You will be asked to send a reminder letter and a second copy of the study information sheet two weeks following the initial letter if necessary. Then, your involvement in the study will end. At this point, potential participants will be asked to contact me directly if they are interested in learning more about the study.

**Where to get more information about supporting this study:**
Please do not hesitate to contact me to ask any questions, or to indicate your initial interest in supporting the study. My supervisor, Dr Michael Feely, can also be contacted.

| Catherine O’Leary: Email: coleary5@tcd.ie Tel: 083 485 9558 |
| Dr Michael Feely: Email: mfeely@tcd.ie Tel: 01 8964101 |

I sincerely thank you for giving consideration to supporting my research study. I look forward to hearing from you.

Yours faithfully,

Catherine O’Leary
Appendix 3: Consent form

Access to justice for witnesses with communication difficulties in Irish criminal proceedings: An examination in relation to Article 13.1

Lead researcher: Catherine O’Leary, MSc Disability Studies student, Trinity College Dublin

Consent to take part in research

- I……………………………………………………………… voluntarily agree to take part in this research study.

- I understand that even if I agree to participate now, I can withdraw at any time or refuse to answer any question without any consequences of any kind.

- I understand that I can withdraw permission to use data from my interview within two weeks after the interview, in which case the material will be deleted.

- I have had the purpose and nature of the study explained to me in writing and I have had the opportunity to ask questions about the study.

- I understand that participation involves conducting at least one, and no more than two, face-to-face interviews with the lead researcher, where access to justice for witnesses with communication difficulties in criminal proceedings will be discussed.

- I understand that I will not benefit directly from participating in this research.

- Please select one: I agree to my interview(s):

  - Being audio-recorded
  - Documented in written notes

- I understand that all information I provide for this study will be treated confidentially.

- I understand that in any report on the results of this research my identity will remain anonymous. This will be done by changing my name and disguising any details of my interview which may reveal my identity or the identity of any people I speak about.
• I understand that disguised extracts from my interview may be quoted in the lead researcher’s dissertation, conference presentations and published journal and magazine articles.

• I understand that if I inform the researcher that myself or someone else is at risk of harm they may have to report this to the relevant authorities - they will discuss this with me first but may be required to report with or without my permission.

• I understand that signed consent forms and original audio recordings will be retained in password protected files on the lead researcher’s computer. These will be accessible only by the lead researcher and her supervisor, and retained until exam boards confirm the researcher’s results for her dissertation.

• I understand that a transcript of my interview in which all identifying information has been removed will be retained for two years from the date of the exam board.

• I understand that under freedom of information legalisation I am entitled to access the information I have provided at any time while it is in storage as specified above.

• I understand that I am free to contact any of the people involved in the research to seek further clarification and information.

Catherine O’Leary:  Email: coleary5@tcd.ie  Tel: 083 485 9558
Dr Michael Feely:  Email: mfeely@tcd.ie  Tel: 01 8964101

______________________  ______________________  __________
Signature of research participant  Name in block capitals  Date

For the researcher:
I believe the facilitator is providing informed consent.

______________________  ______________________  __________
Signature of researcher  Name in block capitals  Date
Appendix 4: Interview guide

Access to justice for witnesses with communication difficulties in Irish criminal proceedings: An examination in relation to Article 13.1

Interview Schedule

Introduction:
Thank you very much for taking the time to speak with me today. Today’s interview will last approximately 1 hour and is being audio recorded using my tablet. If you would like to take a break at any time, please let me know. That is no problem. If I ask any questions which you would prefer not to answer, that is also OK. Let me know and we will move on to the next question.

As you know, our interview today will focus on people with communication difficulties who act as witnesses in criminal trials. We will speak in general terms about this topic, but will also consider part of the United Nations Convention on the Rights of Persons with Disabilities and the concept of ‘access to justice’. You do not need to know about these previously, as I will introduce it to you.

I will start by asking you some general questions about your background, before moving more specific questions regarding the participation of witnesses with communication difficulties in criminal proceedings. We will also use some fictional scenarios to explore the topic.

Have you any questions before we continue?

Q1: To begin can you tell me about what you do for a living?

Probes:
- How long have you worked in the field?
- Can you describe your current responsibilities?
- Have you had other jobs in the legal/disability field?
- What does a typical day at work look like for you?
- Did you complete any specific training to become a _____?
- Have you come into contact with people with communication difficulties as part of your role?
- Have you come into contact with people with other disabilities as part of your role?
- Have you come into contact with people with disabilities who have had involvement with the criminal justice system?

-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------
In my study, I am focusing on situations when people with communication difficulties act as witnesses in criminal court cases.

*(Give interviewee card with explanation of ‘communication difficulties’)*

For the purposes of my study, ‘communication difficulties’ is taken to mean any challenge which interferes with a person successfully exchanging information and ideas. They can be due to problems understanding, problems using words and sentences, or problems with speech sounds. Communication difficulties have many causes, including intellectual disabilities like Down Syndrome; stroke, brain injuries or physical disabilities like cerebral palsy.

In this study, deafness or hearing impairment are not considered a ‘communication difficulty’. Deafness is typically considered a ‘communication difference’, as many use a different language, sign language, to communicate fluently and without difficulty.

I know that can be a lot to remember, which is why I will leave the card here for us to refer back to as a reminder. Do you have any questions about the term ‘communication difficulties’?

*(Interviewer answers any questions regarding the term’s meaning.)*

I’d like to move on to explore the topic of people with communication difficulties who act as witnesses in criminal proceedings.

**Q2a. Are there any times which come to mind when you were directly or indirectly involved in a situation when a person with a communication difficulty acted as a witness in criminal case?**

Probes:

- How did you come to be involved in this situation?
- Do you have any sense as to what the experience was like for that person?
- Do you think the experience was similar or different to that of someone without a communication difficulty in the same situation?
- In this situation, are you aware of any things which helped the person’s participation?
- Are you aware of anything which acted as a barrier to their participation?
- Reflecting on that situation, do you think there was a successful outcome for the witness? Can you tell me why you feel that?
- How influential was the person’s communication difficulties on proceedings?
Q2 b. Are there any other experiences coming to mind which relate people with communication difficulties acting as witnesses in criminal proceedings?

(If participants do not have direct experiential contributions, refer to scenarios included below in the ‘Additional Resources’ section to probe the topic using their professional knowledge)

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Now we will move on to talking about the United Nations Convention on the Rights of Persons with Disabilities which was adopted in 2006. Ireland has signed this, but have yet to ratify it. According to the Government this will happen in late 2016.

Article 13 is titled ‘Access to justice’. I’d like to talk about Article 13.1 in particular.

(Give interviewee card with text of Article 13.1)

Article 13.1 states:

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

Again, I will leave this card here as it might be useful to have it to refer to during our discussion.

Please take as long as you’d like to consider this Article and refer to the card whenever you would like.

(Leave pause of 30 seconds to allow person to consider article)

Q3: What do you believe ‘access to justice’, as described in the Article, would look like for people with communication difficulties who are witnesses in criminal proceedings?

Probes:

- Is the phrase ‘access to justice’ one you have come across before? In what contexts? How do you think it applies to people with disabilities?

- Specifically, in the situation described above-or-for John/Sinead/Pauline, what do you think access to justice would look like for him/her?

- Can you tell me what you think of when you hear the word justice?

- What things may play a role in facilitating access to justice for people with communication difficulties?

- What things may interfere with access to justice for people with communication difficulties?

- Do you think ‘access to justice’ is important?
Article 13.1 mentions that countries must provide ‘procedural and age-appropriate accommodations’ to support people accessing justice.

In Ireland, the Criminal Evidence Act 1992 provides for adaptations to criminal courtroom proceedings in certain circumstances for children, those with learning disabilities, and alleged victims of violent or sexual abuse. For witnesses in these three groups, legal professionals remove their wigs to deformalize proceedings. Witnesses can give evidence via video link so they do not have to face the defendant. Additionally, an intermediary can be used to ask the witness questions on behalf of the court, which has been used once in Irish courts.

Q4: From this information, but also drawing on your own knowledge and experience, how do you believe current accommodations in Ireland sits alongside Article 13.1?

Probes:
- Have you seen any of these being used in court? What were the benefits of these adaptations, from your perspective? Did any of these help a person to understand the language used or help them to tell their story more clearly?
- Have you seen or heard of any other accommodations being made in court to support a person with communication difficulties giving testimony?
- Perhaps consider one of the subjects of our earlier scenarios to help frame your thinking.
- Drawing on your experience interacting with people with disabilities, do you feel these strategies remove the barriers to communication in the courtroom?
- Drawing on your experience of cross-examining witnesses, and the types of language you use, do you feel participant with communication difficulties are ‘facilitated to take an effective role’ as mentioned in the Article?
- The Article mentions ‘procedural barriers’ to accessing justice. From your experience, which procedures may be particularly challenging for people with communication difficulties and how are they addressed?

Q5. Do you have any views regarding whether the State need to take any additional actions to meet the obligations of Article 13.1 of the UN CRPD for witnesses with communication difficulties?

Probes:
- Is there anything the State should do, that they are not already doing?
- The Article mentions ‘procedural and age appropriate accommodations’ – what comes to mind for you when you hear this?
- In an ideal world, what would the experience for people with communication difficulties be like in Ireland when they were witnesses in criminal proceedings?
Q6. Do you envisage any challenges in meeting the obligations of Article 13.1 in Ireland?

Probes:
- Is there a need for reform or are current practices sufficient?
- How would you envisage any reform proceeding?
- Do you feel reform would be supported by the disability advocacy movement/legal profession? Why would they/would they not support reform?
- What would the challenges of additional ‘procedural and age-appropriate accommodations’ be?
- Do you have concerns regarding adapting evidence giving procedures for people with communication difficulties?

Q7: We’re coming to the end of our interview. Is there anything else which we haven’t covered which you think is important to consider regarding the topic?
Interview schedule: additional resources

1. **General probes:**
   - You mentioned ________________. Can you tell me more about that?
   - It sounds like you’re saying____________________
   - So, you feel that X is linked to/caused by (etc) Y.
   - Tell me more about that.
   - I’m interested in exploring what you said about X more.

2. **Scenarios:**

   (For use if a participant’s experiential knowledge is limited and their contributions are more appropriately based on wider professional experience, to be applied to the context of witnesses with communication difficulties in criminal justice system).

I’d like to use three fictional examples to explore this topic. I will describe a situation and then we will discuss your impressions.

**Scenario 1: John**

“John is a 58-year-old man who has cerebral palsy. He does not have an intellectual disability but due to his cerebral palsy, his control of the muscles for speech, like the tongue and lips, are reduced. John communicates using words and sentences, but those who do not know him can sometimes struggle to understand the words he is saying. John was the only witness to an assault in his home town. He has been called to give evidence in court.’

**Q. What are your thoughts regarding John’s situation and upcoming participation in a criminal trial?**

Probes:
   - Are there any things which concern you about this person’s participation?
   - Are there any things which you feel would be necessary to support this person to take part?
   - Do you feel the trial would proceed as normal?
   - Do you feel the outcome would be the same?

---------------------------------------------------------------------------------------------
Scenario 2: Sinead:

Our second scenario relates to Sinead, a 20-year-old woman who has Down syndrome and a mild intellectual disability. Sinead finds it difficult to concentrate for long periods of time when people are speaking to her. She finds it difficult to understand new and unfamiliar words, such as ‘evidence’ and ‘guilty’. She also gets confused with language concepts that relate to time, such as ‘before’, ‘after’, and ‘first’. When she doesn’t understand, she often pretends she does, in the hope that people will then leave her alone. Sinead witnessed an armed robbery. She has been called as a witness during the trial.

Q. What are your thoughts regarding Sinead’s situation and upcoming participation in a criminal trial?

Probes:
- Are there any things which concern you about this person’s participation?
- Are there any things which you feel would be necessary to support this person to take part?
- Do you feel the trial would proceed as normal?
- Do you feel the outcome would be the same?

------------------------------------------------------------------------------------------------------------

Scenario 3: Pauline

Our final scenario is that of Pauline. Pauline is 31 years old and has autism. Pauline becomes very anxious in new situations. She communicates verbally, but has difficulties with other aspects of communication. She is unsure of the social rules of conversation and will often interrupt the person she is talking to or may change topic with no warning. Pauline takes language literally and becomes confused when figurative language such as ‘to have a chip on your shoulder’ or ‘to rub someone up the wrong way’ is used. Pauline is the only witness to an alleged assault.

Q. What are your thoughts regarding Pauline’s situation and upcoming participation in a criminal trial?

Probes:
- Are there any things which concern you about this person’s participation?
- Are there any things which you feel would be necessary to support this person to take part?
- Do you feel the trial would proceed as normal?
- Do you feel the outcome would be the same?

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Appendix 5: Interview definition cards

Communication difficulties:

- Any challenge which interferes with a person successfully exchanging information and ideas.

- Due to problems understanding, problems using words and sentences, or problems with speech sounds.

- Causes include intellectual disabilities like Down Syndrome; stroke, brain injuries or physical disabilities like cerebral palsy.

