

PROTECTIONS FOR VULNERABLE ACCUSED IN MALAYSIAN CRIMINAL TRIALS:
ARE THEY SUFFICIENT? PROPOSAL FOR REFORM

BY

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Abstract

This dissertation argues that the protections for vulnerable accused in Malaysian criminal trials are not sufficient. It is crucial to ensure that vulnerable accused receive proper treatment when dealing with the court. After thoroughly scrutinising the law and practice in several other jurisdictions, this dissertation proposes several amendments to the Criminal Procedure Code and the Evidence Act 1950 to provide clear guidelines as to how to deal with vulnerable accused in a criminal trial. It is ultimately recommended that the right to give an unsworn statement be modified so that it is more effective and fair in its operation. This dissertation further recommends the introduction of an adverse inference clause for the right to remain silent at trial so accused person can better understand the effect of their choice. Recommendations are also made to introduce an intermediary service for those vulnerable accused who choose to give sworn evidence in court, and to allow a support person to accompany a vulnerable accused during trial. These amendments aim to assist vulnerable accused persons physically and emotionally, and to protect their fair trial rights.

Word length

*The text of this paper (excluding abstract, table of contents, footnotes, appendix and bibliography) comprises approximately **33,464** words.*

Subjects and Topics

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Right to remain silent

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Support person

I Introduction

Every person deserves to be treated fairly in a criminal trial process; this includes an accused person. Every accused has the right to a fair trial. This is a fundamental safeguard of one's human rights.¹ Extra protections are even necessary for accused who are vulnerable. Hence, the provision of proper protections to ensure vulnerable accused are properly guided throughout the trial process is part and parcel of the standard required for a fair trial.²

In Malaysia, the meaning of the term “vulnerable person” in the context of criminal trials is not clear. My dissertation submits that it is crucial to have a proper definition of what constitutes a vulnerable person in the Malaysian criminal justice system because this type of accused may have trouble in engaging with the process of the court. Although such persons may understand what is going on and therefore be deemed fit to stand trial, it may be difficult for them to *fully* appreciate the court's proceedings without some form of assistance. A number of jurisdictions provide protections for vulnerable accused, but little protection is currently available in the Malaysian criminal justice system. My dissertation aims to examine whether the protections for vulnerable accused in Malaysian criminal trials are sufficient for a trial to be considered fair, and to suggest possible improvements. At the moment, one of the mechanisms to provide fair treatment to the accused in Malaysia is seen in the Criminal Procedure Code (hereinafter referred to as “the Code”), which offers three options when An accused is called to enter a defence in court. These options are well explained in s 173 of the Code, which provides as follows:

(ha) When the Court calls upon the accused to enter on his defence under subparagraph (h) (i), the Court shall read and explain the three options to the accused which are as follows:

- (i) to give sworn evidence in the witness box;
- (ii) to give unsworn statement from the dock; or
- (iii) to remain silent.

One of the choices available is unusual in international terms, and that is the right to give an unsworn statement (hereinafter referred to as “the RUS”). The RUS has been abolished in most Commonwealth jurisdictions. Nevertheless, it is interesting to note that a reverse scenario is seen in the Malaysian criminal procedure where a step contrary to other Commonwealth countries was taken by making the RUS more prominent under the Code. The RUS was a substantive right prior to 2007. It was adopted from English criminal

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), (1948), art 10; The European Convention of Human Rights, art 6.

² A thorough examination of the principle of a fair trial is beyond the scope of this dissertation. It will be discussed only intermittently.

procedure by invoking s 5 of the Code. This provision gives permission for the criminal procedure in England to be followed when such procedure is not available in Malaysia, as long as it is not in conflict with the Code. However, it was apparently preserved in the legislation when the Code was amended through the Malaysian Criminal Procedure (Amendment) Act 2006 and the law came into force on 7 September 2007.³

The Code also provides for the right to remain silent at trial (hereinafter referred to as “the RRS”). An accused has the freedom to say nothing during the defence case to avoid making a self-incriminatory statement. In overseas jurisdictions, the law expressly explains that an adverse inference will be drawn from the accused’s silence.⁴ In Malaysia, the law is silent on the inference to be drawn but it does require the judge to explain the consequence of the right. My dissertation highlights that the RRS creates an awkward situation in Malaysia. This is because, rather than focusing on the original purpose of the RRS, that is to protect the accused against self-incriminatory statement, it has been established by the Malaysian judiciary as one of the key elements to establish prima facie case. The scenario is; when the prosecution has successfully adduced credible evidence to prove each ingredient of the offence, and if the accused chooses to remain silent, an automatic conviction will follow. This is where the RRS becomes ineffective as protection to vulnerable accused. My dissertation suggests that the existing rights (RUS and RRS) that are intended to protect the interest of a vulnerable accused do not achieve the objectives for which they were originally formulated. The problems with the current Malaysian approach, and possible reforms, are considered in detail in this dissertation.

A *Scope of this Dissertation*

Theoretically, although it seems that Malaysian criminal procedure provides sufficient rights to an accused, as apparent from its Code, in reality none of the rights operate to really benefit vulnerable accused. Uncertainty about the evidential status of the RUS allows the possibility that the statement will not be viewed as evidence to support the accused’s case. Hence, the possibility of an innocent and vulnerable accused being convicted because of a failure to raise doubt is great. Meanwhile, the RRS is more concerned with how a prima facie case is reached than it is a tool to protect the accused against self-incriminatory statements. Therefore, I argue that the welfare of the vulnerable accused in Malaysian criminal trials is threatened by current processes. This is because not only are the rights offered in s 173(ha) insufficient as protections to the accused in general, but there is also very little additional assistance available to vulnerable accused who may find the court process daunting. The possible reason

³Section 21; Salim Ali Farrar “The ‘New’ Malaysian Criminal Procedure: Criminal Procedure (Amendment) Act 2006” (2009) 4 Asian Criminology 129 at 129.

⁴ Criminal Justice and Public Order Act 1994 (E&W), s 35; Evidence Act 1995 (Cth), s 20(2); Evidence Act 2006(NZ), s 33; Criminal Procedure Code 2010 (Singapore), 230(1)(m).

this scenario is happening in Malaysia is because the law in that country gives little attention to whether an accused might be vulnerable. I argue that if the term “vulnerable person” is defined precisely, and appropriate assistance is available for the benefit of these accused, it would reduce the flaw of the rights currently available to the accused and would be a platform to introduce other relevant assistance for them in the future. I argue that vulnerable accused persons need better protections. Hence, there have to be effective safeguards in the Malaysian justice system to shelter these accused and thereby prevent unfair proceedings. My dissertation determines a practical approach to protect the interests of vulnerable accused when dealing with the court process in a Malaysian criminal trial.

B The Structure of this Dissertation

My dissertation recommends step-by-step measures to improve the treatment of vulnerable accused by the Malaysian criminal justice system, beginning with a proposal to define who is a vulnerable person in the Malaysian criminal context. I argue that if this is done, it may help to determine proper assistance to be given to a vulnerable accused by the court. To achieve this aim, in Chapter II I discuss the term “vulnerable person” as it is found in other jurisdictions. I suggest the Malaysian legislature should amend the Code to incorporate the definition of a vulnerable person in criminal procedures. I argue in that chapter that when the term “vulnerable person” is properly defined, it makes it easier to determine the relevant assistance that needs to be provided for vulnerable accused.

Then I move on to discuss the current protections for vulnerable accused in Malaysia in Chapter III. I discuss in detail the current approach to the RUS in the Malaysian criminal justice system. It is important to examine the RUS thoroughly because the government chose to retain the right rather than abolish it in the name of justice to the accused. Hence it is crucial to determine how far it helps vulnerable accused. I make comparisons with the relevant law and practice in other Commonwealth jurisdictions such as England and Wales, New Zealand, Australia and Singapore. The discussion explains why the RUS in Malaysia today is problematic. I argue this right creates more disadvantages than advantages for the vulnerable accused. I then propose how to mend the situation by offering a more effective approach. I suggest the RUS could be modified so that it applies only to vulnerable accused. To this effect, I recommend the use of unsworn evidence as practised overseas as a relevant source of reference. However, I propose the core element of the unsworn statement, which is the restriction against cross-examination, should remain. I suggest the provision regarding the unsworn statement should be inserted into the Malaysian Evidence Act 1950. That amendment would make reform of the RUS more realistic in an environment where it has considerable public and political support. In Chapter IV I explain how the RRS is treated in Malaysia. In assessing whether the RRS offers sufficient protections for vulnerable accused

in Malaysia, the discussion will focus on the RRS at trial. The RRS at the pre-trial stage will be discussed only where necessary. It is obvious in this Chapter that the RRS does not receive the same respect as it does in other jurisdictions. I discuss that less attention is given to the reasons behind the decision to remain silent, as the court will look at the silence from a different perspective than that adopted by courts in other jurisdictions, that is, as a test to determine whether a *prima facie* case has been made by the prosecution or not. I also clarify in this Chapter that the law in Malaysia does not provide clear guidelines on how to explain the effect of silence to the accused. This could be detrimental to the accused who is unrepresented and the situation is more serious to the vulnerable accused. Therefore, I suggest the Code to be amended to introduce an adverse inference on the accused's silence and also put clearly the explanation that should be read by the court to accused who choose to remain silent. The Singapore Criminal Procedure Code 2010 is referred to for this purpose.

To discuss further protections for the vulnerable accused in Malaysia, in Chapter V I examine an intermediary service, as available in England and Wales. I highlight the benefits that the vulnerable accused might gain from this service. Malaysia also provides for an intermediary service, but it is only for child witnesses. Therefore, I suggest the Code be amended to provide the service to vulnerable accused. This service will be beneficial to vulnerable accused who choose to give sworn evidence in court. I also suggest having the service available to vulnerable accused/suspects as early as during the police investigation. In Chapter VI, I discuss another form of assistance available in New Zealand and Australia. These countries allow for support persons to vulnerable accused at trial. Quite similar assistance is also available in Malaysia, but again it is only applicable to child witnesses. I submit in this Chapter that this assistance is also very useful for vulnerable accused, who may be overwhelmed by the court process. This assistance is more related to the emotional well-being of the accused. I therefore propose the Code be amended to include a provision for support persons for vulnerable accused during trial proceedings. I argue that it may not be too demanding for the Malaysian legislature to consider an intermediary service and support persons to be available for vulnerable accused, since such assistance already exists in its justice system, but with a narrower scope. These proposed amendments aim to do justice to the vulnerable accused person in the Malaysian criminal court while maintaining fairness for all participants and parties.