- In this study, deafness or hearing impairment are not considered a ‘communication difficulty’. Deafness is typically considered a ‘communication difference’, as many use a different language, sign language, to communicate fluently and without difficulty.


“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”
Appendix 6: Transcription protocol

Transcription Protocol

Adapted from McLellan, MacQueen and Neidig (2003)

1. LABELLING AND FORMATTING

1.1 General instructions:

The transcriber shall transcribe all interviews using the following formatting:

- Arial 10-point font, 1.5 spaced
- One-inch top, bottom, right, and left margins
- Participant/Interviewer identifying code shall begin at the left-hand margin
- Transcription of text of interview to begin at 1.5-inches.
- Entire document shall be left justified
- Line numbers will be inserted for ease of coding and referencing
- Interviewer contributions will be emboldened.

1.2 Labelling of individual interview transcripts

1.2.1 Initial page

The first page of each transcript shall contain the following information, formatted as shown:

Title of study:
Participant Pseudonym:
Interviewer Name:
Participant Category:
Date of Interview:
Transcriber:

1.2.2 Header

The header for each page of interview transcriptions shall include the following information, formatted as shown below:

Pseudonym: Date of interview:
1.3 **End of interview:**

The end of interviews will be indicated by insertion of the capitalised words ‘END OF INTERVIEW’, centre aligned, on the line following the last transcribed interview data.

---

### 2. STORAGE

2.1 **Saving of audio files:**

Audio files will be saved using the following convention:

Participant pseudonym-date

Example: Catherine-01.01.16

2.2 **Storage of audio files:**

Audio files will be saved as password protected files on the researchers Dropbox account.

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### 3. CONTENT

3.1 **General principles:**

- Audiotapes shall be transcribed verbatim.

- If interviewers or interviewees mispronounce words, these words shall be transcribed as the individual said them. The transcript shall not be “cleaned up” by removing foul language, slang, grammatical errors, or misuse of words or concepts. If an incorrect or unexpected pronunciation results in difficulties with comprehension of the text, the correct word shall be typed in square brackets. A forward slash shall be placed immediately behind the open square bracket and another in front of the closed square bracket.
  
  *Example:* I thought that was pretty pacific [/specific/], but they disagreed.

- The spelling of key words, blended or compound words, common phrases, and identifiers shall be standardized across all individual and focus group transcripts.
Enunciated reductions (e.g., betcha, cuz, 'em, gimme, gotta, hafta, kinda, lotta, oughta, sorta, wanna, coulda, could’ve, couldn’t,ouldn’ve, couldn’t, wouldn’t, wouldn’ve, wouldn’t, wouldn’t, wouldn’t, wouldn’t, wouldn’t, wouldn’t, shouldn’t, shouldn’t, shouldn’t, shouldn’t, shouldn’t, shouldn’t, shouldn’t, shouldn’t, shouldn’t) plus standard contractions of is, am, are, had, have, would, and not shall be used.

- Filler words such as hm, huh, mm, mhm, uh huh, um, mkay, yeah, yuhuh, nah huh, ugh, whoa, uh oh, ah, and ahah shall be transcribed.

- Word or phrase repetitions shall be transcribed. If a word is cut off or truncated, a hyphen shall be inserted at the end of the last letter or audible sound (e.g., he wen- he went and did what I told him he shouldn’ve).

- General information needed to explain occurrences in interview will be centre orientation and included in square brackets e.g.

  [Completed demographic information]

3.2 Inaudible Information

The transcriber shall identify portions of the audiotape that are inaudible or difficult to decipher. If a relatively small segment of the tape (a word or short sentence) is partially unintelligible, the transcriber shall type the phrase “inaudible segment.” This information shall appear in square brackets.

Example:
The process of identifying missing words in an audiotaped interview of poor quality is [inaudible segment].

If a lengthy segment of the tape is inaudible, unintelligible, or is “dead air” where no one is speaking, the transcriber shall record this information in square brackets. In addition, the transcriber shall provide a time estimate for information that could not be transcribed.

Example:
[Inaudible: 2 minutes of interview missing]

3.3 Overlapping Speech

If individuals are speaking at the same time (i.e., overlapping speech) and it is not possible to distinguish what each person is saying, the transcriber shall place the phrase “cross talk” in square brackets immediately after the last identifiable speaker’s text and pick up with the next audible speaker.

Example:
Turn taking may not always occur. People may simultaneously contribute to the conversation; hence, making it difficult to differentiate between one person’s statement [cross talk]. This results in loss of some information.
3.4 **Pauses**

If an individual pauses briefly between statements or trails off at the end of a statement, the transcriber shall use three ellipses. A brief pause is defined as a two- to five second break in speech.

*Example:*
Sometimes, a participant briefly loses . . . a train of thought or . . . pauses after making a poignant remark. Other times, they end their statements with a clause such as but then . . .

If a substantial speech delay occurs at either beginning or the concluding a statement occurs (more than two or three seconds), the transcriber shall use “long pause” in parentheses.

*Example:*
Sometimes the individual may require additional time to construct a response. (Long pause) other times, he or she is waiting for additional instructions or probes.

3.5 **Sensitive Information**

If an individual uses his or her own name during the discussion, the transcriber shall replace this with the participant’s selected pseudonym.

If an individual provides others’ names, locations, organizations, and so on, the transcriber shall replace this with a general description in brackets

*Example:*
I was working with (disability advocacy organisation) when I came in contact with (name of 3rd party).

4. **REVIEWING FOR ACCURACY**

The researcher shall check (proofread) all transcriptions against the audiotape and revise the transcript file accordingly. A three-pass-per-tape policy will be adopted, whereby each tape is listened to three times against the transcript before it is considered an acceptable representation of the interview.
**Appendix 7: Example of transcribed interview: Paul**

<table>
<thead>
<tr>
<th>Title of study:</th>
<th>Access to Justice for witnesses with communication difficulties in Irish criminal proceedings: An examination in relation to Article 13.1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participant Pseudonym:</td>
<td>Sarah</td>
</tr>
<tr>
<td>Interviewer Name:</td>
<td>Catherine O'Leary (COL)</td>
</tr>
<tr>
<td>Participant Category:</td>
<td>Legal professional</td>
</tr>
<tr>
<td>Date of Interview:</td>
<td>06/07/16</td>
</tr>
<tr>
<td>Transcriber:</td>
<td>Catherine O'Leary</td>
</tr>
</tbody>
</table>

---

1. **COL:** So thank you so much. I really do appreciate your time today. Em, so, as I kind of sent you in the information, what I am looking at really is the concept of access to justice. Em, my background: I’m doing the Masters in Disability Studies but I’m a speech and language therapist

2. **Sarah:** OK.

3. **COL:** So, I’m quite interested in, I suppose, when people with communication difficulties come into contexts where there is lots of demands on their communication.

4. **Sarah:** Yes

5. **COL:** And, to lay all the cards out on the table, I came from a family that was quite involved in law so

6. **Sarah:** OK

7. **COL:** I kind of grew up with an awareness of the law, so it’s always been an interest of mine. Em, and I also worked in the UK for a while where they have intermediary systems that are a bit more advanced than here

8. **Sarah:** Ya

9. **COL:** So I was exposed to that. So I suppose, that’s, that’s where I am coming from in terms of, in terms of my background to it. So what I am kind of trying to figure out is what the current context in Ireland is and within the Disability Studies community,
there is a lot of talk about the UN Convention which the Government are saying they will ratify by the end of the year and in that Article 13.1 talks about the concept of Access to Justice. So I'm trying to tease some of those issues out by talking to people who are, I suppose versed in the area

Sarah: Ya

COL: And also I suppose, some naysayers who can give a different perspective on it. Em, so that's where I'm coming from

Sarah: Sure

COL: with it. Em, I have a couple of kind of main questions, but then I'm also just going to be led by what you've

Sarah: Sure

COL: to say as well. If there is anything you don't want to answer

Sarah: Yes, fine no problem

COL: That's absolutely fine. I'll give you a pseudonym. Em, so

Sarah: I don't particularly mind, yes.

COL: If there is any particular name that you do or don't want? But ya, just let me know if there's anything that you don't want to answer, that's fine. Em, so I suppose, just to get an idea of your, of your background

Sarah: OK

COL: and perspectives

Sarah: 22 years qualified as a barrister. The last 15 of which I would have spent doing about 90% crime

COL: OK.

Sarah: Of that time, I would have spent about 7 or 8 years, I'm not sure if the maths will actually add up

COL: Ya, but

Sarah: Doing only prosecution, with maybe one defence case a year and maybe two or three civil cases a year. The last 6 or 7 years, I took silk in 2009, since then, I have done about 50/50 prosecution and defending on the criminal side and again, still doing 3 or 4 significant enough, but not in terms of time

COL: Ya

Sarah: Civil cases. So, particularly I suppose, in the last ten years, I have spent almost all of my time at work in court and spent the evenings then preparing for the next day in court. So I've spent an awful amount of time in court. What I find interesting about some of your questions, in advance

COL: Yes

Sarah: Is that I have spent a lot of time in the Bar Council and I'm doing some work with [participant Clíona] on the Victims Directive and I've also sat in with the Irish Disability Authority on in particular, eh guidelines they are doing at the moment for people with autism coming into contact with the justice system. And I found that very interesting. But also, because I've done so much work in court, I can tell you that it is very very rare for someone, with, particularly with significant communication difficulties to come into contact with the criminal
justice service. And that’s not, I suspect, because they are put off by the way the service is
presented, but because statistically, most people will not come into contact with the criminal
justice system.

COL: Do you think
Sarah: So

COL: that is because they haven’t committed crimes or witnessed crimes?
Sarah: Exactly. That’s exactly what I’m saying. So to be careful just statistically,

COL: Ya
Sarah: to be aware, when you study a subject, I’m even reminding myself of it all the time, what I’ve
specialised in, in particular, is sexual offending. I have to remind myself that the vast
majority of people in Ireland, and indeed, hopefully worldwide, will never, have any kind of
experience, personal experience of serious sexual offending. They may hear anecdotes, or
they may read about it but they personally will not experience it, and if they’re lucky, and
most people are. Their families won’t experience it either. So you get kind of a skewed view
when you’re in an area

COL: Ya
Sarah: And I’m just thinking, if I were you, I would be very focussed on people

COL: Yes
Sarah: with particular disabilities. As I saw when I went into the Disability Authority and talked about
people with autism, and I have to remind myself, much as I’d like to, and I will help in any
way I can, and I think it would be easy to make certain adjustments that will help people, we
have to be realistic about the resources, and realistic about the numbers of people involved,
because it’s very small.

COL: small.
Sarah: I think it’s very small. I may be wrong.

COL: Ya, ya.
Sarah: But from my experience it’s very small, and I am happy to be proven wrong if there is an
argument that one of the reasons is because anyone with a disability isn’t coming forward as
a witness. I mean, let’s be realistic, people with every kind of advantage would prefer not to
be witnesses.

COL: Absolutely.
Sarah: So, that’s, there’s always, … anyway, that’s an extremely long answer. That’s what I do.

COL: Yes.
Sarah: That’s what I spend most of my time doing. So I’m anticipating probably some of your
questions.

COL: Ya.
Sarah: Ask away. Do you have enough from that or do you want me to tell you any more about any
bit of that? I’ll happily expand on that.

COL: That’s great.
Sarah: [cross talk]
And in your, you said that you have I suppose split your time I suppose between defending and prosecuting

Sarah: Yes

In either of those contexts, have you even come across a situation where, as a witness, or as another player within the court case, you felt the person was having challenges understanding or communicating their, I suppose, their views, their their story, the narrative or what’s happened?

Sarah: I can break this down to three different areas. Two are very isolated incidents and they are about very different types of people, and they are in different contexts, and the third is a whole category which is children. Because I think that is a specific category. Because they do not communicate in the same way that adults do.

No, no.

Sarah: But em, obviously, disability isn’t a word one would use, because they are not fully formed in terms of their ability to communicate, but clearly it is a very natural state of being to be a child. Nobody would consider it to be labouring under a disability. And actually, I think that’s probably the right way to think about it. Not to be pejorative about disability, but, but because children are ubiquitous

Sarah: Nearly everyone, I don’t have children myself, but I know many children, I have nephews, I have plenty of, all my friends have children, everyone, practically everyone, have some ability to communicate with children. Even though they themselves don’t realise they are changing their mode of communication

Sarah: Most of us do it naturally. Some of us, particularly some of us, some barristers who have been involved in, we just met a friend of mine, [name of friend]. She is involved in the advocacy group that I, we all take part in, eh, one of our aims is to make barristers think more carefully about how they ask questions and in particular with a witness such as a child who may communicate in a different way. So the answer to your question is yes, I’ve come across a lot of witnesses who are children and that is partly, largely because of what I do.