II Vulnerable Persons in the Context of Criminal Trials

A proper definition of who is considered to be vulnerable in court is very important. This is because only when the term “vulnerable person” is defined does the necessity of providing appropriate assistance become obvious and relevant. Unfortunately, no such terminology exists in the Malaysian criminal justice system. This may be one reason vulnerable accused do not receive proper treatment when dealing with the criminal justice system.

Part A of this chapter discusses the definition of a vulnerable person in other Commonwealth jurisdictions. It also discusses whether a vulnerable accused is fit to stand trial or not. Then, in Part B I discuss the Malaysian approach in determining an accused’s fitness to stand trial. I highlight that the scope for fitness to stand trial in Malaysia is very narrow, because the law lacks ways to deal with accused who suffer from disabilities other than unsoundness of mind. In Part C, I propose the Code should be amended to define who is a vulnerable person for the purpose of the Code. I recommend following the New South Wales Criminal Procedure Act 1986 to achieve this aim.

A Who is a Vulnerable Person

The definition of a vulnerable person varies in each jurisdiction. It is worth comparing the overseas terminology on vulnerable persons to consider examples for Malaysia. The New South Wales Criminal Procedure Act 1986 defines “vulnerable person” as including a cognitively impaired person, which includes the categories of persons with an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia, a severe mental illness, or a brain injury.⁵ However, the law in England and Wales gives a narrow definition of a vulnerable person as someone who suffers from intellectual impairment.⁶ This definition is given specifically for the purpose of providing assistance for vulnerable witnesses under the Youth Justice and Criminal Evidence Act 1999. Brendan O’Mahony, a forensic psychologist and Registered Intermediary, recommended that “the wording in the legislation should be amended so that the term vulnerable person explicitly includes more general cognitive impairment and not only diagnoses of learning disability.”⁷ Meanwhile, in New Zealand, the term “vulnerable adult” is only defined to suit the Crimes Act 1961, which includes persons with mental impairment, but the definition refers to victims rather than to accused persons.⁸ However, the New Zealand Criminal

⁵Section 306M.

⁶Youth Justice and Criminal Evidence Act 1999 (E&W), s 16.

⁷Brendan O’Mahony “The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary” (2009) 38 British Journal of Learning Disabilities 232 at 236.

⁸ Section 2.

Procedure (Mentally Impaired Persons) Act 2003 is the relevant legislation to deal with accused who might be regarded as vulnerable persons. In determining a person's vulnerability, the legislation depends on the definition of intellectual disability as interpreted in the New Zealand Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, which gives a very detailed definition of a person with an intellectual disability, which also includes mental impairment.⁹

In Malaysia, the Code does not specifically provide a definition of a vulnerable person from the criminal justice perspective. However, the Malaysian Persons with Disabilities Act 2008 provides a general definition of persons with disabilities as "those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society".¹⁰ Furthermore, the Malaysian Mental Health Act 2001 also provides a definition of "mental disorder" as:¹¹

Any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and "mentally disordered" shall be construed accordingly.

Despite the availability of the provision that defines persons with disabilities and mental disorder, the criminal justice system does not attempt to address how these persons might struggle with the criminal process in the event they are charged in court. The law does deal with a child witness with a disability,¹² but this does not include a child accused.¹³ I submit that it should not be too difficult for the government of Malaysia to deal with this issue since reliable resources (i.e. Mental Health Act and the Persons with Disabilities Act) are available to determine the definition of a vulnerable person in the context of the criminal procedure.

1 Is a vulnerable accused with intellectual disability or mental disorder fit to stand trial?

In some overseas jurisdictions, an accused who has a permanent intellectual impairment with such a degree of severity as to result in his or her being unable to participate in the trial process will be found unfit to stand trial.¹⁴ Furthermore, this type of accused might not be able to instruct and/or communicate effectively with counsel and might be unable to understand the nature of the proceedings.¹⁵ It is a common law practice that if a person is not

⁹Section 7; *Barton v R* [2012] NZLJ 269 at [93]-[100].

¹⁰Section 2.

¹¹Section 2(1).

¹²Evidence of Child Witness Act 2007(Malaysia), s 12.

¹³Section 2.

¹⁴Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011) at [8.2]; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 7; Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (E&W), s 2.

¹⁵Brookbanks, above n 14, at [5.1] and [8.6.1]; Criminal Procedure (Mentally Impaired Persons) Act 2003(NZ), s 4(1); Crimes Act 1900 (ACT), s 311(1); Criminal Law Consolidation Act 1935 (SA), s 269H; Criminal Justice (Mental Impairment) Act 1999 (Tas), s 8; Crimes(Mental Impairment and Unfitness to be Tried) Act 1997(Vic),

able to understand or answer the charge against him or her, no criminal charge can be made in a court of law.¹⁶

However, in any other situation, an accused with an intellectual disability or mental disorder may be found fit to stand trial if the disability is not unduly severe and is concerned with a particular disability to do something.¹⁷ In such a case, relevant assistance is provided to the accused in order to minimise the gap between an accused without any disability and the accused with a disability. An accused with vulnerability may not be able to cope with the court's process well. Therefore, it is crucial that he or she understands the trial proceedings and, without assistance, it might be difficult for him or her. With appropriate support, this type of accused may be able to stand trial without being deprived of a fair trial. The approach of Malaysian law on fitness to stand trial is discussed next.

B Fitness to Stand Trial in Malaysia

In Malaysia, the court has the statutory duty to determine whether an accused is fit to stand trial or not.¹⁸ An accused is found unfit to plead if he or she falls under the definition of unsound mind in s 342 of the Code. Moreover, the Malaysian Penal Code explains that a person of unsound mind does not commit an offence.¹⁹ In terms of procedure, when the court becomes suspicious of the accused's sanity, it will investigate the matter by ordering the accused to be observed by a medical officer in a psychiatric hospital to determine whether the accused is fit to stand trial or not.²⁰ If the accused is found unfit to plead, and if the offence is bailable, the court may release the accused if satisfied that the accused will not do harm to himself or herself or to others. If the offence is unbailable, the accused will be subject to the order of the *Yang di-Pertuan Agong* (High King of the Federation), if it is in federal territory or to the Ruler if in a state, to keep the accused in a psychiatric hospital. Unfortunately, the Code does not give clear guidelines on how should the courts determine an accused's fitness to stand trial, as available in other jurisdictions.²¹ Some judges are of the opinion that the medical officer's report should not be the only mechanism to determine an accused's fitness to stand trial. In the case of *Public Prosecutor v Misbah bin Saat*, the court held:²²

s 6; Criminal Law (Mentally Impaired Accused) Act 1996 (WA), s 9; *R v Pritchard* (1836) 7 Car & P 303 at 304, (1836) 173 ER 135 at 135; *R v Walls* [2011] EWCA Crim 443 at [21].

¹⁶ Brookbanks, above n 14 at [5.1].

¹⁷ At [8.1.1].

¹⁸ *PP v Ismail Bin Ibrahim* [1998] 3 MLJ 243 at 243.

¹⁹ Section 84.

²⁰ Criminal Procedure Code (Malaysia), chapter XXXIII.

²¹ Criminal Law (Mentally Impaired Accused) Act 1996 (WA), s 9; Crimes Act 1900 (ACT), s 311; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s 6; Criminal Law Consolidation Act 1935 (SA), s 269H; Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ), s 4(1).

²² *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495 at [38].

Though not relevant for the purposes of the present application, I am, however, of the view that some of these principles ought to be adopted in Malaysia. Stanley Yeo Meng Heong, Senior Lecturer at the Faculty of Law, National University of Singapore – in an article entitled ‘Fitness to Plead in Criminal Proceedings’ [1984] 2 **MLJ** lxxxiv – is of the view that some of these English principles may be applicable in Malaysia by virtue of s 5 of the CPC: see note 10 of the article. The learned writer further states (at p lxxxv):

The [Criminal Procedure] Code does not define the phrase ‘unsoundness of mind’ nor does it state the factors which are relevant in determining whether an accused is incapable of making his defenceThe factors to be considered in assessing the accused's mental condition at the time of the inquiry or trial are those which have evolved under English common law. These factors are whether the accused has sufficient intellect: (i) to understand the nature of the charge and the possible consequences of a finding of guilt; (ii) to instruct his legal counsel; (iii) to understand the [*505] substance of the evidence against him; and (iv) to understand the course of the proceedings at the trial so as to make a proper defence. A fifth factor of having sufficient intellect to challenge jurors is relevant in Malaysia where jury trials continue to be held [now no longer applicable].

In the event the accused is found fit to stand trial, the court will proceed with the trial.²³ However, he or she is allowed to depend on the defence of insanity or unsoundness of mind in s 84 of the Penal Code to raise the issue of absence of *mens rea*.²⁴

The above discussion shows that the requirements relating how to determine the fitness of an accused to stand trial in Malaysia are very narrow. They focus only on an accused who is of unsound mind or who is insane. Discussion about an accused who is suffering from other kinds of mental diseases is very limited. The law does not explain what should happen to an accused who is not insane but suffers some kind of mental disorder/impairment as explained in the Persons with Disabilities Act 2008. This is because being unfit to stand trial does not necessarily mean the accused has to be insane or unsound of mind. A mentally disabled or disordered accused might also be unfit to stand trial.²⁵ It may not be a good approach for the Code to only depending on the term mental disorder and unsound mind/ insane to determine a person's fitness to plead. Previously, the same term (mental disorder) was used in New Zealand's Criminal Justice Act 1985 by referring to the New Zealand Mental Health (Compulsory Assessment and Treatment) Act 1992 to indicate a person's competency to stand trial. However, there was a conflict over the common definition of the term “mental disorder” in relation to an accused with an intellectual disability who was suspected to be unfit to stand trial.²⁶ Therefore, to avoid confusion and to accomplish the aim of procedural

²³ Criminal Procedure Code (Malaysia), s 349.

²⁴ Anita Abdul Rahim “The Plea of Insanity and Diminished Responsibility Under the Malaysian and the English Criminal Law: A Comparative Approach” (2011) 1 LNS (A) Iiv at 11 of the PDF version (no hardcopy available).

²⁵ *R v Roberts (No 2)* HC Auckland CRI-2005-092-14492, 22/11/06 at [56]-[57]; *SR v R* [2011] NZCA 409, [2011] 3 NZLR 638, at [157]; *R v Sexton* (2000) 77 SASR 405 at 416; *Eastman v R* [2000] HCA 29 at [59].