Sarah: Because a lot of victim of sexual offending are children. And I meet them sometimes when they are still children. More often when they are adults, but it is still a very difficult thing for them to communicate about but I think partly because I have a lot of experience now in dealing with them, not because I was specially trained at any point, although more recently, thanks to the Victims Directive, we are bringing that in and I am very keen to see more training, for me first of all, but also to try and roll it out for other barristers and anywhere else in the criminal justice system. So training is a great thing, which happens organically. That is not an ideal solution because not everyone stays up to the same speed so I’m a big fan of proper training and proper research in these areas. But the way I have learned to communicate better with children is by experience. I would be much more comfortable dealing with a child witness now than I was 15 years ago. Even 10 years ago. And one of the things I’ve learned, and again, this is the kind of thing that I would like to see more junior colleagues trained in, is that the more contact, and the more friendly contact that one has with the witness, before anything begins, the easier it is for that witness to tell her story or tell his story. And obviously, one isn’t, in fact, one can’t talk about the evidence, but that is not the issue. The issue is that they have then, met the barrister, that they don’t feel quite as nervous about telling, speaking the evidence that they have come to speak. So that’s a whole category. That’s children. I think they find it, in fact adults find it difficult to give evidence as well, so I’m not sure I’d make a huge distinction between the difficulty of a child
going to court and the difficulty of an adult. Again, that is probably back to what I do. The adults coming in to see me, in this context, have often been either abused or they are being accused of abuse and they are saying they are not guilty. Now whether they are or not is a different issue. Either way, it is a hugely stressful position to be in. But children have different obstacles but a lot can be done to make them feel more comfortable about it. Not just having a parent or a friend there, the victims support do great work in terms of adult and children witnesses. Em, and I suppose my experiences in dealing with children in particular, have been largely positive, because by the time a child comes to me, they have already told their story to An Garda Siochána, they have already, they usually have gone to extensive counselling, it’s very rare for me to see a child victim who hasn’t been counselled. So I see them at the end of a process. So they’ve usually made much progress. Em, I’m not sure.

COL: Do you think that there is lessons to be learned from the way that we communicate with children that can be transferred to adults with communication difficulties?

Sarah: Definitely. Yes. That would make perfect sense to me. Let me move on to the two

COL: Yes

Sarah: Specific examples I have that weren’t children and both cases, what could be called disability. And one is, one is entirely random. It was a juror whom it was clear right from the moment she started taking the oath that she didn’t know what was going on. But she had huge difficulties in actually repeating the oath. And it was too late, we have to challenge jurors after, sorry, before the oath is taken, and we actually did have a discussion, I think I was prosecuting in that case, had a discussion about whether we would challenge for cause shown, but then, legally speaking it should be done before the oath was taken. And em, she solved, or resolved the problem for us by simply not turning up the following day. Clearly there were issues there. Em, that was interesting because it hasn’t happened since, and I don’t know how, em, other than, including Courts Services in this study, which and I’m not sure if you’ve done that Catherine

COL: No

Sarah: That might be interesting as the jury minder might be clued into that or the Courts Services administration, in terms of a juror trying to take part in something. But again, we’re talking about a fraction of cases. Most cases don’t involve juries. Those that do, this is an issue that I have once seen

COL: Once

Sarah: Once in 22 years, and there you are. But clearly whatever was happened to her, whatever was wrong with her, she didn’t turn up and we continued with 11 jurors. That was how that was dealt with. I’ve read some interesting comments about the ability of a profoundly deaf for instance or blind juror taking part in cases, and I know there are strong views that it should be facilitated. The judicial response to that has been, the legal system to say without a third person, an independent person in the room with the jury, that may not be possible. Again, depending on resource issues, I don’t think it’s unreasonable to say, that’s a huge amount of resource to put in to facilitate that person. Who could be opposed to it, clearly it is a reasonable enough suggestion. It is just a question of how it is done. If the third party was to assist them with translating for want of a better word, if that third party was, would have to be, there would have to be an oath for that person also, confidentiality of the, of the jury’s deliberations. But I worry about that. And a friend of mine who was in practice for over 10 years as a barrister who was deaf, excuse me, was blind, is, is blind, I still know her obviously. But she left the law library. And one of the, and we had this conversation with her about how she was going to continue in practice, and indeed, other barristers and I had this conversation as well. How anyone could continue in practice unable to see the reaction of a witness to a particular question because that is part and parcel of how we determine if someone is telling the truth. So that was interesting.
Mmm. So you’ve had various experiences where disability

Sarah: The last one and the most significant in one way was a very profoundly autistic boy who was a witness in a case again I was prosecuting. He was the victim of a sexual assault. And he was because we got our conviction. But there were very serious worries about whether we should proceed with the case because there was a fear that he wouldn’t be able to give his evidence. And this was something that was, a DPP, very properly, wondering should we proceed in circumstances where this boy was, because he was still very young. And he was autistic, so his, he was not a voluble character at all, he was not prone to having any kind of casual conversations about anything. It was. We couldn’t talk to him about his evidence. He has produced a very short, I would say minimal enough statement: ‘This man touched me here. This is where...’ And these were the two locations and this is where he touched me and how he did it, and a very very short statement. His mother, who obviously knew him better than anyone insisted or pretty much, was very strongly of the view that he would be able for this.

Sarah: And wanted to proceed. And really, having talked to her and having met the little boy, we took the decision, myself and the solicitor, if the mother, of all people, thinks he is emotionally able for this, has met me, it won’t be any big deal for him, that, once he has certain comforts in terms of routine, as an autistic person he needed a certain amount of routine, and she had explained to him what was going to happen. It had to happen in Dublin unfortunately. They were from another country location but we had to move it up to Dublin because of the video link facilities and em... he gave excellent evidence. Just excellent. He was so obviously direct and to the point. I mean, I don’t know, obviously I didn’t ask them, but it was obvious to me that the jury loved him. He could not remember one of the incidence. He simply couldn’t and he just told them ‘I can’t remember’. And I think even that showed them that this little boy was not going to make anything up. He was very, very direct, and em they convicted him. So I was interested in that and I had to be very careful about what questions I asked and I’ve written an account of this for the Disability Authority because they wanted it for a case study for their guidance notes, but the defence council, not I think realising I think how literally he would answer every question asked him who was on the train when you were on your way to the case this morning. And what defence council was getting at was ‘my client was on the train, I know you saw him and I want you to start talking about him’. But instead of answering as any person would, this man, this little boy took him literally and said there were loads of people on the train. Looking at him as if ‘what kind of stupid question is that’

Sarah: Like, from then on, it was clear, he was not only going to answer the question, he was going to answer the question exactly and not have any nuance or any ulterior motive. He was going to specifically answer the question, completely directly.

Sarah: Careful about your language, no, I’m council for the DPP

Sarah: He’s my chief witness.

Sarah: Exactly.

COL: So, in that instance, you were obviously advocating for him, because you were his counsel,

Sarah: Oh, you were for the DPP.

Sarah: Oh because he was a victim.

COL: Ok, ya.
Sarah: So, I mean obviously we'd have similar interests, but not identical.

COL: OK

Sarah: Because I'd have to present to the jury, for instance, if there was any evidence that was contrary to the evidence. I would be presenting that as well.

COL: Did the defence, do you think, adapt anything that they did? Positively or negatively?

Sarah: Not at all. Not at all. No, No.

COL: Ok.

Sarah: And I thought that was foolish on their part actually. I thought they could have done more.

COL: Mmm.

Sarah: To prepare for it. I don't think they realised what they were getting in to actually.

COL: Do you think that they knew that he was on the autistics spectrum?

Sarah: Oh, not only did they know because it was part of our disclosure was is to tell them, but they actively fought... em, against telling the jury.

COL: OK.

Sarah: Em, I canvassed it with them, and legally, I agreed with them. I thought they, I, I, I, I, I, I'm not sure if it was the correct thing, for want of a better word morally, but legally they had a really good point. And I wanted if we got a conviction, I wanted to be sure I'd keep it in the court of appeal so I didn't fight them hard on that. I thought he would get it through which he did on his own evidence without having any kind of 'and by the way he's autistic, go easy on him'. I didn't need that. And also, I thought, and I think I was right as well, the jury would know that this was a boy who might be on the spectrum, which wasn't really a phrase we used at the time, this was many years ago, and yet, em, I, the defence was live to this sympathy factor and didn't want the jury being told that he had any kind of disability.

COL: Ok, Ok.

Sarah: So that was kind of interesting.

COL: Ya.

Sarah: And I'm not sure if it would help. I mean, I'm a big fan of, of being very careful to have a fair trial for anyone, but I'm not sure how hiding a disability, or hiding a medical condition, helps anyone.

COL: Yes.

Sarah: I'm not terribly keen on hiding things from a jury, but having said that, em...so I'm not sure, does it help?... Em, there's always going to be a conflict between helping, what the British call, helping the witness to give their best evidence, and the defence council's duty to get the best result for their client. That's a really difficult one, it's not something anyone can solve I think. And at the moment, the balance of the scales is in favour of the accused. That is undoubtedly the case. And even though I have spent much more of my working life on the prosecution side and trying to help victims of crime, particularly if they're, I mean, one's sympathy particularly if the victim of the crime is disabled

COL: Mmm.

Sarah: Is very very firmly in their favour. I don't know anyone, including defence council usually, who wouldn't be in their favour.

COL: Yes.
Sarah: But… the idea that somebody might be wrongly convicted is still so abhorrent that I can live with the fact that there are undoubtedly people, even disabled people who have been in some way wronged, and they have not been properly vindicated, I can live with that more easily than I could live with the idea that because our system changes in favour of the…

COL: The witness

Sarah: The victim of crime, that it might actually result, OK, the victim may actually have been offended against, but for any number of reasons, we have the wrong accused. That’s the system I’d be more fearful about because that is the system An Garda Siochana, Ministers of Justice, not the minister for justice but obviously, he or she would be included in this, but anyone involved in the administration of justice, could actually then create an enemy of theirs is the subject matter of some kind of investigation. I think unless the prosecution is held to rigorously high standards that kind of a terrifying spectre for everybody.

COL: So, do you think that, any reform in the area where, which would give more accommodations to witnesses with communication difficulties to allow them give evidence, do you think within the legal profession, the rights of the accused would be a foremost concern?

Sarah: Yes, I do think they would be the foremost concern, but what I think is very interesting, and I don’t think most barristers yet know this, what is really interesting is the measure that were brought in in the UK, and in particular I’m thinking of time limits and judicial intervention when questions become repetitive and too long, and indeed too confusing, those kind of measures could easily be promoted here. In fact, they could probably be brought in within the system, we just need a bit of culture change, and some of us are arguing for this at the moment, but I’d like a bit more support on this, because what I love about these measures, I recently asked a British, she’s now a judge, em, a woman who works under this system, when the measures were brought in, which was I think in 2012, but I’m not sure of the exact timing, but they’ve a series of measures were brought in the UK in order to get best evidence and to just make it easier for these people, since then I asked her, ‘have the conviction rates changed?’. No.

COL: No.

Sarah: And that is the only answer you need to give to a defence barrister who is trying to argue this is going to be unfair to his client. It’s not. It’s not going to change.

COL: So nothing has changed, but the giving of evidence is improved then

Sarah: I would say in the UK that it must have done, because it still happens here that you have a victim of crime two or three days in the witness box. That just can’t be right. And that includes children. And we have judges, some intervene and some refuse to intervene. They don’t want to hamper defence council in their cross examination. And what they don’t all realise is that this is not going to change anything. It will not change the jury result. All you’re doing is making this much more difficult for the victim of crime.

COL: You used a really interesting phrase of ‘culture change’. Do you think that there is a culture among the legal profession of, em, I suppose, resistance to reform is it?

Sarah: No, I don’t think I would call it resistance to reform actually. I’d be much more positive about it. The culture I am talking about is the expectation that there will be a fair trial.

COL: Ok.

Sarah: This kind of, very, very strongly held belief that the accused person must receive a fair trial, otherwise we’re in an unjust system, I think that’s, I mean, rightly, something that we believe in very strongly, but what is not, and this is the culture change I mean, what we haven’t I think grasped, is that, to be more fair to, to complainants is better than victims because we don’t know until the conviction is there, but to complainants and particularly to
witnesses, to adapt the system to allow them to give better evidence and to be gentler in
terms of their experience, does not affect a fair trial. That is where we need to shift the views
and help people to understand, OK, you, you know not being allowed to shout at the victim,
might actually upset you because it's the way you think you will be most effective, but in fact,
you’re not very effective.

COL: OK.

Sarah: That’s what people don’t realise. It’s not an effective way of conducting one’s exam. What it
might get them is a bit more work from that solicitor or someone in court who thinks they are
a really tough barrister, but in terms of the result the obtain, it actually doesn’t change the
result. So it doesn’t affect the fairness of the trial. That, I find that quite interesting.

COL: Very interesting. Ya, ya. The culture change I think is something that I started to pick
up as something about a strong culture, and that’s actually put it really, really clearly.