²⁶ Brookbanks, above n 14, at [4.6.2].

fairness in determining the competence of an accused to stand trial, the term “mental disorder” was replaced with “mental impairment”.²⁷ This happens because the term “mental impairment” does not necessarily refer only to a person of unsound mind or who is insane, since it also includes persons with mental disabilities. Now, the scope is wider and a person with intellectual disabilities as defined under the New Zealand Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 may fall under the definition of mental impairment.²⁸ The same situation is seen in Australia, particularly in the state of Victoria. The words “mental impairment” are not defined in the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997. As a result, the court relied on the common law defence of insanity to define the same. Therefore, the Victorian Law Reform Committee recommended that the legislation needed to be amended to make clear the intention of the law that the provisions in the statutes are associated with insanity and not mental disability.²⁹

I argue that it is important for the law in Malaysia to give more attention to accused who have a mental illness or disability to determine whether they are fit to stand trial or not. Accused who have a mental illness or disability are not necessarily rendered unfit to stand trial if they have sufficient comprehension of the nature of the proceedings.³⁰ Therefore, when they are found fit to plead, relevant protections are required since they may not be as well-equipped as other accused without disability or disorder to understand and conduct an effective defence. Unfortunately, there is no provision in Malaysian law that deals with an accused who suffers from mental disabilities, but who is fit to stand trial. This leaves an impression that the criminal justice system in Malaysia does not see the necessity of having proper assistance for vulnerable accused in this category. Therefore, it is crucial for Malaysia to learn from other jurisdictions on who the potential vulnerable accused in Malaysia are and how to deal with them. This is important to make sure that the principle of a fair trial is adhered to.

A vulnerable accused may find it difficult to become involved in the court process without proper assistance. At present, because of the lack of protections for vulnerable accused at trial, the law in Malaysia is seen to be insensitive to the plight of an accused person who has problems in coping with the court’s proceedings due to his or her mental disability. It is somewhat surprising to see that even though the court is aware of the lack of understanding of the accused in the trial process, the law permits the court to continue with the proceedings without providing any reasonable assistance. This is evident in s 258 of the Code when it states:

Section 258. Procedure where accused does not understand proceedings.

²⁷ At [4.6.2].

²⁸ Bruce Robertson (ed) *Adams on criminal law* (online looseleaf ed, Brookers) at [CM4.13.01].

²⁹ Law Reform Committee *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (VLRC PP216,2013) at xxv.

³⁰ *R v Daniel* [2007] NZCA 15.

If the accused, though not insane, cannot be made to understand the proceedings the Court may proceed with the trial and, in the case of the Court of a Magistrate if the trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the Court of a Judge shall make therein such order or pass such sentence as it thinks fit.

It is even more absurd when the provision explains that if the accused is convicted, the case should be brought before the High Court for an order or sentence to be passed. It is submitted that this would create a stir in a trial process since the case needs to be brought before two courts of different jurisdictions to be solved. Although the reason for this may be for the interests of the accused, in terms of providing an appropriate sentence to the accused and/or to satisfy the higher court that there is no miscarriage of justice in the proceeding, but this would be inefficient as it would cause delays in the disposal of the case. The deficiency in the procedure could be avoided if proper methods were practised to ensure those vulnerable accused are given the opportunity to give evidence in a fair manner. To achieve this, I propose the Code be amended to give a plain interpretation of a vulnerable person. That proposal is discussed next.

C Recommendation: Definition of Vulnerable Person in the Malaysian Criminal Procedure Code

After an analysis of the approaches of some Commonwealth countries in defining who is a vulnerable person, I submit that it is timely to do the same in the Malaysian justice system. I propose a clear definition of the words “vulnerable person” be inserted in s 2 of the Code. For this purpose, the law in the New South Wales Criminal Procedure Act 1986 will be referred to.³¹ The reason I propose to rely on this legislation is because the Act is drafted with attention to detail and it covers almost every important element of what constitutes a vulnerable person. This may avoid the likelihood of a vulnerable accused does not being unable to receive assistance because of an inadequacy in the interpretation of the word “impairment”. Hence, it is easy to deal with the issue because the statute gives a straightforward answer to questions about what constitutes a vulnerable person. Besides, the definition in the New South Wales legislation may not be too different from the interpretation of disabilities within the context of the Mental Health Act 2001 and the Persons with Disabilities Act 2008 in Malaysia. Nevertheless, some modifications are suggested as highlighted below.

The proposal for an additional interpretation in s 2 of the Code is as follows:

Section 2. Interpretation

(1) In this Code-

³¹ Section 306M.

"vulnerable person" means a **witness or accused person who is a child or a cognitively impaired person of any age**. For the purpose of this **Code**, a "cognitive impairment" includes any of the following:

- (a) an intellectual disability,
- (b) a developmental disorder (including an autistic spectrum disorder),
- (c) a neurological disorder,
- (d) dementia,
- (e) **a mental disorder (has the same meaning as s 2 of the Mental Health Act 2001)**,
- (f) a brain injury.

The inclusion of the words "**witness or accused person**" aims to give better understanding that this provision is applicable to vulnerable accused of any age in a criminal proceeding. It may help the court to determine who is eligible to be granted proper assistance. I also suggest the inclusion of an additional category that is "**a mental disorder**" because from the discussion in Part C, the determination of one's fitness to stand trial (concerning the issue unsoundness of mind) in Malaysian criminal trial needs to be read together with the Mental Health Act. In addition, an accused of unsound mind may also be found fit to stand trial, as provided for in s 349 of the Code. For this reason, I find it is important to make sure that the accused of this category is defined as a vulnerable person to allow them to get access to proper assistance when making their defence in the court. Therefore, s 2 of the Code needs to be cross-referenced to the Mental Health Act 2001 in defining a vulnerable person in the context of criminal trials.

D Possible Benefit from the Amendment

It is reasonably clear that the law in Malaysia lacks a proper method to deal with a vulnerable accused who is fit to stand trial. I argue that when the Code provides for the definition of the term "vulnerable person", which includes a vulnerable accused, it will become a stepping stone for the law in Malaysia to be more alert to the needs of vulnerable accused when dealing with the law and procedure. It will be much easier to introduce other relevant assistance to the vulnerable accused in future. Therefore, a vulnerable accused who is fit to stand trial will not be treated the same as the accused without any disabilities.

A clear definition or interpretation of the term "vulnerable person" may also help to reduce the possibilities of delays in court proceedings. This is because when the provision clearly

defines that relevant assistance is only applicable to those who fall under s 2, it would prevent the provision being extended to accused who are not eligible. Therefore, when the scope of assistance is narrowed down, the likelihood of abuse is also reduced. In addition, this amendment has a two-pronged effect. Instead of benefiting only an accused person at trial, the inclusion of the word “witness” opens the scope wider so that “vulnerable person” may include a suspect during the pre-trial phase. This provision might allow proper assistance to be provided to persons being examined by the police, as mentioned in s 112 of the Code.

After the term “vulnerable person” is defined, it is important to examine what would be the possible assistance available to a vulnerable accused who is found to be fit to stand trial in Malaysia. In the next chapter, I discuss in depth the current protection available in Malaysia, that is the RUS, and whether it is an effective safeguard of the interests of vulnerable accused in criminal trials.

III Current Protection: A Critical Analysis of the Rights to give an Unsworn Statement in Malaysian Criminal Trials

This chapter presents a detailed analysis of the RUS provided for an accused person by the Malaysian criminal justice system. I critically analyse the actual functions of the RUS and whether the current practice in Malaysia meets the objectives of the RUS. It is important to examine closely the RUS since this is often the choice adopted by vulnerable accused at trial. My dissertation reveals that the current characteristics of the RUS in Malaysia make it ineffective as protection to vulnerable accused. This chapter also highlights why the RUS is problematic and possible solutions to overcome the problem.

In Part A, I explain the original aim of the RUS in the criminal justice system. However, it is no longer seen as necessary to maintain it in other jurisdictions and therefore has been discarded in the legislation of those jurisdictions. Then, I highlight the reasons the Malaysian government decided to retain the RUS in the Code. In Part B, I demonstrate that no proper research was carried out before making the decision to retain the RUS. I submit that the reasons given for the preservation of the RUS are without proper justifications. Furthermore, the current features of the RUS in Malaysia are out-dated and open to abuse. It benefits neither the vulnerable accused, nor other parties in the criminal trial. Therefore, in Part C, I argue that the RUS is problematic and discuss its effects on the court, prosecution and the witnesses. In Part D, I analyse the effect on vulnerable accused specifically, and on society generally, of the abolition of the RUS. I find that the abolition of the RUS in Malaysia might not be practical. However, I discuss current features of the RUS that are in need of modification. For this purpose, I discuss how unsworn evidence is used in other jurisdictions and how such practices might help to improve the RUS in Malaysia. In Part E, I propose some modifications to the RUS to restrict its application to vulnerable accused only. I consider some useful characteristics of unsworn evidence. However, I propose the restriction against cross-examination be sustained. I argue that a modified unsworn statement may be useful for those vulnerable accused who choose to give a statement without an oath in court. To give this effect, the Malaysian Evidence Act 1950 needs to be amended.

A The Right to Give an Unsworn Statement

The RUS is an ancient right. In the nineteenth century, accused persons were not allowed to give evidence on oath as they were considered to be incompetent as witnesses.³² In addition, they were not permitted legal representation, except in misdemeanour cases.³³ This rule was

³²Wayne T Westling "Anglo-Australian Criminal Procedure the Right of Silence" (1975) 7 Tex Tech L Rev 1 at 1.

³³S Augustine Paul "Dock Statement – Reality or Myth" (1991) 2 CLJ xli at 1 of the electronic version (no hardcopy available).

originally developed in civil cases in the sixteenth century based on the principle of “disqualification for interest.”³⁴ However, by the end of the seventeenth century, the principle was extended to criminal cases since there was a concern that the person who had the greatest interest in the charge was the accused.³⁵

In order to avoid miscarriages of justice and to give an opportunity to the accused to respond to the prosecution’s case, the RUS was introduced in England in the late nineteenth century.³⁶ The RUS has a special characteristic whereby accused are not cross-examined on the statements made in their defence. The rationale for the introduction of unsworn statements was the protection of accused persons who were thought to be ignorant, illiterate and/or innocent because there was a fear that forcing them into the witness box might expose them to the unwitting making of self-incriminatory statements.³⁷ Hence, it was introduced to prevent the accused from facing the challenge of cross-examination.³⁸ The RUS was exercised by either giving oral statements or by preparing a written statement which would later be read before the jury.³⁹

However, the (English) Criminal Law Revision Committee in its Eleventh Report recommended that the unsworn statement should be abolished for the reason that if the accused chose to give evidence in court, it had to be done under oath and subject to cross-examination like other witnesses.⁴⁰ There was a concern that allowing the accused to be shielded against cross-examination would encourage the accused to give irrelevant statements without fear of being questioned by the prosecution. The recommendation was later endorsed by the Royal Commission⁴¹ and the right was abolished in its country of origin in 1982.⁴²

Meanwhile, in New Zealand, the RUS was abolished in 1966.⁴³ New Zealand was the first Commonwealth country that took the step to depart from the practice of allowing the accused to give an unsworn statement.⁴⁴ Now, accused persons who choose to give evidence in court have to do it in the same manner as a witness and are subject to cross-examination.⁴⁵ Hammond J in *R v K* made it clear that witnesses must deliver their statements on oath, and if accused persons choose to give statements in court, then they will be called as witnesses and

³⁴ Timothy P O’Neil “Vindicating the Defendant’s Constitutional Right to Testify at a Criminal Trial: The Need for an On-The-Record Waiver” (1989) 51 U Pitt L Rev 809 at 812.

³⁵ K H Marks “‘Thinking Up’ about the Right of Silence and Unsworn Statements” [1984] LIJ 360 at 371.

³⁶ Criminal Evidence Act 1898 (E&W), s 1(h).

³⁷ C R Williams “Silence and the Unsworn Statement: An Accused’s Alternatives To Giving Sworn Evidence” (1976) 10 Melb U L Rev 481 at 503.

³⁸ Williams, above n 37, at 494.

³⁹ At 497.

⁴⁰ (English) Criminal Law Revision Committee, Eleventh Report *Evidence* (Command Paper No.4991, 1972) at [104].

⁴¹ Royal Commission on Criminal Procedure (Command Paper No. 8092, 1981) at [4.67]

⁴² Criminal Justice Act 1982 (E&W), s 72.

⁴³ Crimes Amendment Act 1966 (1966 No 98)(NZ), s 5(1); Summary Proceedings Amendment Act 1973(NZ), s 3.

⁴⁴ Crimes Act 1961(NZ), s 366A; R A McGechan *Garrow and McGechan’s Principles of the Law of Evidence* (7th ed, Butterworths, Wellington, 1984) at 246.

⁴⁵ Chris Gallavin *Evidence* (Lexis Nexis, Wellington, 2008) at [4.3].

can be cross-examined by the prosecution.⁴⁶ In addition, the RUS was increasingly seen as irrelevant once the ability to give a sworn statement became available to the accused.⁴⁷

The RUS has been abolished in Australian states in stages despite some controversy;⁴⁸ there were diverse views on the retention or abolition of the RUS. However, in some jurisdictions in Australia, there has been tendency to replace the unsworn statement with the right to give unsworn evidence.⁴⁹ Although some of the characteristics of the unsworn evidence are more or less the same as the unsworn statement, the former may be exercised only with the permission of the court and cross-examination is allowed. Meanwhile, no such permission is needed for unsworn statements.

Singapore, whose system is very similar to Malaysia, decided to adopt the recommendation by the (English) Criminal Law Revision Committee and the RUS was abolished in its Criminal Procedure Code (Amendment) Act 1976.⁵⁰ Now, if the accused elects to give a statement, it must be made on oath.⁵¹

While other jurisdictions decided that the RUS was anachronistic,⁵² the Malaysian government decided otherwise and has safeguarded the RUS in the statute by amending the Code to that effect. The discussion in this Part begins with analysis of the Select Committee Report (hereinafter referred to as “the Committee Report”) concerning the amendment to s 173 (ha) of the Code. I examine the reasons behind the decision to give the RUS statutory effect. It is apparent that the amendment was intended to give clarity on the options available to accused at the defence stage. However, the Committee Report also revealed that there was a proposal by the Select Committee of the House of Representatives (hereinafter referred to as “the Committee”) to allow cross-examination on an unsworn statement when it is based on s 113 of the Code. However, the proposal received strong objection from the public.

⁴⁶ *R v K* [1995] 2 NZLR 440 at 447.

⁴⁷ (15 June 1966) 346 NZPD 490.

⁴⁸ Law Reform Commission *Criminal Procedure: Unsworn Statements of Accused Persons* (NSWLRC R45, 1985) at [3.10]; Criminal Procedure Act 1986 (NSW), s 31; Evidence Act 1929 (SA), s 18A; Criminal Code of Queensland, s 618 (former statute); Evidence Act 1906 (WA), s 97; Evidence Act 2001 (Tas), s 30A; Marks, above n 35, at 372.

⁴⁹ Evidence Act 1995 (Cth), s 13; Evidence Act 1995 (NSW), s 13; Evidence Act 2011 (ACT), s 13; Evidence Act 2001 (Tas), s 13; Evidence Act 2008 (Vic), s 13; Evidence Act 1929 (SA), s 9; Evidence Act 1977 (Qld), s 9A; Evidence Act 1906 (WA), s 106C; Criminal Code (NT), s 360; Law Reform *Criminal Law and Procedure Australia-Victoria* (1986) 12 CLB 446 at 468; James Gobbo, Governor of Victoria “The Legal Profession in Victoria – Idealism under Stress” (Leo Cussen Memorial Lecture 2000, Leo Cussen Institute, Victoria, 18 October 2000); Law Reform Commission *The Right to Silence*, (NSWLRC R95, 2000) at [4.71]; David Brown “Silencing in Courts: The Abolition of the Dock Statement in New South Wales” (1994) 6 CICJ 158 at 158; Bron McKillop “The Position of Accused Persons Under the Common Law System in Australia (More Particularly in New South Wales) and the Civil Law System in France” (2003) 26 UNSWLJ 515 at 526.

⁵⁰ Criminal Procedure Code (Amendment) Act 1976 (Malaysia).

⁵¹ Criminal Procedure Code 2010 (Singapore), s 291; Stanley Yeo Meng Heong “My Lord, the Defendant Chooses to Remain Silent” (1981) 23 Malaya L Rev 237 at 238.

⁵² C L D Meares “Judges Support Removal of Dock Statement” *The Sydney Morning Herald* (online ed, Australia, 2 May 1994) at 14.

Therefore, in Section 2, I discuss the connection between the statement under s 113 and the unsworn statement. I argue that to maintain the RUS based on those reasons is groundless. In Section 3, I also argue that public opinion received during the process of drafting legislation is crucial but should be assessed carefully.

1 Why Malaysia sustains the right to give an unsworn statement

The RUS in Malaysia was a substantive right prior to the year 2007. It adopted the English criminal procedure on the issue by invoking s 5 of the Code to justify the application of the RUS in the Malaysian criminal trial. However, the Criminal Procedure Code (Amendment) 2004 Bill was tabled in the House of Representatives on 12 July 2006, and one of the proposed amendments was to incorporate a specific clause concerning the RUS.⁵³ The Committee had conducted surveys involving 67 organisations and associations, consisting of representations from human rights pressure groups such as SUHAKAM, SUARAM ('Suara Rakyat Malaysia', the Voice of the Malaysian People), Police Watch and the Joint Action Group-Violence Against Women, as well as from the Attorney-General, the Deputy Police Chief, the Chief Registrar of the Federal Court, and representatives from the Malaysian Lawyers Association, the Prison Service, and from local universities.⁵⁴ The committee also visited Australia and New Zealand for the purpose of the amendments, and legislation in Singapore, New Zealand and Australia was referred to explicitly in respect of amending s 173.⁵⁵

Before analysing the amendment on the RUS in the Code, the Committee Report as delivered in Parliament by the then Minister of Justice, Mohd Radzi bin Sheikh Ahmad, must be examined. The Committee Report in its original language states:⁵⁶

Tuan Yang di-Pertua, pindaan kepada perenggan 173(h)(a) bertujuan memperuntukkan secara khusus tiga pilihan pembelaan kepada tertuduh iaitu samaada beliau hendak memberi keterangan bersumpah dari kandang saksi, memberi keterangan dari kandang tertuduh atau berdiam diri. Cadangan pindaan asal juga memperuntukkan bahawa jika tertuduh memilih untuk memberi pernyataan secara tidak bersumpah dari kandang tertuduh dan pembelaannya berkaitan dengan pernyataan beramaran yang merupakan sebahagian daripada keterangan pendakwaan, beliau boleh diperiksabalas oleh pendakwa.

Orang ramai membantah dengan keras cadangan pindaan yang membolehkan pendakwaan menyoalbalas tertuduh mengenai pemberian pernyataan secara tidak bersumpah dari kandang tertuduh jika pembelaannya menyentuh pernyataan beramarannya yang telah

⁵³ (13 July 2006) 46 MPD HR at 39; Criminal Procedure Code (Malaysia), s 173(ha).

⁵⁴ Farrar, above n 3, at 135.

⁵⁵ (13 July 2006) 46 MPD HR, above n 53, at 30.

⁵⁶ At 40.

menjadi sebahagian daripada kes pendakwaan. Mereka menghujahkan bahawa prosedur ini adalah bertentangan dengan undang-undang yang sedia ada.

Jawatankuasa setelah mempertimbangkan maklumbalas serta kedudukan undang-undang bersetuju dengan pendapat orang ramai bahawa adalah tidak adil untuk membenarkan pihak pendakwaan memeriksabalas tertuduh mengenai pemberian pernyataan tidak bersumpah. Sehubungan itu jawatankuasa mencadangkan peruntukan ini dimansuhkan. Ini adalah selaras dengan pindaan seksyen 113 yang telah dijelaskan sebelum ini.

Translation:

Mr Speaker, the amendment to paragraph 173 (h) (a) specifically seeks to provide three options of defence to the accused person that are whether he or she wants to give a sworn statement from the witness's box, to testify from the dock or remain silent. The original proposed amendment also provides that if the accused person chooses to give an unsworn statement from the dock and his or her defence is related to the cautioned statement that has become part of the prosecution's evidence, he or she may be cross-examined by the prosecutor.

The public strongly objected to the amendment that allows the accused to be cross-examined by the prosecution on the unsworn statement from the dock if his or her defence is in relation to the cautioned statement that has been part of the prosecution case. They argued that this procedure is contrary to the existing law.

After considering the feedback and the position of the law, the committee agreed with the public opinion that it is unfair to allow the prosecution to cross-examine the accused on the unsworn statement. Therefore the committee recommends for this provision to be repealed. This is in line with the amendment to section 113 that has been explained before.

Apparently, the purpose behind inserting s 173(ha) in the Code was to improve clarity regarding the three choices an accused person has when the defence case is called: to give a sworn statement from the witness box; to make an unsworn statement from the dock; or to remain silent. However, there was remarkably little discussion concerning the RUS in the Committee Report. The only discussion on this issue is found in clause 14 of the Committee Report in respect of the amendment to s 113 in regard to the admissibility of a cautioned statement. The amendment to s 113(which now in force) provides guidelines on how to use any statements that were made in the course of a police investigation in court.⁵⁷ The subsection in s 113 that is relevant to s 173 is:⁵⁸

S 113

- (1)
- (2)

⁵⁷At 33.

⁵⁸At 33.

- (3) Where the accused had made a statement during the course of a police investigation such statement may be admitted in evidence in support of his defence during the course of the trial.
- (4)
- (5)

As can be seen from the Committee report extract set out above, because of public objection to cross-examination on an unsworn statement, no amendment to the practice of giving an unsworn statement was in fact made.