Sarah: An you’ve mentioned the intermediaries, and that’s something we need. The other thing we
need is more resource because it’s so rarely used that it just almost doesn’t arise. It’s it, it
becomes a complicating factor in a case if you have to talk about intermediaries. I know it
has been used, successfully, but I would really, like to see it being more widely available. Of
course, the problem again is, were back to what I said at the very beginning, very very few
Irish complainants, in any kind of way, are suffering from such a communication difficulty
that they cannot give their evidence without an intermediary. You see, in the UK it is a vastly
bigger population. So of course, they’re going to need it because it will arise much more
often there. It simply doesn’t arise here and I think that’s part of the problem. It’s a bit like
the Government being asked to resource some particular piece of medical equipment that is
going to help five people. They’re thinking, why would we spend money on this because it’s
only going to help such a tiny fraction of the number of people? So, I suppose. I’m not a big
apologist for the State but I see that, I see that problem, because I’m in it so long now, and
the fact that I haven’t some across more than a handful of people who couldn’t express
themselves at all. That says a lot to me, is that this is a very niche... But, that, in terms of
disability and serious inability to communicate, definitely helping, and that’s why I love the
idea of the training, under the Victims Directive, I think we could definitely make all peoples’
lives easier, and we could make it easier for children to communicate to with training.

COL: Do you think your colleagues, in general, have good disability awareness knowledge?

Sarah: I think, reasonable. And I don’t think all of them. Some of them are excellent, Do you know,
it’s probably, I would hope, that it’s better than the general population.

COL: Ok

Sarah: Because communication is so much a part of what we do. One of the things we’ve been
doing for the last, it’s now 2016, so the last 3 or 4 years, is we’ve had very focussed
advocacy training and that includes segments of being aware of how, how to communicate
with a witness and how to allow them to communicate properly with you. And that is actually
a relatively new thing at the bar as well. So I think we’re hoping that, hopefully, we’re raising
awareness through that as well.

COL: And is that, is that training a compulsory or optional?

Sarah: Now that’s an interesting question. I would love to make it compulsory.

COL: Right.

Sarah: Its optional at the moment. And that’s partly because we’re only training our own trainers.
That’s what [colleague] does with me as well, with another. There are about 50 of us. Out of
a bar of about 2000, there are 50 of us who are now trained to train. We have done two
courses per year for the last four years and they have been approximately 50 or 60
barristers taking the course. So we have a few hundred people trained now. We’re also
helping the Kings Inn to train the same course. They'll be taking very junior, obviously pupil, trainee barristers through the same training, so give it a couple of years and hopefully we will have half of our bar trained. That's the plan.

COL: And it's feeding itself through.

Sarah: It's feeding itself. Exactly. And I know that up the north, em in Belfast they require, not just first years to do it, but they have a much much smaller bar, a much smaller intake, so only 20 go in every year.

COL: OK

Sarah: So they require those 20 to do this training. And they require their masters, in other words, the people who are taking a devil, taking a first year pupil as an apprentice, must do this training. That is what I would like to see brought in here. Whatever about people resisting to do this particular course, we have a CPD environment whereby you have to do a certain amount of points every year. That's a standard thing in any profession.

COL: Yes, ya.

Sarah: And at the moment you can pick whatever ones you want to do. The only one that is compulsory is ethics, which is fair enough.

COL: Yes.

Sarah: I would like to see an advocacy module being compulsory and I would also like to see, if you want to go on the role of masters and take somebody on as an apprentice, you have to do this course. Because it's a two-day course, there will be a bit of resistance to that, because...

COL: Time is money

Sarah: Nobody wants to be obliged to do the two-day course.

COL: No.

Sarah: But we've been doing it in vacation times.

COL: OK, ya.

Sarah: So they are not going to losing out on a court date if they do our course. We do it at Easter and in September.

COL: And how did the course come about? Is it taken from somewhere else or did you devise it yourself?

Sarah: This is hilarious because we had two junior barristers. We've had load of barristers do it, but not come back to us. Two junior barristers went off to Oxford, Keble College, and did a course called the Hampel Method course in Oxford. It's a week long course, Monday-Saturday.

COL: Mm hmm.

Sarah: And they came back and they said this is brilliant, you should be doing this. And they came to a couple of people, I was on the Bar, I am still on the Bar Council and was on it at the time and so was a colleague of mine, Paddy McGrath. And they came to us and we both like the idea. But we had never seen it. So we basically got these two juniors to more or less explain how it worked, we asked a load of colleagues to come up and help us run this course for the first time. We're kind of making it up but we're basing it on what we've heard about this. I had no idea at the time how rigorous that course really could be. But we had a great day of barristers coming in with a made up set of papers, asking questions, being helped as to how to do it better. Really ran well. After that, I went to Belfast where they have
been doing it for a few more years and they’ve actually been trained by people who know about this method. It’s a really really rigorous method. I did not know this the first time I heard about it. And we watched the way they were doing it and realised, OK that is much much more efficient and much much more slick, and we got in touch with a group, it’s a voluntary body in London who represent independent bars and in particular the English bar and they sent us some trainers and we did it with them the following year and we also got the Belfast, the woman who runs the course there to help us create the course. So we copied it from both Belfast and London and we have kind of a hybrid of the two. And we’ve used trainers from both jurisdictions. And last… April… ya, last April, was the first time we ran it ourselves. So we had about 30 or so, or 40 trainers and we had a group of about 30 participants. Like its quite a large number of trainers per group and you take them in small groups and you got through all of the questions, and go through all of the witnesses like that, and give individual feedback. And also, it is, and also this is the interesting thing, getting back to what we’re talking about, for the first time, the barristers play the witnesses.

COL: OK
Sarah: So almost without exception it is the first time the barrister has sat in the witness box and realised

COL: Felt that.
Sarah: Unless you’re asked the right question, you cannot give the evidence you want to give, you cannot just give this big ‘I’ll take it from here, now judge’. Like nobody is able to do that, even a really articulate person can’t, it’s not possible. So as soon as you have sat in a witness box for the first time and watched your colleague, usually around your vintage, trying to ask you the questions and you realise ‘this is far more difficult than I thought it would be’. It gives you a whole new perspective on how to, on how to do the job.

COL: Ok. And there are rules aren’t there about prepping witnesses?
Sarah: Oh you can’t.

COL: And you can’t.
Sarah: Sorry, you can’t. But, now that I’ve done this course so often, I realise if you think much more carefully about how you ask the question, it is going to be [unclear] easier for the witness to give their evidence.

COL: So you can’t prepare them
Sarah: You don’t need to

COL: But you can prepare right yourself.
Sarah: You prepare yourself. Exactly. And you know, the witness. In an ideal world the witness was there and will remember. So really, what you want out of the witness is the truth.

COL: Yes.
Sarah: You don’t want them with some prepared answer.

COL: No.
Sarah: So, ya.

COL: It’s a very complex area when you think about the challenges
Sarah: It is, oh it’s a huge mix of the English language, psychology, communication, sociology, human behaviour

COL: And the law
And a bit of law thrown in. Actually, not an awful lot of law. The law is before you get to ask any questions. You’ve figured out legally what I want from this witness, what is important from this witness. And once you figured that out, forget about the law and in fact the witness doesn’t need to know anything about the law.

So really, training will get to the heart of that.

Sarah: 

If, if, the barristers have been trained to do it in the right way, to be disability aware, in those instances

Then actually they should be able to apply those skills and make it an easier process for the witness.

Sarah: 

That’s really interesting. In terms of the UN Convention, em, so let me just give you this one. So this is what the UN Convention says about access to justice. So, let me just call out the important parts. So what it says is that States Parties, which will be us, shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

So for me I’m just for this study, I am focussing on witnesses and I’m focussing on the courtroom. Obviously, there is a whole kind of process that you go through in, kind of, lead up, but, if you think about what that says, and think about the reality in Ireland at the moment, how do you think they align?

Sarah: 

Not too, not badly actually.

OK, good.

Particularly when you look at the criminal courts which is a very different building to the Four Courts. The Four Courts was really antiquated and really difficult for people. Now, one of my devils was in a wheelchair and em, so I found out the hard way that it was an impossible building to get around. There was no wheelchair access to some of the courtrooms in which I was practicing and he couldn’t come in with me and listen to the cases. So, em, and also, many people my age would have the same experience, once my parents became increasingly immobilised as they got older, I began to realise how difficult it was to go to certain places.

OK.

So other than getting there, which I, which would probably still have to be in a taxi. The Criminal Courts of Justice is not near enough to the Luas stop. It simple isn’t. It’s a very large, the nearest stop is Heuston station which is a very large and dangerous road to cross if you’re immobile or very slow on your feet or in a wheelchair. Other than all of that, it’s a very good building because there are ramps everywhere. Lifts are huge. Toilets are built in order to accommodate anyone in a wheelchair. So that’s a huge bonus. It’s, it’s reasonable attractive but quite sterile, I’m not sure, what else could be done. There’s a super victims support area. It is nice and clean and bright and there is a lovely room for child witnesses which has toys, and they’re very well trained there. So I think, good. Actually, I have to say. But remind me if there is anything else
Sarah: Or if there is anything I’m [cross talk] Anything in particular you think should be there or?

COL: So, ya. That strikes me as a really good summary of, of physical access to justice. So then, when you think about people who have communication difficulties, so for that, what I’m thinking about is people who have difficulties understanding, em, they might have a mild intellectual disability. Something like Down syndrome, or they could have something like cerebral palsy, where their speech clarity isn’t good but their understanding is fine. Or you could have somebody who has been in a car accident and has a traumatic brain injury and the processing of everything is a bit more challenging for them. Em, so in terms of access to justice for them, and they talk about accommodations for them in their role as a witness, do you think that things like the Criminal Evidence Act cover the accommodations that somebody like that would need to give particular evidence?

Sarah: Well... I think just practically speaking and looking back over the last few years, I think it’s really going to be on a personal level. It’s not going to be something you get out from the 1992 act. I mean a video link; I’ve met witnesses to whom it makes no difference.

COL: OK.

Sarah: Whether or not they. I mean, now, having said that, video link is becoming more and more common and I think there will come a time when it is no big deal.

COL: Ya

Sarah: I still think some defence council resist it. Again, it makes no sense. It makes no sense because it doesn’t matter to a jury or to anyone else, including them really whether the person is in the room or not.

COL: Ya.

Sarah: And it can really help the victim not to be in the room. Or the child witness or the disabled witness as the case may be. I don’t see how, other than an intermediary, I don’t see how the measures, that’s the only measure that might help somebody with communication difficulties and because it’s so rare. Like again, practically speaking, what will happen in those cases is that most professions and most, indeed including the guards and the courts services dealing with a person with any kind of serious and observable disability, will know, em, that they have to speak slower. They will know that they have to wait for the person to confirm that they understand what is going on. I don’t know I really don’t know any barrister, particularly on the State-side, who would be dealing with, let’s say, a witness in a criminal case, that would not make sure that a witness understood what was going on. I suppose there could be a problem if the witness is not a particularly significant witness. But the guards again, I’d be astonished if they wouldn’t flag to counsel, ‘this witness that you haven’t met yet, because they’re not the complainant, may have a difficulty’.

COL: And if they weren’t a significant witness, do you think that they would end up being called?

Sarah: I think that it would depend on the facts. If they were needed, they could still be called. And in fact, my view is, cynically and tactically I wanted them, if I thought they might actually help get the conviction or help if I was defending, I would want them because I think a jury would be very much swayed by a, a, a juror, by a witness with a disability. I’ve, good, right or wrong, they would be seen, they would be seen in a kind of a holier light almost. I think that must be, em, just, that is my immediate reaction to hearing kind of a description of someone as a being in any way as suffering from a disability and being a witness. I mean, well, illogical, and it is illogical, illogical though this is, I would, I think as a human kind of reaction, I would like to cut them some slack, and I think a jury would feel the same way and probably a judge. So I think any barrister who had any prospect of calling a witness with any kind of,
would want to do it, so long as they could do it without actually harming the witness or causing them undue stress.

COL: And how do you think the defence would react, do you think they would accept their testimony?

Sarah: Well, let's call it the other side. Let's call it the other side because it could go on either side. You could have them as a defence witness.

COL: Ya, you could.

Sarah: So the other side? How would you react? Well, again this is again why it is such a brilliant tactic. If they're swearing up for you, and the other side has to cross examine them, then the other side doesn't want, no more than a child witness, they don't want the witness to be clearly under stress in front of the decision maker, jury or judge. So they have to be very very careful, you know?

COL: Do you think they would question the validity and credibility of the witness?

Sarah: Oh they'd have to. Sorry. It's their job. Yes, they'd have to. But they could do it in a way which wasn't aggressive or bullying. And there are some who feel they'd have to be aggressive because there you are.

COL: Ya. In instances like that, do you think the judge would ever request, like a psychological assessment or an assessment from a speech and language therapist?

Sarah: No. No, Because, and I'll tell you why. We're dealing now with witnesses as opposed to the complainant or the defendant. So the idea that you would be side tracked into the ability of a witness. You're now dealing with the credibility of somebody who is not actually central to the facts of the case. And nothing, nobody has those kind of resources. And this is, by and large, going to be public money. If it is a private case, which or the parties is going to bear the cost of assessing a witnesses who is arguing, again, depending on what is necessary. There might be cases which they are the cruc, they are the crucial witness, even if they are not party to the case or a complainant in a criminal case.

COL: But very unlikely?

Sarah: I mean, we're in the hypothetical here as well.

COL: We are, ya, ya.

Sarah: Ya, so, very unlikely.