2 *The relationship between the amendment of s 113 and s 173(ha) of the Malaysian criminal procedure code*

Before the amendment to s 113, the prosecution used cautioned statements (statements made by the accused during police investigations that may be used against him or her at trial) under the former s 113 of the Code as evidence in court. However, after scrutinising feedback from the Police Department, the Attorney-General's Chambers, Bar Council, different associations and the public, the Committee was of the view that an amendment should be made to repeal the ability of the prosecution to adduce cautioned statements in court. This is because most of the time cautioned statements are inadmissible in court and this situation would undermine the police's image.⁵⁹ Besides that, the procedure to adduce cautioned statements in court is time consuming, as it may need to go through the process of *voir dire*.⁶⁰

These are valid justifications for repealing the ability to adduce cautioned statements, and J D Heydon discussed similar drawbacks regarding confessions in police custody.⁶¹ According to Heydon, besides taking time and money, a *voir dire* process could disrupt the main trial. In addition, the tendency of the accused to allege police misdemeanours during confession taking would affect the police's reputation.⁶² Furthermore, a confession made voluntarily would still be considered unfair if it were admitted in court.⁶³ However, such an explanation does not absolve the Committee from any controversy regarding the decision. The question arises as to what existing law the public was referring to, as referred to by the Committee in the Committee Report. If the law is s 113 itself, it is evident from the construction of the proposed amendment that the section does not explicitly indicate that the accused should not be cross-examined if he or she chooses to use the statement in s 113(3). Even if the public was referring to the Code, it has to be borne in mind that the RUS was merely a practice rather than a statutory right at the time. However, there may be a possibility that the basic

⁵⁹At 33.

⁶⁰At 33.

⁶¹J D Heydon "Current Trends in the Law of Evidence" (1977) 8 Syd L Rev 305.

⁶²At 310; Wendy Amigo "Uncorroborated Confessions: Recent Decisions in the New South Wales Court of Criminal Appeal" (1979) 3 UNSWLJ 321 at 321-322.

⁶³Amigo, above n 62, at 321.

rights of an accused person, as guaranteed by the Malaysian Federal Constitution, were referred to.⁶⁴ The rights of an accused person in the Constitution are clearly set out in the Code and s 173(ha) concerns one of those rights. That said, there is no specific explanation in the Constitution to suggest that cross-examination of an accused person at trial could deprive them of their personal liberty or deny fair treatment. It is undeniable that an accused person deserves to be treated fairly by the law. However, it is not necessarily the case that cross-examination is detrimental to all accused. It may be argued that in the absence of a clear discussion in the Committee's report as to what the "existing law" referred to was, this issue remains a mystery. Hence, the vagueness on these aspects opens up the Committee's Report to criticism.

As discussed, one of the main factors in the retention of the RUS was the objection of the public to its abolition. The next part will discuss public perceptions of fairness and the extent to which the public should influence the enactment of a law.

3 *Public interest and the law*

The Committee stated that it would be unfair to the accused if he or she was allowed to be cross-examined. The word "unfair" used in the report is also controversial, as the report does not explain how this could be unfair to the accused.

The rights of an accused person in court are protected under the principle of a fair trial. However, this principle also involves an element of public interest. It may be submitted that the public interest has no direct interpretation. Although the public interest should be taken into account in upholding justice, fairness to the accused may also be interpreted as serving justice to society. This is because society may not tolerate a system that serves one-sided justice. It could be argued that forcing the accused to be cross-examined on an unsworn statement may be seen as injustice by the public, since such action may affect disadvantaged or vulnerable accused. One of the main reasons an accused might choose to give an unworn statement in court is because he or she has limited ability to cope with the processes of the court, which may be intimidating for them. This particularly affects accused with intellectual disabilities. To force this class of accused to go through cross-examination may cause them to damage their own case. Hence, protection against cross-examination is one of the ways to assist this type of accused in facing the challenge of court proceedings. This might be why the public objected to the Committee's proposal to cross-examine the accused on statements made from the dock. However, whether or not this is the reason that persuaded the public to object is not obvious from the Committee Report. To maintain the RUS with the aim to avoid an accused person from being cross-examined by the prosecution, particularly without some limitation on the application of the RUS, may backfire. Such leeway may cause the RUS to be taken advantage of by those accused that do not deserve such protection. After all, the

⁶⁴Article 5.

initial objective of the RUS when it was introduced was to protect “ignorant” accused. The intention of the RUS suggests that it should not be allowed to be used generally now that legal representation and general improvements in education are in place, but that it should be narrowed down to the vulnerable accused only.

Should the public have such a direct effect on criminal justice policy? On the one hand, it is argued that the public may not be well versed on what constitutes good procedure. Linda J Skitka and David A Houston found in their empirical analysis that when the public do not know whether an accused is guilty or not, they will observe the outcome of the proceeding as legitimate when it involves fair procedures and the accused is shielded with due process rules.⁶⁵ On the other hand, if the public is using its moral mandate (“the selective expression of a core moral value or values”)⁶⁶ in determining the outcome of the case, it is shown that procedural fairness is no longer necessary, as the public is then more interested in the fairness of the trial verdict.⁶⁷ This study is a perfect example of how the public may perceive fairness differently according to the situation and its level of knowledge.

Regardless of how the public perceives fairness in a trial procedure, it is submitted that its opinion is still crucial.⁶⁸ This is because, theoretically at least, laws that take into account public opinion are good laws. However, although the public’s opinion is pivotal in determining a law, it is submitted that the legislator as the law maker should consider the issues or opinions from every aspect to formulate effective solutions. To take on board public opinion without thorough research may produce a senseless law. People come from different educational and cultural backgrounds. It is impossible to please everyone as each person has a different perspective on things. Therefore, public perception is not the only factor to be considered in passing a law. It is a challenge to establish a procedure that will satisfy all parties in a criminal trial. However, it is the duty of the government to provide fair procedures that take into account both the interest of the public and the interest of the accused, and come to some assessment of what is required in light of sometimes competing demands. The ability to produce such procedures will ensure a fairer justice system as required by the principle of a fair trial. It is my contention that, in relation to vulnerable accused, this does not happen in the Malaysian justice system. In the following discussion, I contend that the decision to give statutory effect to the RUS was made without adequate research.

⁶⁵ Linda J Skitka and David A Houston “When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocent”(2001)14 Social Justice Research 305 at 316.

⁶⁶At 307.

⁶⁷At 308.

⁶⁸At 306.

B Whether Appropriate Research was Conducted Prior to the Amendment to s 173(ha)

It is my view that the government's justification for keeping the unsworn statement is without rigour. The decision to keep and codify the RUS followed a decided lack of analytical study or discussion. Instead of focusing on the main issue – whether the RUS is still relevant in Malaysia – the Committee was more concerned with cross-examination on statements in s 113. It is somewhat surprising to realise that the disadvantages laid down to justify the amendment of s 113 are in fact present in relation to unsworn statements, as the RUS could also be time consuming and the issue of admissibility of the statement is always questioned. Nevertheless, the Committee did not seem to recognise such similarity. The Committee failed to consider the fact that the unsworn statement itself has flaws that require a review. The Committee was able to research the issue of admission of statement made during a police investigation that is consistent with recent developments in other countries, but unfortunately no attempt was made to evaluate the viability of the unsworn statement today, despite the obvious disadvantages, as discussed below in Part C, of continuing to allow the unsworn statement in its present form.

It is submitted that as many concerns were voiced in respect of suspects' rights pre-trial, the same attention should also be given to the accused's rights available during trial. This could have been the perfect opportunity for thorough research to be done in respect of this issue as the Committee visited Australia and New Zealand, which have long abandoned the RUS. They could have capitalised on the opportunity afforded by the visits to ensure that all related aspects of the law that required attention were taken into consideration. Unfortunately, the focus of the amendment was more on the rights of the accused pre-trial and, as clearly seen in the Committee Report, the visits to New Zealand and Australia were more directed towards the rights of accused persons while in police custody. While it is defensible that the Committee had pre-trial rights as its main focus, given that a number of controversial issues had occurred in Malaysia and public confidence regarding protection of suspects' rights was decreasing due to the treatment of suspects by the police during investigation,⁶⁹ it would have taken little effort to use the opportunity to also discuss relevant trial rights.

Furthermore, the discussion on unsworn statements in the Committee Report specifically mentioned objections to cross-examination if the accused is relying on a statement made during police investigation under s 113. The question that arises is, would the public object if cross-examination was made on the unsworn statement made in court, as well as any statements made during the investigation? I submit that the answer to this question required in-depth research by the Committee. On the surface, the decision to maintain the RUS is unreasonable. I submit that there are other relevant factors that make it justifiable for the unsworn statement to remain in the Malaysian justice system that the Committee has failed to

⁶⁹Farrar, above n 3, at 130.

notice. One of the most relevant reasons is to protect vulnerable accused. However, the Committee did not discuss this. Therefore, there is a legitimate assumption that the unsworn statement is preserved for the benefit of all accused. This is where the RUS becomes irrelevant in Malaysia.

If efforts had been made to discuss the rights of accused persons during trial with the relevant authorities in New Zealand and Australia, there is a possibility that the Committee would have considered more fully whether it is reasonable to preserve the accused's right to give an unsworn statement. Perhaps an examination would have then been made on whether to maintain, modify or abolish the RUS in the future. The amendment in 2007 chose to consolidate the RUS, but the Committee's deliberations could also have been the road to discarding it if evidence suggested that was the best course. It seems that the RUS could be taken away only by an express provision in the Code. This observation is found in the Singapore case of *Mohamed Salleh v PP* where Wee Chong Jin CJ decided that:⁷⁰

In our judgment, the right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code. It seems to us beyond doubt that under our system of administration of justice, and it has been so throughout the entire history of our courts, a person accused of a criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. **In our view this right can be taken away only by an express statutory provision to that effect (Emphasis added).**

Since the judgment has never been refuted by a court of concurrent jurisdiction in Malaysia, and in fact has been followed by succeeding cases, it is submitted that legislative abolition is the only legitimate way to remove the RUS.

My dissertation argues that if the Malaysian criminal justice system could produce a better justice system, it might benefit not only the public as a whole, but also help the government to gain the confidence of the people. For this to happen, parliament needs to be more effective and open-minded in order to change law that is out-dated in the current legal world and replace it with law that serves justice for all parties involved in criminal proceedings in Malaysia. Being an independent country, Malaysia should be free from colonial influence physically and mentally. Apparently the remnants of the common law are strongly visible only to the mind of parliament, as such influence is losing its place in the hearts of Malaysian judges.⁷¹ It is argued that such an anomaly in law making may be avoided if judges' views are appreciated and considered by the legislature before any laws are enacted or amended. A

⁷⁰ *Mohamed Salleh v PP* [1969] 1MLJ 104 (FC) at [7].

⁷¹ Abdul Aziz Bari "The Indigenous Roots of the Malaysian Constitution – The Provisions and the Implications: (2008) 6 CLJ(A) xxxiii at xli.

relevant case to illustrate the court's view on the English law is seen in the case of *Public Prosecutor v Sanassi* where Sharma J held:⁷²

It is entirely a matter for the legislature to decide whether the procedure of the courts in this country, which is now sovereign and independent, should depend upon a foreign enactment and whether any amendment made to its own laws by a foreign Government should still continue to remain binding on us who have a supreme legislature of our own.

Malaysia should learn from the other Commonwealth countries, and one good example is Singapore. Singapore has decided to amend legislation that emerges from the practice and procedures of the English laws.⁷³ It is argued that if Malaysia thought that the jury system was no longer relevant to its justice system, and eventually abolished it in 1995, why are there no similar moves taken to review English laws that may no longer be relevant to current practice in Malaysia? Even worse, Malaysia continues to practice law that is no longer in existence in England. It is not wrong to have reliance on the law and procedure in England as long as it suits the community. It is time for the Malaysian government to rethink the English law that is no longer relevant to the current situation. The amendment to the Code in 2007 was made without proper research and consideration and it allows the longstanding controversy regarding the RUS to continue. This is a great disappointment, since the amendments that were made were the biggest changes in the Malaysian Criminal Procedure Code for more than 30 years.⁷⁴ However, as the reverse happened and the RUS was confirmed in statute by its inclusion in the amended Code, my dissertation explores the possible problems it causes to the Malaysian criminal justice. In the next part, I analyse the impact on the court, the prosecution and witnesses of maintaining the RUS with its current features.

C The Right to give an Unsworn Statement in the Malaysian Criminal Justice System Today is Problematic

I argue that before any legislation is amended, it is essential to consider the effects of every aspect of the laws in order to create rational and acceptable rules. The opinions and conditions of all parties directly affected by the amendment have to be seriously taken into consideration to ensure that the legislation will provide reasonable consequences and promote fairness to all participants. This is because everyone “is a potential prisoner, and anyone is a potential victim of crime.”⁷⁵ Besides, it is also crucial to ensure that all the money and time allocated in the enactment of the laws are not expended in vain. As it stands now, the RUS

⁷²*Public Prosecutor v Sanassi* [1970] 2 MLJ 198 at [26](HC).

⁷³Joyce Chao Suling “Singapore Legislation Digest of Acts Passed Between March and September 1997” (1997) 9 SAcLJ 433 at 440; Statutes (Miscellaneous) (Amendment) Act 1997 (Singapore), s 6 and the First Schedule.

⁷⁴Farrar, above n 3, at 129.

⁷⁵Frank H Easterbrook “Substance and Due Process” [1982] Sup Ct Rev 85 at 112.

without proper guidelines and limitation might raise the issue of the inequality of arms between an accused and the state. This happens due to the nature of the RUS, which is applicable to all accused from any background, without limiting it to those who are vulnerable. An accused who does not have special need for protection could take advantage of the RUS. Therefore, to make sure that the Code was amended after due consideration, the impact of the amendment on the relevant parties – that is, the court, the prosecution and the witnesses – will be assessed.

This Part discusses the consequence of the current practice of the RUS in criminal proceedings, beginning with the court. I argue in Section 1 that the RUS does not receive popular support from the judges, particularly when its evidential status is uncertain. It is obvious in this section that it is a waste of judicial time to exercise a right that is freely adopted but often not accepted as evidence by the court. In Section 2, I discuss the effect of the RUS in terms of the prosecution. Allowing an accused who does not need protection against cross-examination to enjoy the benefit of the RUS is unfair to the prosecution. The prosecution does not have the opportunity to verify the statement and this is a major disadvantage to the prosecution's case. Finally, in Section 3, I discuss the impact of the RUS on witnesses. The characteristic of the RUS that allows the accused to attack a witness's character while his or her character remains safe, has a very detrimental effect, especially in a sensitive case such as rape. I argue that if this situation persists, it may prevent the witness from coming forward and assisting the state to solve crime in the future.

1 Court

Prior to the abolition of the RUS in other jurisdictions, it was a controversial practice.⁷⁶ In Australia, a Supreme Court judge, Acting Justice Lee, suggested that the law should be changed and he added that allowing the accused person to make an unsworn statement amounted to “conscious and deliberate manipulation of the trial process” that would contribute to the delaying of trials and cost society a huge financial burden.⁷⁷

The issue of the RUS is not widely researched in Malaysia. However, the opinions of judges on this issue are not to be taken lightly. Although use of the unsworn statement has been followed by judges in Malaysia, it may be argued that judges do not wholeheartedly agree with the RUS. Careful examination of judgments illustrates that judges in Malaysia have been trying to channel their views and observations on the RUS to the government through those judgments. It is fair to say that judges tend towards abolition rather than maintenance of the RUS, as evident from their judgments.⁷⁸ Unfortunately, the efforts of the judges have gone unnoticed by the government. One of the best examples to represent the view of judges on

⁷⁶Williams, above n 37, at 502.

⁷⁷ Jennie Curtin “Govt Urged to End Unsworn Statements” *The Sydney Morning Herald* (online ed, Australia, 5 June 1992) at 7.

⁷⁸*Er Ah Kiat v Public Prosecutor* [1965] 2MLJ 238 (FC).

unsworn statements can be seen in the case of *Public Prosecutor v Shariff Kadir* where Hishamudin Yunus J, in referring to the abolition of the right in England, was of the opinion that:⁷⁹

With all humility, I respectfully suggest that perhaps our Parliament might consider making a similar move. In my humble view, besides the theoretical legal difficulties inherent in such a practice (of allowing unsworn statement to be made by an accused), as I have endeavoured to point out, such a practice also appears to be somewhat inconsistent with the scheme of the Criminal Procedure Code.

However, be that as it may, as for the moment, the reception of unsworn statements from the dock is still part and parcel of the law of this country and it is my solemn duty as a judge to apply the law as it is – no matter what my personal views are on the matter.

The RUS creates a nuisance in the criminal court system. This is due to the characteristics of the RUS which, amongst others, include the fact that the statement may contain hearsay evidence and irrelevant statements, shields the accused from cross-examination by the prosecution, and fails to test the truthfulness of the statements.⁸⁰ In Australia, the accused is not permitted to give statements that are not relevant to the case.⁸¹ For example, in the case of *R v Kilby*, the New South Wales Court of Criminal Appeal held that “a prisoner has not the right to make a statement from the dock which is not relevant to any issue in the case being tried.”⁸² However, a different approach may be seen in Malaysian courts, where the court may not interrupt the accused in the course of making an unsworn statement unless it is to make clear an ambiguity in the statement.⁸³ One of the best examples of how irrelevant unsworn statements can be, without the courts having the power to prevent it, is found in the unreported case of *Public Prosecutor v Dato’ Seri Anwar Ibrahim*.⁸⁴ The accused in this case was the former Deputy Prime Minister of Malaysia, who was charged with sodomy under s 377B of the Malaysian Penal Code. At the defence stage, the accused chose to give an unsworn statement from the dock. He contended that the charge was a conspiracy of the Malaysian Prime Minister and with malicious intent to send him to prison.⁸⁵ Although the statements were irrelevant to the charge, the High Court judge was unable to stop it and instead had to spend his judicial time to hear the same.

The grey area about the evidential status of the RUS may also be one of the key factors why judges are not keen to retain the RUS. Not only are there different views by judges and legal scholars about the RUS’s evidential status, it is also seen as an unnecessary practice that is problematic for judges, as they are given the burden of determining whether the statements

⁷⁹*Public Prosecutor v Shariff Kadir* [1997] 5 CLJ 463.

⁸⁰P K Waight and C R Williams *Cases & Materials on Evidence* (2nd ed, The Law Book Company, Sydney, 1985) at 473.

⁸¹Williams, above n 37, at 498.

⁸²At 498; *R v Kilby* [1970] 1 NSW 158 at 159.

⁸³*Suhaime bin Haji Serat v Reg* [1956] 1 MLJ 252 at [4].

⁸⁴*Public Prosecutor v Dato’ Seri Anwar Ibrahim* [Criminal Trial No: 45-9-2009].

⁸⁵At [186].

are admissible or not.⁸⁶ The evidential status of the unsworn statement is discussed in more detail next.

(a) The evidential status of unsworn statements

Although the issue of unsworn statements is not extensively explored by legal academics in Malaysia, the main scholarly arguments focus on the evidential status of the unsworn statement.⁸⁷ At the moment, the evidential status of the RUS is unclear and creates tension amongst Malaysian legal scholars and the judiciary. Nevertheless, it is an acceptable principle that an unsworn statement has little evidential value when compared to sworn testimony.⁸⁸

The Code was amended to make the position of the RUS in s 173(ha) clearer and it is now a procedural right rather than a substantive right, but the law in Malaysia fails to explain the status of the statement.⁸⁹ Previous studies reinforce the view that the evidential status of unsworn statement is blurred, as such studies were not able to give a clear answer on the exact position of unsworn statement in the law of evidence. This is the case particularly with regard to the term “evidence” in s 3, since it is unclear whether a statement from the dock is considered as evidence under the provision. According to Mohd Akram b Shair Mohamad, the term “evidence” and “proved” in s 3 have to be read together in order to determine the meaning of evidence.⁹⁰ He argues that the parliament intentionally omitted the word evidence in interpreting the term “proved” and used the words “matters before it” instead so that the unsworn statement could fall under the wording of “matters before it” as used under the definition of “proved”.⁹¹ Therefore, an unsworn statement does not necessarily fall under the definition of “evidence” but it fits into the phrase “proved” in s 3.⁹² This means that although an unsworn statement is not evidence in its direct meaning, it is still a matter for the court to consider in determining whether a particular fact is proved or not.⁹³ Although this argument sounds convincing at a glance, on careful review, it is submitted that it is merely taking advantage of the ambiguous meaning of the term “matter before it”. This happens in order to provide legitimacy to unsworn statements in the law of evidence. As bare statutory interpretation allows for a far from definitive conclusion about the evidential status of unsworn statements, relevant case law must be assessed.

In the case of *Ng Hoi Cheu v Public Prosecutor*, Chan Min Tat J held although the accused gives an unsworn statement from the dock, such a statement falls under the definition of

⁸⁶ Heydon, above n 61, at 309.