COL: Very unlikely. OK. So do you think that, so thinking about those witnesses with communication difficulties, do you think there is anything that should be done that is not already being done, to help us to meet the obligations of Article 13.1?

Sarah: (long pause). I think we're in reasonably good shape. I hope I'm not proven wrong.

COL: Ya.

Sarah: But, I do. I mean reading this, I'm thinking particularly with the, and there seem to be real efforts to meet the Victim's Directive.

COL: Yes.

Sarah: Because I would see that to be even more important than acting as a witness generally.

COL: Yes.

Sarah: Clearly what's most crucial is that a person with disabilities can be vindicated if they've been wronged than being facilitated and entitled to participate in the process. Em, [cross talk] I
think once the training comes in for victims, how can it not affect other witnesses, if you think about it.

COL: Yes.

Sarah: And I think that, I mean, really the answer to that is, particularly since, as I see it, the Victims Directive is being taken seriously. It certainly appears that the Garda Commissioner seems to be taking it very seriously, she seems to be a big fan of it, and I think that will help enormously as I think that is the first port of call on the criminal side, is an Garda Siochana. We’re taking it seriously at the Bar and I know that there is a current project, in fact we’re getting, were getting some EU funding which is brilliant, the ICCL, the Bar and the Law Society are going to do a joint programme for eh, for training for professionals in the criminal justice system on dealing with victims of crime, and that’s in train.

COL: So that’s great.

Sarah: Ya, I think that’s great.

COL: If you needed an intermediary tomorrow what would you do?

Sarah: I do, that is a really good questions. I would probably ring, because I met some of them in January in the UK. Well, sorry, short answer, I would ring [name of senior counsel], because I think it was [name of senior counsel] who was in the case with the lady with the Down syndrome.

COL: Yes.

Sarah: And I would ask if they used an intermediary in that case, because I think they might have. And the other person I could call [name of another barrister] who may have used an intermediary as well. I think it’s only been done once or twice, to find out who was used. Em, the second person I would call is whoever my contact is in the chief prosecutions office to find out who has been used in Ireland and the other ports of call would be London because they have quite a few registered intermediaries. So ya, I would have a few different. And I’d probably ring them all. I wouldn’t just rely on one.

COL: Yes, get information from a number of sources.

Sarah: Yes, and then decide what might suit. And of course, finally, and I would, this would make sense as well, talk to the guards about the witness and their support structures and it may be a family member you would be using.

Sorry, I thought that was off [referring to phone].

COL: No that’s absolutely fine.

Sarah: That’s fine.

COL: So, a family member. Do you see

Sarah: Because it might be a family member, or a teacher or a social worker who knows that witness very well, who might be the best person to act

COL: As the intermediary.

Sarah: It may not actually require a registered intermediary. In fact, it may, because you might have to learn that person’s language from the beginning, so it might be someone in their lives.

COL: A familiar adult.

Sarah: Exactly.
COL: Ya, and would you then, obviously it depends on the side and everything, but would then you feel that you needed some kind of independent overseer of that family advocate and the victim or witness?

Sarah: Well, I would always have that. I would never meet a witness on my own anyway. So anytime I meet witnesses, I have at least my solicitor with me, and usually a member of the guards as well.

COL: Right.

Sarah: So it’s there, it’s built in.

COL: Ya, ya. And if you were in court and let’s say this person was giving evidence and, their family member was, they were kind of acting in the capacity of, ‘Ok, her speech is hard to understand and [cross talk] this is what I have interpreted it to mean’

Sarah: Yes. Em, well, it shouldn’t under the 1992 act, but the reality is that they might try. It would depend. It would depend on how good and how clear the person was at explaining why, that this is what they’re saying. It may be obvious or it may be that in fact all he or she can say is I know because I’ve been living with this person for the last...

COL: 40 years or whatever.

Sarah: But yes it could, of course it could be open to challenge ya.

COL: What I’ve been hearing from lots of people, and I’m kind of hearing coming through from you is that each situation would have to be dealt with in quite an individual way.

Sarah: Definitely.

COL: Would you agree with that?

Sarah: Ya.

COL: So, it depends on the nature of the crime

Sarah: Exactly, the nature of the disability, whether or not an intermediary could help, whether or not a family member could help.

COL: So you need flexible supports.

Sarah: Ya, ya.

COL: Interesting. Ok. Is there anything else that strikes you that we haven’t discussed, when you think about facilitating people with communication difficulties in the court rooms?

Sarah: Em, other than, and I think I’ve covered it but I’ll just say it again, because it struck me as I read some of the articles and I knew that some of the authors were very impassioned about the rights of the disabled to take part in the process, and it struck me as I read some of them, much as I agree with that,

COL: Yes

Sarah: I am very conscious of the fact that it demands resources and as I look at, for instance, special needs assistants in schools being cut, family carers allowance being cut, all of that kind of resource, those resource issues, I think they are more coal face than

COL: Ya.

Sarah: And, and, and I know that sounds, it’s not harsh, it’s, it’s, it’s just reality.

COL: Ya.
Resources are limited. And I think the idea of pumping resources in to allowing any sector of society to participate in the administration of justice in circumstances where there is no, it appears to me, there is no bias in the system against those with disability, so it’s not as if they are required to take part in order to make sure their rights are vindicated, that’s a different thing I think. It just struck me as I read about the idea that you would train an interpreter or a translator or, in order to be in a jury room. I consider that to be the nth degree, you’d really have to have a very well-resourced system in order to justify that, when there are other parts of the system that are not adequate.

Sarah: And when there are not resources being put into prisons for instance. I’m not a huge fan of criminals but I am a huge fan of rehabilitation.

COL: Ya, ok.

Sarah: That that money is better spent in, but that’s just a, really a policy decision rather than, it’s a good or a bad thing in itself. So I don’t see any. I think we’ve covered…

COL: Great. Thanks you so much. It has been really really useful. And actually, a whole other perspective on things than other people have brought. So really useful

Sarah: Oh good.

END OF INTERVIEW
Memo 7: Prevalence and justifying resources

Date: 07.07.16

Context of reflection: During transcription of Sarah's interview

During yesterday’s interview, and today’s transcription, issues of prevalence played on my mind, based on Sarah’s contributions.

Sarah spoke about how she has only come across a handful of situations where a person who was involved in a criminal case had noticeable communication difficulties. There are no prevalence figures available as far as I am currently aware, however people with ID are more likely to be victims of abuse and there is a higher than average rate of people with communication disorders in prisons than in the general population. Therefore, I question whether there are many people who are simply not identified as having communication difficulties in her courtrooms. These are likely people with hidden disabilities such as SLI & undiagnosed Asperger’s and not cases where people have more obvious disabilities such as those Down syndrome and cerebral palsy.

Sarah makes the argument that it will be hard to resource as the prevalence rates are so low, but perhaps there needs to be more training so that people are first identified. Then, it would be easier to prove the necessity to resource.

The other thing that strikes me is that outside of prevalence, there is an argument that people have a right to accommodations, and this shouldn’t be prevalence dependent. Human rights should not depend on prevalence. Therefore, the arguments to resource supports are potentially more suited to this angle.
Appendix 9: Initial coding: example

Extract of initial coding from Paul’s interview

<table>
<thead>
<tr>
<th>Appendix 9: Initial coding: example</th>
<th>COL: You mentioned that case earlier.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Having first experience of witness with disability</td>
<td>Paul: Ya, so, that would probably be the best case to describe because there was a lot of firsts in that case.</td>
</tr>
<tr>
<td>Qualifying communication skills</td>
<td>COL: OK.</td>
</tr>
<tr>
<td>Acknowledging variation in skill level from person to person</td>
<td>Paul: So effectively what you had was a lady with Down Syndrome who was in her late 20s, maybe 27 or so.</td>
</tr>
<tr>
<td>Viewing her life as difficult</td>
<td>COL: Ya</td>
</tr>
<tr>
<td>Family supporting autonomy</td>
<td>Paul: Em, who, eh, basically had a communication level something similar to a 7-year-old. Obviously it varies from person to person with Down syndrome, so she, if I remember correctly, she could comprehend matters to about an 18-year-old but in terms of actually communicating, she was communicating at the level of a 7-year-old. So, eh she had had a difficult life really in that, her mother had done everything she could actually to get her out and get her to make decisions on her own and so on. So she was able to take the bus for example on her own but only when the parents had shown her maybe 10 times and she was going to school. She actually had a job around the corner from, a shop, kind of stacking shelves, 2 or maybe 3 hours a week and they were pushing her as much as they could to go out into the community to try and get her a bit of independence and so on. And then, there was, very tragically, she, she basically came across a guy who kind of, obsessive sexual activity and what he was doing really was going around to any woman who he could meet, no matter where they came from or who they were of what age or anything and basically asking everyone that he met would they come and have sex with him. He, he was saying every so often somebody would say yes, and also he was sleeping with prostitutes. But he meets this lady, she's out jogging with her mum, she's got separated from her mum, her mum's gone home and the, they end up going back to his house. And one of the huge issues in the case was consent or not, whether she was capable of giving consent and also what, because, they was no overt signs of violence, there was no marks on her body, there was nothing from a physical sense that would suggest she didn’t consent. Well, question one was she capable of consenting to, if she is capable of consenting, did she in fact consent and then there’s obviously a separate offence of having sex with somebody who is mentally impaired.</td>
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<tr>
<td>Enabling independence in wider life</td>
<td>COL: Yes, ya.</td>
</tr>
<tr>
<td>Pushing her to be independent</td>
<td>Paul: There are issues about whether that should exist but</td>
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<td>Becoming victim of sexual assault</td>
<td>COL: The 1993 Act, ya.</td>
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<td>Describing assault</td>
<td>Paul: Ya, because some people would say it criminalising those who have, what’s called, what the act refers to as a mental handicap.</td>
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<td>Case depending on establishing consent</td>
<td>COL: Ya</td>
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<td>Having sex which breaks Sexual Offences section 5</td>
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<tr>
<td>Concerned with ‘severe’ cases</td>
<td>Balancing protection and empowerment</td>
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<td>Viewing as complicated</td>
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<tr>
<td>Needing to enable victim to</td>
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<td>tell story</td>
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<tr>
<td>Needing to ensure fair trial</td>
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<tr>
<td>Restricting protections so as not to overly influence jury</td>
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<td>Process beginning with taking of statement</td>
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<td>Needing to adapt traditional method</td>
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<td>Comparing to adaptations needed for children</td>
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<td>Changing the environment to assist with statement taking</td>
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<td>Requiring special training</td>
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<td>Comparing children and those with ID</td>
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<td>Being preoccupied with ID</td>
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<tr>
<td>Using specific questioning techniques</td>
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<td>Checking understanding of terminology</td>
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<td>Needing to get story out but not lead</td>
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<tr>
<td>Using childish questions as examples</td>
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<tr>
<td>Using statement as evidence in chief</td>
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**COL:** Ya.

**Paul:** That works quite well and they’re very careful to ask open questions all the time, non-leading questions. Very careful to, eh, ensure the person understands the difference between the truth and a lie and that the person can actually give concrete examples of between a truth and a lie and all that sort of stuff. And the they try and get the story out as best as they can in the words of the person, in a non-leading way. And they’ll flow between asking really simple questions like ‘who is your favourite band?’ and ‘have you been to see One Direction lately?’ and ‘Where do you go at the weekends?’ and then they’ll intersperse then with questions about what happened. And, try to get the story that way. So that not only amounts to the statement. The reason they take statements is so the accused knows what the allegation is, but it actually, in these cases, can also amount to their evidence in chief. So what happened in this case was that her evidence in chief, i.e. the videos, were played to the jury and the jury were told to accept that as her evidence as though she had got into the witness box here in front of me and given that evidence. Ok. Eh, then comes the thorny issue of cross examination because you can’t really do cross examination in advance, because you really can’t cross examine somebody until you have all the information. And you don’t have all the information until the case has effectively been closed by the prosecution and handed over to the defence. So em, what we did was, she was hooked up on a live video link and she was in a little room up here in the CCJ and the images were being broadcast directly into the court. Em, and an effort was made before that happened that the judge would introduce himself. Em the judge wore a tie rather than tabs, nobody wore gowns, em, the judge introduced himself in a, kind of as non-confrontational way as possible so did the barristers, the prosecution and...
Managing to get through
defence barrister did his cross examination of her, and she managed to get through it effectively via video link.

Learning from international practice
Do you think the defence altered anything they did, for the better or for the worse, em, when they were, kind of cross examining a vulnerable witness?

Paul: Yes, I do. Em, we spent a good bit of time looking at the law from the UK and from Europe as to what they do in similar circumstances because there are codes and stuff like that in the UK which don’t exist in Ireland.

Defence being largely open to suggestions
We tried as best we could to apply a lot of the European and the UK stuff to the Irish scenario because it doesn’t exist in our legislation. And in nearly all the circumstances, the defence didn’t put any objection to it and the judge was, allowed all those things to occur. Eh, we, we, did a list of ground rules, 20 or so ground rules of thing to try and assist in the process. And

Devising ground rules that were ruled upon
And they were kind of mutually agreed upon by all?

Paul: Well, there was a bit of arguing and so on but they were ultimately ruled on.