⁸⁷ Mohd Akram b Shair Mohamed “The Evidential Value of an Accused’s Unsworn Statement from the Dock” (2003) 1 MLJA 169; Paul, above n 33; Ahmad Ibrahim “Unsworn Statement from the Dock” (1975) 2 MLJ vi.

⁸⁸ G L Peiris “Law Enforcement and Protection of the Rights of the Accused: A Comparative Analysis of Modern Legal Systems” (1980) 22 Malaya L Rev 238 at 257.

⁸⁹ *Ahmad Faizal bin Aulad Ali & Ors v Public Prosecutor* [2010] 2 MLJ 547 at [107]

⁹⁰ Mohamed, above n 87, at 5 of the PDF version (no hardcopy available).

⁹¹ At 5.

⁹² At 5.

⁹³ At 5.

evidence in s 3 of the Evidence Ordinance.⁹⁴ In a later case of *Public Prosecutor v Sanassi*, Sharma J disagreed with Chan Min Tat J and held that an unsworn statement is not evidence.⁹⁵ In *Mohamed Salleh v Public Prosecutor*, the Federal Court held that the accused was allowed under the law to give a statement from the dock and the jury should evaluate the statement with the weight that they considered fit.⁹⁶ The wish to retain flexibility to assess the statement in the light of the particular facts and other evidence in the case is understandable. However, the approach is rather unhelpful for fact-finders in later cases. I submit that the principle laid down in *Mohamed Salleh's* case relied heavily on the principle regarding unsworn statements in English cases. It concerns only the matter of how to warn the jury and what would be the proper comment to be made to the jury regarding the weight of the unsworn statement. The court neither discussed thoroughly whether the unsworn statement falls under the category of evidence or not, nor did it give clear guidelines regarding the evidential weight to accord an unsworn statement. Since *Mohamed Salleh* has become the leading case on this issue, the ambiguity remains.

Given the fact that criminal trial in Malaysia is now by judge alone, the principle in *Mohamed Salleh's* case may no longer be much help to the judges in making their findings regarding the evidential status of an unsworn statement. Before 2007, the responsibility on the judges to consider the weight of the unsworn statement as they thought proper might have been an acceptable approach, since making an unsworn statement was a substantive right that was uncodified. Now, as the RUS has become a codified procedural right, the status of the statement should be made clear in the statute, as it has been given recognition by the law. For example, it should be made clear whether the evidential value of an unsworn statement carries the same value as, or lesser value than, evidence given on oath. Unfortunately, the silence of the Code on the matter of the evidential status of unsworn statements means that judges must decide. If the objective of the RUS is to provide a protection to the accused during trial, it should not make a negative implication to them. If the unsworn statement has not got the status of evidence then there would be a likelihood that the statement would not affect the court's decision. However, being a superior court, the principle in *Mohamad Salleh's* case is not fully ignored by later cases and its finding is authoritative. Therefore, until the evidential status of unsworn statements is made clear, arguments on the weight of such statements are likely to persist.

A further disadvantage offered by the RUS to the court is that it causes delay in the proceeding. Even though some may argue that a dock statement is shorter than sworn evidence,⁹⁷ such a view may be refuted by reference to the speech by His Excellency the Honourable Sir James Gobbo. He explained that among the reasons for the abolition of the unsworn statement in Victoria, Australia, was a case where the accused persons had made an

⁹⁴*Ng Hoi Cheu v Public Prosecutor* [1968] 1 MLJ 53 at [10] (HC).

⁹⁵*Public Prosecutor v Sanassi*, above n 72, at [23].

⁹⁶*Mohamed Salleh v Public Prosecutor*, above n 70, at [8].

⁹⁷Brown, above n 49, at 159.

unsworn statement for fourteen days.⁹⁸ He also added that Mr Stonehouse, former British Cabinet Minister in the United Kingdom, gave an unsworn statement for five days.⁹⁹

2 *Prosecution*

It is disappointing to know that the Attorney-General was one of the parties actively involved in the amendment of the Code, but that as yet there is no initiative to suggest reform in respect of the unsworn statement considering the problems it causes the prosecution. It may be argued that one possible reason this is happening is that the prosecution may think that the RUS does not threaten its case due to its low evidential value. However, it has been shown that even though the issue of the evidential status of the unsworn statement remains unclear, there is nothing to stop judges from exercising discretion in admitting and considering the statement in their decisions. Attention should be paid to the case of *Er Ah Kiat v Public Prosecutor*.¹⁰⁰ Wylie CJ in his judgment stated that the unsworn statement made by the accused should be taken into account by the court of first instance as that statement formed part of his defence.¹⁰¹ Therefore, failure to do that caused the conviction to be set aside by the Federal Court and a retrial was ordered.¹⁰² The decision of the Federal Court on the issue of admissibility of the unsworn statement in this case should not be taken lightly, for the decision came from the highest court of the land.

The prosecutor plays a “less partisan role” than the defence counsel since it is not the duty of the prosecution to secure a conviction but rather to present the case in a fair manner.¹⁰³ However, disallowing the prosecution to cross-examine the accused may frustrate the aim of the criminal process to deliver justice by disadvantaging the prosecution to test evidence contrary to their case. It must be borne in mind that “the purpose of cross-examination is to weaken, qualify, or destroy the case of the opponent and to establish the party’s own case by the opponent’s witnesses.”¹⁰⁴ No doubt there could be valid reasons other than guilt as to why accused persons choose not to give evidence that could expose them to cross-examination. There may be possibilities that surrendering themselves to cross-examination would cost them their private lives or destroy a personal relationship.¹⁰⁵ Even though the RUS would benefit the innocent accused, as they would be able to explain their defence to the court without fear of cross-examination, it might also give an advantage to “a guilty accused who fears that his inadequate story will be exposed by cross-examination.”¹⁰⁶ These were amongst the reasons taken into account by the English Criminal Law Revision Committee when it

⁹⁸Gobbo, above n 49, at 5 of the electronic version (no hardcopy available).

⁹⁹At 5.

¹⁰⁰*Er Ah Kiat v Public Prosecutor*, above n 78.

¹⁰¹At [10].

¹⁰²At [12].

¹⁰³Waight and Williams, above n 80, at 474.

¹⁰⁴M E Casey *Garrow and Casey’s Principles of the Law of Evidence* (8th ed, Butterworths, Wellington, 1996) at [29.5].

¹⁰⁵Law Reform Commission *Sworn and Unsworn Evidence* (ALRC R26, 1985) at 586.

¹⁰⁶Williams, above n 37, at 495; Mark I Aronson, Jill B Hunter and Mark S Weinberg *Litigation Evidence & Procedure* (4th ed, Butterworths, Sydney, 1988) at [28.09].

recommended abolition of the RUS.¹⁰⁷ In addition, since the judge has the power to protect the accused against harassment in cross-examination, the preservation of the RUS is no longer acceptable.¹⁰⁸ However, the abolition of the unsworn statement in New South Wales raised several arguments amongst legal practitioners. It was feared that the move would force the accused to give evidence in the court and face cross-examination, which would attack the accused's right to silence and diminish the "fundamental obligation of the Crown to prove the guilt of the accused beyond reasonable doubt."¹⁰⁹

It might seem as though the prosecution has more power and resources than accused persons as it has the might of the state at its disposal.¹¹⁰ However, other mechanisms of due process are in place to address the power imbalance, so that:¹¹¹

While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defence. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve.

In addition, the prosecution has the duty to disclose evidence in advance of the trial so that the defence can prepare. Hence, it may be submitted that there are available protections under the law to safeguard the due process rights between the state and the accused and other jurisdictions have not suffered from a lack of the RUS. If the interests between these two parties are well taken care of, then a fair trial could be said to have been achieved. Therefore, I submit that the current characteristics of the RUS in Malaysia might create an imbalance of treatment between the state and accused persons. This happens because not all accused need such protections, due to advances in education and the right to legal representation. In addition, judges are bestowed with the discretion to ensure that all parties are treated fairly, and there are mechanisms in place to ensure that prosecutors do not treat the accused badly during cross-examination, as well as extensive rights of appeal. Hence, to allow *any* accused to give an unsworn statement may have an impact on the fairness of the proceedings. I submit, these are some of the reasons why the RUS has become ineffective. However, a different situation may be seen in respect of vulnerable accused. They may not gain advantage from education nor would having legal counsel do much to assist them.

3 Witnesses

It is not clear in the Committee Report as to what research had been done in respect of the implication of unsworn statement to witnesses. A witness in a criminal trial may be directly affected by the RUS in Malaysia because the accused is free to attack the credibility or trustworthiness of the prosecution's witness but at the same time the former's bad character

¹⁰⁷(English) Criminal Law Revision Committee, Eleventh Report *Evidence*, above n 40, at [103]-[104].

¹⁰⁸A L C Ligertwood *Australian Evidence* (Butterworths, Sydney, 1988) at [5.51].

¹⁰⁹Brown, above n 49, at 159.

¹¹⁰Abraham S Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure" (1960) 69 Yale L J 1149 at 1150.

¹¹¹*United States v Garsson* 291 F 646 (SD NY 1923) at 649.

or any previous convictions remains unmentioned.¹¹² The witness's situation is most difficult when it comes to rape cases. Her credibility is at stake, as it is more likely to be attacked by the accused or their counsels than is the case in any other types of cases. Undoubtedly, an accused person needs greater protections since his or her liberty is in peril, but to allow the accused to criticise the witness's credibility in the name of the right provided by the law is unreasonable.

The view that an unsworn statement would be able to assist accused who are nervous in court fails to consider that the same anxiety may also be experienced by the prosecution's witness.¹¹³ There is a fear that this might hinder a witness from coming forward to testify against the accused.¹¹⁴ This is obviously not the expected outcome of the rule of law, which is supposed to facilitate the work of the police and prosecution in upholding justice, besides providing fair treatment to the accused. According to the Rt Hon Lord Justice Leveson, not only do the witnesses or society have a responsibility to come forward to support the justice system, but the justice system also has the same obligation towards society.¹¹⁵ Having discussed the impacts of the current characteristics of the RUS on the parties in criminal proceedings, I now turn to discuss the possible method to solve the situation.

D To Amend or to Abolish: What is the Correct Approach?

The RUS might have been an acceptable practice before, but might no longer be relevant in the modern era. Furthermore, the RUS has lost its original purpose. The unsworn statement symbolizes an "anomaly in the administration of criminal justice" and the step to abrogate the right is "welcome".¹¹⁶ It is worth noting the observation expressed by the Hon. Mr. Justice K H Marks of the Supreme Court of Victoria, which explains everything. Referring to the Royal Commission, he stated that the RUS should be abolished:¹¹⁷

Although it is of relatively long standing, its purpose has long since gone. And there are some positive objections to it. It provides an opportunity for the accused to engage in attacks on the prosecution or upon his co-accused, which cannot be tested in cross-examination. Its status is unclear and may be confusing to a jury and Magistrate; since it is not on oath and cannot be tested by cross-examination it is not formal evidence. But the jury can scarcely ignore it, and have to be instructed merely to make of it what they wish. In our view, this is extremely unsatisfactory.