Hampering the defence is inevitable and unavoidable
And they were kind of mutually agreed upon by all?

Paul: Well, there was a bit of arguing and so on but they were ultimately ruled on.

Comparing to children
The need to balance, the, I suppose, respect for the needs of the witness but also the rights of the accused and that it, it can be difficult to do both.

Accommodating children
It, it is but like the bottom line is, if you have a child say...

Being challenging in unavoidable for a child
Mmhmm

Making job difficult for defence
Paul: [long pause] It’s a fact, they are a child and it is going to be more difficult for everyone. It’s going to be more difficult for the child, for the prosecution and it’s going to be more difficult for the defence. And there is a huge danger that you know, somebody has invented something, not, almost certainly not out of any badness, but just because sometimes mad ideas get into people’s heads. But that is a real danger, that, that somebody who is from that vulnerable circumstance, comes up with sort of mad idea, or maybe has a mad idea put in their head by somebody else, gives that to the Gardai on the DVD and then the accused person is in a very difficult position in court trying to challenge, not trying to challenge in such a way that they upset the person, and therefore cause themselves more difficulty in the eyes of the jury, and actually try to be forensic in any sort of way, it, it’s an extremely, extremely difficult for the defence in that sort of circumstance, you know.

Perceiving risk of inventing difficulties
COL: I would imagine.

Vulnerable person being open to influence

Restraining challenges in order not to upset person

Hampering defence

Risk of alienating jury
Defending concept of fair trial

Being fair is different from trial to trial

Changing orders depending on circumstances

Depending on judges’ experience

Relying on objective facts

Judging what is and isn’t unfair on case by case basis

Flagging victim support

Making person feel comfortable

Keeping situations relaxed and gentle

Having access to children’s toys

Making ‘as painless as possible’

Acknowledging unavoidable difficult nature

Paul: So, it’s not ideal. Em

COL: Do you think there is such a thing as a fair trial? Outside of… I suppose why I am asking is because people have said to me, em… various different things about if you alter procedures and put more supports in place. Some people will say it will sway it to the side of the accused and other people have said ‘actually we need to kind of be realistic and there isn’t such a thing as a fair trial for anybody because there are always going to be different factors at play’.

Paul: I, I, No I would think there is such a thing as a fair trial.

COL: Ya, ya.

Paul: I think that… like, in less than on the fingers on one hand can I think of cases that were unfair trials. You know, in the very, very vast number of cases they are fair trials. And every case is different, and every case the judge is there to try and make orders in every single case to balance the competing rights.

COL: Ya, I suppose actually, because that was going to be my follow up question. Do all fair trials look the same?

Paul: No.

COL: So they don’t, ya.

Paul: So you might make different orders in different cases depending on the circumstances, you know.

COL: Ya.

Paul: Eh, and it’s going to come down to as well, the judge is going to have to use his own or her own kind of experience to say, listen, in some case you’d be more concerned than in others. And you’ve to look at objective things. And you know, at the end of the day if the judge does feel that what is occurring is unfair, he does have the jurisdiction to stop the case. Now, it is something they are slow enough to do but they have done and can do, so.

COL: Ya, ya, interesting, OK.

Paul: So, in that case, well there’s quite good facilities here. So, em, there is two or three people who are in the victims’ support unit and they are full time employed and that is their job, to meet people, make them feel at home, tea and coffee, you know, orange whatever. They’ve got a room up there which has a bunch of couches, it is nice furnished, it has nice views of the Park, it’s light, it’s airy, everyone is friendly, very gentle. Em, when they meet barristers, and solicitors, you know they don’t actually meet them that often, but when they do its’ supposed to be kind of kept relaxed and gentle as possible. And then there’s the video conferencing rooms up there and they have balls and plastic toys and they have teddies and that sort of stuff if people need any of that to try and calm the situation down as much as possible. So, my view is that the facilities are there to make it as painless as possible, but you know, it’s going to, it’s always difficult going to Court.
Appendix 10: Incorporation of emerging theory into subsequent interviews (theoretical sampling)

Extract from interview with Niamh.

Niamh: The one benefit that we have in our system is that we have become more flexible on the understanding who, that if you can give an intelligible account of proceedings so, the, the I suppose the eligibility for testifying and exemptions from the oath and things like that are potentially useful to people, and I think there is potential scope to interpret that in a more progressive and flexible way and I've seen some evidence of some judges doing that, which at least gives people the option to testify. So we don't have such strict competency to testify requirements as would exist in other jurisdictions and that is important I think, but it's still, it's not enough for sure. Ya. I think there are a lot more accommodations required in the process.

COL: It's really interesting that you said you've seen some judges do it.

Niamh: Ya

COL: That's come up a couple of times from other interviews that I've done so far, that inconsistency I guess across the way disability issues are approached I suppose from all legal professionals but particularly judges. Some barristers have said that if they were working with a client who had a communication difficulty, that they would be more conscious of what judge they got to try the case. Do you think there is inconsistency across judges?

Niamh: Well, I think, you know, there will inevitably be different ways that judges approach these issues and their own experience will dictate that to some extent. So you know, I recently gave a presentation to the District Court judges and em, one of the judges who asked a lot of questions was someone who had a background, he previously had been a psychiatric nurse and had in, later in his career had turned to legal practice and then to becoming a judge. And he had a very fixed idea of even, in the family proceedings that we were talking about, he was saying 'well I can only give an advocate to someone who has a moderate intellectual disability. I can't give it to somebody who has mild'. And I was like 'where is he getting this?'. Like this isn't actually in the criteria and I thought OK that's... And that's obviously his professional, previous professional life and that experience kind of coming to bare on. And he would be regarded as quite good in his practice. You know and that he is somebody who understands these issues and is flexible and is accepting and provides accommodations and appreciates the, the challenges that people might be facing. So that was kind of interesting to me that, that pe-, eh, that judges then will impose limits on how flexible they can be, and, and, that mightn't be on my, I don't see that anywhere in the Brady circular
Appendix 11: Development of focused codes

Memo 11: Emerging analysis and focused codes

Date: 01/08/16

Context of reflection: Notes made throughout re-reading of all initial codes of interviews and early memos (1-10)

Emma – from advocate perspective – frustrated with rejecting of AAC as valid form of communication. Niamh and Paul (both legal perspectives) talked about the courts need for proof about these methods and their validity. Paul had high levels of narrative which suggested suspicion that people fake disabilities. This may be suggestive of wider suspicion in the profession. Paul mentioned the courts naturally being cautious and cynical. John said lawyers are cautious.

Focused code: Court being preoccupied with validity of disability

*****************

Frequent rhetoric about CJS as process involving many different steps and organisations – however Gardaí are mentioned frequently and statement taking in particular.

Focused code: Highlighting needs at other stages of CJ process

*****************

There is a focus on intellectual disability in peoples’ responses and also a focus on level of severity of their difficulty.

From memo 9: Additionally, there has been a tendency on participant part to talk about ID only (even despite wider examples given). Awareness may be highest in this area, and limited elsewhere. There is likely most cross over between the accommodation needed for people with ID and those needed by children, but there may not be much awareness about the needs of other groups.

Focused code: Having narrow conceptualisation of disability

*****************

John explicitly said that courtroom accommodations for PwD is a big problem, where are Sarah said it is a small problem. John has knowledge of and is convinced of the barriers which PwCD face in navigating the CJS whereas Sarah stated that’s he doesn’t believe that there are barriers, that people are just not exposed to crime. The literature rejects this.

Focused code: Considering demand in assessment of accommodations

*****************
Conflicting views in the data re need for professionals to specialise in working with PwCD or whether it if better to increase general knowledge of all. – Mary, Claire, Cliona and Paul all discuss this. Sarah does work which supports general training. Cliona mentioned that training for legal all professionals was required, but in addition that there should be legal professionals who develop specialised skills in this area. Cliona, using her knowledge as a practicing barrister, did state that it would be difficulty to manage this re defence council, balancing everyone’s right to select their own representation.

*Focused code: Advocating for training*

*Focused code: Considering training models*

***************

Lacking needed formal structure. The size of the Irish jurisdiction is seen as an issue in developing a more formal support system. Accessing funding to develop is perceived challenged. Not a priority in profession, government. – John, Emma, Niamh, Sarah

Slow change characteristic of current reform

Needing to use moral argument.

*Focused code: Identifying barriers to reform*

***************

Judges frequently mentioned as key decision makers – Niamh talks about how they are affected by their own experiences in the decisions they make – John gave example of forward thinking judge who had own personal experience – Claire feels that with more knowledge, can do job better. Paul emphasises the need for Judges discretion. Cliona being very aware of the judge you get.

Judges resisting training however – Cliona and Emma. So how do you ensure they are aware and making appropriate informed choices? Unlike the situation Claire described where judge said reports were too old for someone with a lifelong disability.

*Focused code: Considering judges’ role and perspectives*

***************

Frequent discussions about courts failing to adapt and the need for flexibility. Judges may want ‘if person has x’, they should do ‘y’ (Niamh) but recognition that this is not helpful.

Needing to adapt questioning style most commonly discussed

*Focused code: Needing more flexibility in court processes*

***************
Intermediaries – seen in positive light in principle mostly. To facilitate access to justice. Paul was not sure if intermediary should interpret answers back for court – was uncomfortable and used words like dangerous – he is the most sceptical of disability and wary that it is not used as an excuse.

Barriers to successful use of these reported –

- No implementation or follow through
- Education
- Size of jurisdiction and investment
- Demand – low

But would demand be higher if barristers etc. were educated about the role, resulting in them being offered and applied for more, and also other barriers to justice addressed so more cases come to trial?

(Memo 9)

Focused code: Attitudes to principle of intermediary

Focused code: Barriers to effective use of intermediary

*****************

Participants talked about conflicting roles and perspectives of the prosecution, defence, judge (and at times, jury) – at odds with each other.

Focused code: Differing roles having differing agendas

*****************

Child -v- disability narratives

“She was effectively treated as though she was a child” (Quote from Paul’s interview)

++ comparing of children and disability. Is this because they are focusing on ID. Would this transfer into reforms? Need to be age appropriate. And would not necessarily be appropriate for adult with ASD, etc.

Sarah – children seen as more ubiquitous and ‘natural’ – disability less common and harder to relate to.

Everyone believes that there are lessons to be learned from support for children, and some explicitly said that two things are different, but others compared and related them closely.

Paul: ‘And by extension, vulnerable people”

Is this due to a knowledge gap re disability and needing to link to something more relatable? Lawyers are not seeing many people with disabilities in their courtrooms. If they don’t see here, have no personal experience, and it’s not part of training, where are they getting it? Latch onto children as a result.

Focused code: Treating as, or similar to, children
Empowerment -vs- protection/paternalism

This concept brought up explicitly by John. CRPD linked with rights (by Emma too) and legal system with protection – these are at odds.

John talked about society’s progress in how we see people with disabilities. But feels “law is not keeping pace with that”

Niamh talked about needing to make moral arguments for change – this may be particularly pertinent here – to change attitudes.

Lack of rights based talk from practicing lawyers, only those in reform or disability law academia, or advocates. Sarah was more concerned about the low prevalence, but not rights. See memo 7 for more on this.

*Focused code: Having moral and rights based motivations*

*Focused code: Law being concerned re protectionism*

Prescriptive -vs- individual support measures

Prescriptive measures may sit better in court – where fairness and equality big concern – but Paul says these can end up actually interfering more when judge’s discretion removed.

More individual supports – person cantered – but requires knowledge on part of barristers, judges etc. on what to grant.

Call for individuality from many participants including Mary, Niamh, Emma

*Focused code: Advocating for individual supports*

Process is treating PwCD as second class witnesses. Niamh and Claire gave this impression. In scenarios, Cliona, Claire, Emma and Niamh all felt that the person wouldn’t make it to the stand. Exceptions: if person was one of many witnesses, to play sympathy card, very serious case.

It appears that the system is more willing to disregard a person as a witness, and perhaps sacrifice justice, that adapt to facilitate.

*Focused code: Treating as second class witnesses*

Compromising on legal decisions
Reports of cases where justice process interfered with and justice not fully serviced as based on testimony of someone with CD. E.g. tried in different court, took lesser charge.

*Focused code: Compromising on justice*

***************

Comparing Ireland to CRPD obligations…

Negatively – except Sarah who viewed it as infrequent issue…

Acceptance we are some way towards meeting it and ‘not the worst in the world’ (Niamh)

Mary doesn’t use the rights-based language of Emma, who is a full time disability advocate Emma was familiar with and responsive to the UN Convention as a tool for change, whereas Mary did not refer to it in her answers. Cliona, a practicing barrister also struggled to identify with the UN Convention, stating that it was not legally binding, whereas various EU laws were. I previously questioned whether EU law would be more of an argument for reform within the legal profession and Asked Niamh about this, as an academic. She felt it was useful for some limited scenarios but the CRPD helps make the moral argument.

*Focused code: Considering Ireland’s CRPD compliance*

***************

Needing supports across the civil-criminal and defence – accused divide talked about widely

Differing schools of thoughts as to how reform should approach – more palatable (Sarah? - confirm) to do witnesses and victims first… Niamh (academic, using international precedence to guide her) wondered if less of an issue of interfering if processes available to both.

*Focused code: Recognising need outside witnesses in criminal cases*
Appendix 12: Final focused codes

1. Court being preoccupied with validity, objectivity, proof
2. Highlighting needs at other stages of CJ process
3. Having narrow conceptualisation of disability
4. Considering demand for accommodations/ prevalence
5. Advocating for training/education
6. Considering training models
7. Identifying barriers to reform
8. Considering judges’ role and perspectives
9. Lacking necessary flexibility
10. Having positive attitudes to principle of intermediary
11. Highlighting barriers to effective use of intermediary
12. Differing roles having differing priorities
13. Treating as, or similar to, children
14. Having moral and rights based motivations
15. Law being concerned re protectionism
16. Advocating for individual approach
17. Viewing as second class witnesses
18. Compromising on justice
19. Considering Ireland’s CRPD compliance
20. Recognising need outside witnesses in criminal cases
21. Evaluating professions’ disability awareness
22. Lacking experience of disability
23. Having negative attitudes to disability
### Appendix 13: Focused coding: example

<table>
<thead>
<tr>
<th>Lacking experience in disability</th>
<th>COL: Em, so, just to kind of get an idea really at the start of You mentioned that case earlier.</th>
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<td>COL: Ya, so, that, that would probably be the best case to describe because there was a lot of firsts in that case.</td>
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<td>Paul: OK.</td>
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<td>COL: So effectively what you had was a lady with Down Syndrome who was in her late 20s, maybe 27 or so.</td>
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<td>Paul: Ya</td>
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<td>COL: And in that case, did she give evidence?</td>
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<td>Highlighting needs at other stages of CJ process</td>
<td>Paul: She did. So, so the problem for her then was, how are we going to get her story out, such that A. a jury can understand it but B. that the accused actually gets a fair trial because it can actually result in a situation where he’s not getting a fair trial because either she’s not providing the story accurately or there are so many protections put in place for her that a jury would just accept what she says without really evaluating and challenging it properly and so on. So, well, the first thing then is how her statements taken. So the traditional method is like you and me sitting across a table and the Gardai writing down from a person what happened. But that doesn’t work for children and by extension, vulnerable people. She was effectively treated as though she was a child. And, and, basically what the requires is a, a room in non-confrontational circumstances. Couches, soft furnishings, em, lots of break, eh, bottles of orange juice and so on, from guards who are not dressed as guards, generally female, plain dress, who are specially trained to work with people who are children or low functioning ability. I’m sure you’ve seen that sort of thing.</td>
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<tr>
<td>Paul:</td>
<td>Yes, I do. Em, we spent a good bit of time looking at the law from the UK and from Europe as to what they do in similar circumstances because there are codes and stuff like that in the UK which don’t exist in Ireland.</td>
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<tr>
<td>COL:</td>
<td>Ya.</td>
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<tr>
<td>Paul:</td>
<td>We tried as best we could to apply a lot of the European and the UK stuff to the Irish scenario because it doesn’t exist in our legislation. And in nearly all the circumstances, the defence didn’t put any objection to it and the judge was, allowed all those things to occur. Eh, we, we, did a list of ground rules, 20 or so ground rules of thing to try and assist in the process. And</td>
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<tr>
<td>COL:</td>
<td>And they were kind of mutually agreed upon by all?</td>
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<tr>
<td>Paul:</td>
<td>Well, there was a bit of arguing and so on but they were ultimately ruled on.</td>
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<tr>
<td>COL:</td>
<td>Ok.</td>
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<tr>
<td>Paul:</td>
<td>I can actually get you a copy of them I would say.</td>
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<tr>
<td>COL:</td>
<td>That would be, if they're available, that would be fantastic.</td>
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<tr>
<td>Paul:</td>
<td>Ya. Em, I wonder do I have it here. Rather than give you the document I could actually read, read what it said because it’s not privileged or anything like that.</td>
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<tr>
<td>COL:</td>
<td>Ya.</td>
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<tr>
<td>Paul:</td>
<td>Eh, so, so basically I do actually think that the defence were hampered.</td>
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<tr>
<td>COL:</td>
<td>Yes</td>
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<tr>
<td>Paul:</td>
<td>But I mean that’s just a fact of the situation. There’s not a lot you can do about that.</td>
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<tr>
<td>COL:</td>
<td>Ya, that’s come up quite a bit in the previous conversations I’ve had.</td>
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<tr>
<td>Paul:</td>
<td>Ya.</td>
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<tr>
<td>COL:</td>
<td>The need to balance, the, I suppose, respect for the needs of the witness but also the rights of the accused and that it, it can be difficult to do both.</td>
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<tr>
<td>Paul:</td>
<td>It, it is but like the bottom line is, if you have a child say…</td>
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<tr>
<td>COL:</td>
<td>Mmhmm</td>
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<tr>
<td>Paul:</td>
<td>[long pause] It’s a fact, they are a child and it is going to be more difficult for everyone. It’s going to be more difficult for the child, for the prosecution and it’s going to be more difficult for the defence. And there is a huge danger that you know, somebody has invented something, not, almost certainly not out of any badness, but just because sometimes mad ideas get into people’s heads. But that is a real danger, that, that somebody who is from that vulnerable circumstance, comes up with sort of mad idea, or maybe has a mad idea put in their head by somebody else, gives that to the Gardai on the DVD and then the accused person is in a very difficult position in court trying to challenge, not trying to challenge in such a way that they upset the person, and therefore cause themselves more difficulty in the eyes of the jury, and actually try to be forensic in any sort of way, it, it’s an extremely, extremely difficult for the defence in that sort of circumstance, you know.</td>
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<tr>
<td>COL:</td>
<td>I would imagine.</td>
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<tr>
<td>Paul:</td>
<td>So, it’s not ideal. Em</td>
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<tr>
<td>COL:</td>
<td>Do you think there is such a thing as a fair trial?</td>
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<tr>
<td>Advocating for individual supports</td>
<td>Outside of...I suppose why I am asking is because people have said to me, em... various different things about if you alter procedures and put more supports in place. Some people will say it will sway it to the side of the accused and other people have said ‘actually we need to kind of be realistic and there isn’t such a thing as a fair trial for anybody because there are always going to be different factors at play’.</td>
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<tr>
<td>Considering judges' role and perspectives</td>
<td>Paul: I, I, No I would think there is such a thing as a fair trial.</td>
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<tr>
<td>Court being preoccupied with validity, objectivity, proof</td>
<td>COL: Ya, ya.</td>
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<tr>
<td>Treating as, or similar to, children</td>
<td>Paul: I think that... like, in less than on the fingers on one had can I think of cases that were unfair trials. You know, in the very, very vast number of cases they are fair trials. And every case is different, and every case the judge is there to try and make orders in every single case to balance the competing rights.</td>
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<td></td>
<td>COL: Ya, I suppose actually, because that was going to be my follow up question. Do all fair trials look the same?</td>
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<td></td>
<td>Paul: No.</td>
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<td></td>
<td>COL: So they don’t, ya.</td>
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<td></td>
<td>Paul: So you might make different orders in different cases depending on the circumstances, you know.</td>
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<td></td>
<td>COL: Ya.</td>
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<td></td>
<td>Paul: Eh, and it’s going to come down to as well, the judge is going to have to use his own or her own kind of experience to say, listen, in some case you’d be more concerned than in others. And you’ve to look at objective things. And you know, at the end of the day if the judge does feel that what is occurring is unfair, he does have the jurisdiction to stop the case. Now, it is something they are slow enough to do but they have done and can do, so.</td>
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<td></td>
<td>COL: Ya, ya, interesting, OK.</td>
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<td></td>
<td>Paul: So, in that case, well there’s quite good facilities here. So, em, there is two or three people who are in the victims’ support unit and they are full time employed and that is their job, to meet people, make them feel at home, tea and coffee, you know, orange whatever. They’ve got a room up there which has a bunch of couches, it is nice furnished, it has nice views of the Park, it’s light, it’s airy, everyone is friendly, very gentle. Em, when they meet barristers, and solicitors, you know they don’t actually meet them that often, but when they do its’ supposed to be kind of kept relaxed and gentle as possible. And then there’s the video conferencing rooms up there and they have balls and plastic toys and they have teddies and that sort of stuff if people need any of that to try and calm the situation down as much as possible. So, my view is that the facilities are there to make it as painless as possible, but you know, it’s going to, it’s always difficult going to Court.</td>
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</table>
**Focused code: Lacking necessary flexibility**

(Note: Negative cases highlighted in red).

<table>
<thead>
<tr>
<th>Participant</th>
<th>Interview extract</th>
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</thead>
<tbody>
<tr>
<td>Cliona</td>
<td>Have conversation – ask them if they want an intermediary – personal choice. Boy – found it frustrating to have a question asked by intermediary if he didn’t want one. Asking three questions at once [barrister]. Barrister did not know challenges, with things.</td>
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<td>Emma</td>
<td>Emma: No. And we’re not allowed do certain things. There is a policy around legal… or advocacy in the legal context. We’re not allowed go in the box. I’ve done it once. Em, just to make sure something happened. COL: Ya. Emma: But anyway, but you’re not allowed em… be the appropriate adult in the Garda station. Em, we’re not allowed, em… we can support somebody with a witness statement. COL: Ok. Emma: But not to be seen by the custody sergeant as the appropriate adult, somebody else has to do that.</td>
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<td>Emma</td>
<td>Emma: Well, if we think about the gentleman I supported who was being charged with motoring and other offences, he was a selective mute. And so, he could be seen as not being co-operative- COL: Mm hmm, ya. Emma: But there ways in which you could work with him to get answers to questions. But that wasn’t going to happen in court. COL: So you think that the things that work in his day to day life to get him to communicate weren’t utilised in the courtroom? Emma: Not at all. Not at all. COL: No.</td>
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<td>Emma</td>
<td>Emma: He was saying those things and, but then, he wouldn’t, when they would ask him stuff, they wouldn’t answer. COL: Ok. Ya. Emma: And you’d try and suggest certain ways of asking him questions or his mother would be around and she’d poke him and that might get answers sometimes, but then, it would then cause a row other times, so you know</td>
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<tr>
<td>Emma</td>
<td>COL: So thinking about those, and somebody with communication difficulties, do you think they go far enough as accommodations or is there more to be done? Emma: There’s loads that could be done. I don’t see them being done though. I don’t see them using alternative forms of communication, Talking Mats, IT apps eh, those sort of things</td>
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<td>Emma</td>
<td>Emma: So I have a client who has a personality disorder and who for her previous five court appearances had been fairly OK, upset, but calm. And you have to keep focussing her in on her communication because otherwise she would tell you stories or bring in subjects that she was wound up about. COL: Ok. Emma: And couldn’t get instruction. So there, and this solicitor, and barrister, knew at this stage what to do. But this particular time there was</td>
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</table>
another woman with her who she didn’t know well and was
supposedly providing support, right? I was there also and this woman
kept interjecting and causing more chaos. So the barrister twigged it
immediately, and I twigged that the woman was uncomfortable,
[inaudible segment], so she got the whole communication things and
what needed to be the structure around the proper instructions before
we go into the court. So that woman, the other woman was removed
and everybody calmed down and…

John

So that there was a recognition the of the way in which the system might be
adapted, but in a sense primarily that was a single approach of video link. So
I suppose, there is certainly a recognition and then moving to now, eh, there
is recognition among some of the lawyers who are looking at the way in
which some trials have run and where, eh those with eh, the kinds of
communication difficulties that you are identifying in your study, that those
trials have not been satisfactory

Mary

I think that the courtroom is a very intimidating place, so its’ going to be ten
times more intimidating for someone with a disability. And I think they need to
be mindful of that. And to maybe, just relax it a bit when that person is in
court. If that person needs someone beside them, that the person should be
allowed have somebody sit beside them.

Niamh

So, while people might actually need might be like a different format of the
hearing, a lot of regular breaks, a different style of questioning, which again,
would be very challenging to introduce anything like that because it would go
against the whole ethos of the adversarial system in criminal justice settings.
So, I think there is a much wider range of accommodations that could be
used by people. And again, at the early stage in terms of the investigation
and the evidence gathering process. Em, they are certainly not there

Niamh

Em, now I suppose the one benefit that we have in our system is that we
have become more flexible on the understanding who, that if you can give an
intelligible account of proceedings so, the, the I suppose the eligibility for
testifying and exemptions from the oath and things like that are potentially
useful to people, and I think there is potential scope to interpret that in a
more progressive and flexible way and I’ve seen some evidence of some
djudges doing that, which at least gives people the option to testify. So we
don’t have such strict competency to testify requirements as would exist in
other jurisdictions and that is important I think, but it’s still, it’s not enough for
sure

Niamh

And that’s obviously his professional, previous professional life and that
experience kind of coming to bare on. And he would be regarded as quite
good in his practice. You know and that he is somebody who understands
these issues and is flexible and is accepting and provides accommodations
and appreciates the, the challenges that people might be facing. So that was
kind of interesting to me that, that pe-, eh, that judges then will impose limits
on how flexible they can be, and, and, that mightn’t be on my, I don’t see that
anywhere in the Brady circular.

Niamh

Niamh: ‘Ah, and, and in it, you know, I think what judges would really like is
‘persons with X disability behave Y way’.

COL: Yes.

Niamh: And then they would know, so like if they had autism training they’d
be like ‘Ok, well people with autism can do this and therefore in the
courtroom I should do’

COL: ‘I must do.’

Niamh: ‘Ya, and I understand why they want that but of course that’s not

COL: ‘No, no

Niamh: Accurate. And that’s the challenge with a lot of these
accommodations that they’re very procedural in nature, and they
eh, it is much easier to argue for an accommodation that responds
to that kind of scenario. So, you can get a legislative provision that
saying if person has X disability, Y accommodation should be provided, so the person is deaf, sign language should be provided. And people can understand that.

COL: Yes

Niamh: But when it is much more individualised and when you have no way of telling what the person in front of you actually requires.

Niamh: So, and I think where they had learned or experienced that in youth justice, that kind of transitioned and they were able to bring that experience and that flexibility into working with adult offenders with various labels and diagnoses. So I think those were, those were all just examples of situations where judges were just very open, very flexible, to things that weren’t, you know, there was no procedural rule to allow them, you know, they interpreted enough flexibility in the proceedings to be able to do this. And that was important

Paul: So the traditional method is like you and me sitting across a table and the Gardaí writing down from a person what happened. But that doesn’t work for children and by extension, vulnerable people. She was effectively treated as though she was a child. And, and, basically what the requires is a, a room in non-confrontational circumstances. Couches, soft furnishings, em, lots of break, eh, bottles of orange juice and so on, from guards who are not dressed as guards, generally female, plain dress, who are specially trained to work with people who are children or low functioning ability. I’m sure you’ve seen that sort of thing.

COL: Ya.

Paul: That works quite well and they’re very careful to ask open questions all the time, non-leading questions. Very careful to, eh, ensure the person understands the difference between the truth and a lie and that the person can actually give concrete, can give concrete examples of between a truth and a lie and all that sort of stuff. And the they try and get the story out as best as they can in the words of the person, in a non-leading way. And they’ll flow between asking really simple questions like ‘who is your favourite band?’ and ‘have you been to see One Direction lately?’ and ‘Where do you go at the weekends?’ and then they’ll intersperse then with questions about what happened. And, try to get the story that way. So that not only amounts to the statement. The reason they take statements is so the accused knows what the allegation is, but it actually, in these cases, can also amount to their evidence in chief. So what happened in this case was that her evidence in chief, i.e. the videos, were played to the jury and the jury were told to accept that as her evidence as though she had got into the witness box here in front of me and given that evidence. Ok. Eh, then comes the thorny issue of cross examination because you can’t really do cross examination in advance, because you really can’t cross examine somebody until you have all the information. And you don’t have all the information until the case has effectively been closed by the prosecution and handed over to the defence. So em, what we did was, she was hooked up on a live video link and she was in a little room up here in the CCJ and the images were being broadcast directly into the court. Em, and an effort was made before that happened that the judge would introduce himself. Em the judge wore a tie rather than tabs, nobody wore gowns, em, the judge introduced himself in a, kind of as non-confrontational way as possible so did the barristers, the prosecution and defence barrister did his cross examination of her, and she managed to get through it effectively via video link.

Paul: Ah, I’ve got it.

COL: Oh great.

Paul: Em, so, these are all probably fairly straightforward. So we wanted
to play the video as examination-in-chief, OK

COL: 
Paul: We wanted to eh, play a second video of examination-in-chief because they had to go back and take a second statement off her and this Act is actually silent as to whether you can take a second video or not.

COL: 
Paul: And that’s something that should be in the legislation because you know there’s absolutely no reason why you couldn’t use a second DVD and the Act is silent on it and it should be specified and I would amend that if I had the power.

COL: 
Paul: Ok, cross-examination to take place by video link. Eh, prior to the cross-examination, the victim introduced to the judge and both barristers, prosecution and defence, em, via the video link, in the absence of the jury, so before it all starts. Say, listen, there’s no jury here, you don’t need to worry about anything. This is who this is, this is who this is and so on. So, that was good. Em, the use of informal jargon free terminology, so no legal slese. Em, dispensing of gowns and wigs. That’s actually required by the Statute.

COL: 
Paul: Em, dispensing of tabs, that, they’re tabs. Em… that the victim be allowed view both of the DVDs to allow her refresh her memory before giving the evidence because any normal witness is entitled to read their statement so we said she should be allowed to watch the DVDs to remind her, so she wouldn’t be caught out just because she forgot something

COL: 
Paul: That she was given, preferably overnight, to assimilate the contents of the DVD before being required to give evidence. Em, the, we also sought that her mother be allowed to be standing beside her off camera in the room as she gave her evidence and the judge wouldn’t allow that but he said she was not to be in the same room but she could be close by so she could be at the other side of the door

COL: 
Paul: Ya, so at least she knew she was close by. Em…then the other issue was whether, see there was a transcript of the DVDs, and whether a transcript could be provided to the jury while the DVD was being played.

COL: 
Paul: Ya, well that, that is a thorny enough issue because juries really aren’t supposed to be getting transcripts of statements of evidence because then they start doing, they’re looking at what’s said on the piece of paper rather than hearing and watching a seeing which is what their job is.

COL: 
Paul: So, that would only be allowed really where, because of the communication difficulties of the person, or the audio equipment of whatever, that they might actually have a difficulty understanding what certain words were. And in, in that case that kind of did arise because there were some words that we literally were, we were trying to do transcripts and the guards had got the transcripts wrong in certain places, and we were playing the thing back five times say, saying did she say this or did she say that? Em and it could be quite important you know; you know say... ‘I felt scared’ but if you weren’t sure of the word scared, it’s very important if it’s scared or if it isn’t scared. Stuff like that. So, em… the court agreed to watch out for signs of stress, tensing of body, from the witness and the court felt that if she was getting stressed or tense, to allow her opportunities
to pause, regroup and or change topic of discussion if necessary. Em, that she be given sufficient time to answer questions that were asked of her, so that the defence barrister be careful that, to let her finish before asking the next question before kind of barracking **Badgering**

Paul: Ya, ya. Em, That the questions be constructed in simple, concrete and open ended language.

COL: Mm hmm.

Paul: The ruling of the judge in that case was that the counsel were to give her three options in the answer if possible. So, so, a simple question might be ‘what colour is my shirt? Is it blue, black or red?’ The reason for that is that if you just give the one answer, they’re likely to give that answer.

COL: Ya. Paul: But by giving the three options you’re forcing the witness to actually think about the circumstances and give the correct one. You’re much more likely to give the correct answer. That’s something that I, I’ve got a little three-year-old at home, and it’s something I actually use with her and it is effective because if you say one thing she will say ‘yes’ but if you give her the three options she will give you the right one.

COL: Ya, ya. As a speech and language therapist, we call that a forced alternative.

Paul: A forced alternative, ya, OK.

COL: It does work.

Paul: It does work ya. And then, the tone of questioning be positive, gentle and slowly paced. Em, that our clinical psychologist and the specialist interviewers, who are the two ladies in the guards who do the questioning, that they be made available to the prosecution and the defence and the judge to assist if either the prosecution, defence or the judge are having difficulty phrasing the questions. So we use their expertise basically. Em, and then, the prosecution were reserving the position as to whether they would use an ad hoc intermediary. And what I mean by ad-hoc. There’s no official intermediary so we were thinking about getting one, but in the end we didn’t use one for the reasons I explained.

Sarah but to complainants and particularly to witnesses, to adapt the system to allow them to give better evidence and to be gentler in terms of their experience, does not affect a fair trial. That is where we need to shift the views and help people to understand, OK, you, you know not being allowed to shout at the victim, might actually upset you because it’s the way you think you will be most effective, but in fact, you’re not very effective
Advanced Memo: Re focused code ‘Lacking necessary flexibility’

Date: 05.08.16

Context of reflection: Following compilation of collated focused code

Participants of all backgrounds, explicitly or implicitly, suggested that the courtroom process and procedures operate in a rigid manner. The resulting lack of flexibility is incompatible with the needs of people with communication difficulties, who, in a social model sense, require the environment to adapt to meet their needs.

There are some ‘negative cases’ which show a level of flexibility incorporated into proceedings, which is seen as positive. Practices such as taking a Garda statement in an alternative manner, and being able to use this as evidence-in-chief are useful examples of a more flexible approach. Niamh mentioned flexibility in terms of taking the oath and eligibility to testify if capable of giving an intelligible account.

However, there are bizarre examples of limitations being placed on the flexibility. For example, a judge who refused to allowed a mother to sit next to her daughter who had Down Syndrome as she testified via video link. Surely, if the mother was also on camera, it would be perfectly possible to monitor her behaviour and ensure she was only acting in a supporting and not influential capacity? Also, resistance to juries being given transcripts in specific cases as they usually do not, seems like an unnecessary concern, as it does not alter the words being spoken by the person.
Appendix 16: Participant biographies

‘Mary’
Mary has spent her career working in various capacities in the non-profit sector. She particularly emphasised her time working in the School of Law of a third level institution. During this time, she developed her knowledge of legal education, the legal system and legal stakeholders. In recent years, Mary has worked with a legal research organisation. In her personal life, Mary has experience of disability through persona; circumstances and volunteering with Special Olympics. Combining her experiences with law and disability, Mary has established a group whose aim is to improve the experience of people with disabilities when they come into contact with the criminal justice system.

‘Cliona’
Cliona is a practicing barrister who has worked in both civil and criminal contexts. She has often worked with the travelling community and has lectured in mental health law. She is particularly impassioned regarding the rights of victims and is involved in an organisation which is advocating for the implementation of the EU’s Victims’ Rights Directive in Ireland. Her legal work often involves sexual abuse, rape and post-traumatic stress disorder cases.

‘Emma’
Emma is a full time disability advocate who works within an advocacy body. She has a physical disability. She originally worked in the areas of physical and neurological disability, but now works across all disability types. In her work, Emma has often accompanied parents with intellectual disabilities to civil child care proceedings. Less frequently, Emma has been asked to provide advice and support in criminal proceedings. Emma has no legal training, but considerable knowledge regarding the disability rights and advocacy movements.

‘Sarah’
Sarah has worked for 22 years as a barrister. She is now a senior counsel. Within the last 15 years, she reports that 90% of her work has been in the criminal sphere. Overall, she has spent most time prosecuting cases on behalf of the Director of Public Prosecutions. However, at present, she splits her time evenly between prosecuting and defending cases. She is involved in her professions’ representative body and has consulted for the National Disability Authority in issues of disability and justice.
‘Niamh’
Niamh is a law academic who specialises in issues which affect those with disabilities. She has studied the role of advocacy in increasing access to justice for people with disabilities and is aware of the current access to justice context in Ireland and elsewhere internationally. In her day to day work, she has opportunities to interact and work collaboratively with people with disabilities.

‘John’
John is a barrister who also has experience in third level law education. He has chaired an Irish human rights watchdog agency. He now works for a law reform agency. In this capacity, he has worked on a number of publications which have examined legal issues in the disability context, including those which have examined capacity, sexual offences and the involvement of people with disabilities on juries.

‘Paul’
Paul has been practising as a barrister for 11 years. He both prosecutes and defends cases. He has specific experience of prosecuting one case where the alleged victim was a woman with Down Syndrome. His contributions were based on this case.

‘Claire’
Claire has been practicing as a criminal barrister for 23 years. She reports that she has spent 80% of her time doing prosecution work and the remaining 20% defending clients. As well as the time she has spent practicing law, Claire has also spent time working as a law academic. She has an interest in child witnesses and describes herself as a long-time advocate for judges to receive more training on child development and psychology.
Appendix 17: Accessible research summary

Communication difficulties and going to court – Information about my study

My name is Catherine O’Leary. I am a student in Trinity College Dublin.

I asked people about the help that people with communication difficulties get when they go to court as a witness.

Communication difficulties can be:
- Difficulties understanding
- Difficulties talking

A witness is someone who has seen a crime.
I spoke to lawyers and disability advocates.

They told me that there are some good supports. People can tell their story on a video before they go to court. This is good.

There is a person called an intermediary. An intermediary can help a person understand what lawyers say in the courtroom.

People told me this is a good idea but it is not used in Ireland enough.

The Government need to train people to do this job.
People told me that we need more supports in court. People should be able to get the best supports for them.

People told me that lawyers and judges don’t know enough about disability.

This means that they sometimes think people with communication difficulties will not be good witnesses.

Lawyers and judges need training to understand disability. Self-advocates should be involved in this training.

People told me that lawyers and disability advocates think differently about supports in the courtroom.
Disability advocates think it is an unfair place for witnesses with communication difficulties.

Lawyers are worried that more supports for witnesses will make the courtroom an unfair place for the person who might have committed a crime.

Lawyers and disability advocates have to work together to make the courtroom a fair place for everyone.

This should happen soon. The Convention on the Rights of Persons with Disabilities says it must happen.