¹¹²Williams, above n 37, at 495 and 496; Westling, above n 32, at 3; Adam Sutton and Nick Koshnitsky "Comment on the Naffin Rape Inquiry The Case for Empirical Studies"(1984) 9 LSB 162 at 164.

¹¹³Gobbo, above n 49, at 6.

¹¹⁴Heydon, above n 61, at 331.

¹¹⁵Leveson "Criminal Justice in the 21st Century" (2012) 1LNS(A) xix at 17 of the PDF version (no hardcopy available).

¹¹⁶Peiris, above n 88, at 260.

¹¹⁷ At 372; Royal Commission on Criminal Procedure, above n 41, at [4.67].

Considering the effect of the RUS on other parties in the criminal trial, as discussed in Part C, the relevance of the RUS to the modern nature of criminal justice in Malaysia must be examined. The perception that the RUS was already seen as unnecessary after the accused was allowed to give evidence on oath began in the twentieth century. Such a perception is even more pronounced in the twenty-first century. In an English case, *R v Pope*, Phillimore J was of the view that “now that the prisoner is entitled to give evidence on his own behalf under the Criminal Evidence Act, 1898, is not his right to make a statement gone?”¹¹⁸ The same view was also expressed in an article written by Peiris, when he pointed out that now the accused is recognised as competent to give evidence on oath, some countries feel that the RUS implicitly no longer exists, regardless of the statutes providing otherwise.¹¹⁹

There is no yardstick, in the current law in Malaysia, to determine whether the accused falls within the category of “ignorant and not intellectual or innocent”. For example, there are occasions where an accused who chooses to give an unsworn statement comes from a high level of educational background and is therefore literate and able to cope with the court competently.¹²⁰ There is also an argument that the court will not be able to determine whether the accused suffers from any intellectual disability or is simply nervous because he is guilty, when they do poorly in cross-examination.¹²¹ Therefore, it is argued that the RUS is open to abuse, and it appears that some accused persons who are educated and articulate are indeed taking advantage of the system.¹²² This was clearly not the intention of the RUS when it was introduced. Eventually, the right that was supposedly to be made available to “ignorant” accused has now become available to accused from all backgrounds in Malaysia. Nevertheless, the views against the abolition of the RUS consider that nervous accused and those with a tendency to “create a poor impression” through their demeanour may be at a disadvantage if there is no right available in between the RUS and the RRS.¹²³

Today, with more educational opportunities, I submit that the RUS is an anachronism. Abolition in Malaysia would bring the system into line with other Commonwealth jurisdictions. However, all countries are unique, and a comprehensive analysis needs to be done in respect of the background of the society to ensure that the law is suitable for the people. This is because an argument could be made that although the unsworn statement has been abolished in other jurisdictions, it does not mean that the same move would be as just in Malaysia as it might be in those jurisdictions.¹²⁴ Therefore, for this purpose, it is crucial to analyse the barriers that may exist in order to determine whether the abolition of the RUS is practical or not in Malaysia. The factors that must be examined in discussing this aspect are

¹¹⁸*R v Pope* [1902] 18 TLR 717 at 718.

¹¹⁹Peiris, above n 88, at 256.

¹²⁰*Public Prosecutor v Azilah bin Hadri & Ors* [2012] 8 MLJ 222 (HC).

¹²¹Williams, above n 37, at 504.

¹²²Meares, above n 52; *Public Prosecutor v Dato' Seri Anwar Ibrahim*, above n 84.

¹²³At [28.09].

¹²⁴Brown, above n 49, at 160.

the culture, language and level of education found in Malaysia, since these could influence how the accused will conduct themselves at trial.

There is a diversity of races in Malaysia: Malay, Chinese and Indian. Regardless of the difference, they practise almost the same way of living. The culture of one race is not alien to the other. Furthermore, they also speak the same language, Malay, as that is the national language of the land (although they may also freely speak their own languages).¹²⁵ If comparison had to be made with other Commonwealth jurisdictions on the intellectual ability of the people in Malaysia, it may be appropriate to say that Malaysians are well educated now, and they are not too far behind other countries. However, the absence of the RUS may not be just in the case of vulnerable accused. A vulnerable accused, in the context of the unsworn statement, should not be confined only to those cases discussed in Chapter II of this dissertation. The “Orang Asli” or “aborigines” in Malaysia may also be considered to be vulnerable.¹²⁶ The aborigines in Malaysia live in their own villages, speak their own languages and practise their own cultures.¹²⁷ Therefore, since aboriginal people in Malaysia may have limitations engendered by their culture, it is fair to consider them as being vulnerable when facing the court process. Though some of the younger generation in the community have started migrating to cities for education and working opportunities, the majority of the aboriginal people remain comfortable in their ancient way of life. Hence, aborigines in Malaysia may be disadvantaged if the RUS is totally abolished. For example, in Australia the interest of aboriginal people was an important consideration when considering the abolition of the unsworn statement. This is seen in the case of *Stuart v The Queen*.¹²⁸ Max Stuart was an aboriginal accused. According to Michael Kirby J:¹²⁹

Dock statements have now all but disappeared in Australia. That issue does not, therefore, now arise. One of the reasons that caused some lawyers to support the retention of the facility of an unsworn statement before the jury was just such an accused as Max Stuart – illiterate, inarticulate, susceptible to cultural norms favouring agreement and discouraging contest.

It is submitted that the development of effective and efficient legislation can be aided by learning from the experience of other countries/states that have abolished the RUS. The report from the Aboriginal legal service in Western Australia and Queensland explained that the abolition of the RUS in those states has affected the aboriginal people.¹³⁰ This may also be likely to happen in Malaysia.

From the above discussion, it is obvious that abolition of the RUS is almost impossible in Malaysia. It is tolerable if the justification to retain the unsworn statement is made in respect

¹²⁵ Federal Constitution (Malaysia), art 152.

¹²⁶ See page 40 of this dissertation on who is eligible to make an unsworn statement under the proposed provision.

¹²⁷ Aboriginal Peoples Act 1954 (Malaysia), s 2.

¹²⁸ *Stuart v The Queen* (1959) 101 CLR 1.

¹²⁹ Michael Kirby “Black and White Lessons for the Australian Judiciary” (2002) 23 Adel L Rev at 208.

¹³⁰ Law Reform Commission *Recognition of Aboriginal Customary Laws* (ALRC R31, 1986) at [602]

of protecting the interest of a vulnerable accused person. Therefore, taking away the RUS from the justice system may not be a wise approach, as some sort of mechanism is needed to protect vulnerable accused. However, having considered the impact of the RUS on the parties in criminal proceedings, to maintain the RUS in its current form is unreasonable. I argue that the current characteristics of the RUS are in need of modification. This is crucial because of the potential abuse of the current RUS by those who are not at a disadvantage and its possible detrimental effect on the court, the prosecution and witnesses. For a better outcome, the RUS should only be limited to vulnerable accused.

Some of the states in Australia have decided to replace the RUS with a more realistic approach known as unsworn evidence.¹³¹ The same scenario is also seen in other Commonwealth countries. Unsworn evidence offers some characteristics similar to the unsworn statement, but it is not freely opted for by the accused as it is available only if the court decides so. Hence, I submit that the idea of restricting the RUS to situations where the court deems it necessary might address some of the problems with its current operation. Therefore, to identify the extent to which the characteristics of unsworn evidence can be applied to an unsworn statement, I now discuss the nature of unsworn evidence.

1 Unsworn evidence

It is apparent that the RUS in Malaysian criminal procedure has flaws that need to be addressed. The possible reason for this is because there is no exclusivity in its application and therefore the RUS is taken for granted and not given proper application by the government. To remedy the situation, there may be other mechanisms or adjustments to the existing right with better features that could be introduced to the justice system that would provide more effective results both to the accused and the state. The unsworn statement is no longer available in most Commonwealth jurisdictions, but some overseas jurisdictions have provision for narrow categories in which accused can give evidence unsworn. Although their nomenclature is similar, the RUS and the provision to give unsworn evidence are different. In the former, the accused is not allowed to be cross-examined by the prosecution; in the latter, no such restriction is imposed.

I submit that unsworn evidence is actually available in the Malaysian justice system, but it is applied in a certain degree only. At present in Malaysia the RUS is available to accused persons from all backgrounds. Its application is unlimited. However, a different approach is seen in unsworn evidence in Malaysia. The provision on unsworn evidence defines clearly who is eligible to give testimony in court without being sworn. The Malaysian Evidence Act

¹³¹ Evidence Act 1995 (Cth), s 13; Evidence Act 1995 (NSW), s 13; Evidence Act 2011 (ACT), s 13; Evidence Act 2001 (Tas), s 13; Evidence Act 2008 (Vic), s 13; Evidence Act 1929 (SA), s 9; Evidence Act 1977 (Qld), s 9A; Evidence Act 1906 (WA), s 106C; Criminal Code (NT), s 360; Law Reform *Criminal Law and Procedure Australia-Victoria* (1986) 12 CLB 446 at 468; Law Reform Commission *The Right to Silence*, (NSWLRC R95, 2000) at [4.71]; Brown, above n 49 at 158; McKillop, above n 49, at 526.

1950 explains that a child of tender years called as a witness in court, who does not understand the nature of the oath, may give evidence without an oath.¹³² The provision also explains that the unsworn testimony may be accepted as evidence if the court is satisfied that the witness understands the duty to tell the truth. A quite similar provision is also seen in the Malaysian Oaths and Affirmations Act 1949.¹³³ However, both statutes specifically limit the applicability of unsworn evidence to child witnesses. This may include a child accused, but the application does not cover a vulnerable accused person generally. Therefore, I submit that the only option available to a vulnerable accused if they choose to give unsworn testimony is through the RUS.

In England and Wales, unsworn evidence is available to a witness of any age who is competent to give evidence but is incapable of appreciating the nature of an oath.¹³⁴ Meanwhile, the New Zealand Evidence Act 2006 is silent on the category of witness who can give unsworn evidence. This is because, from the construction of the words in s 77(4), it merely states that the judge has the discretion to allow a statement to be given unsworn with the conditions as stipulated in paragraphs (a)-(c).¹³⁵ There is an assumption that one of the categories allowed to give unsworn evidence is a witness who is under the age of 12 years,¹³⁶ or a mentally handicapped person.¹³⁷ In the Australian states covered by the Uniform Evidence Act 1995, section 13 explains that a competent witness is not allowed to give sworn evidence if he or she is not able to understand the duty of giving truthful evidence.¹³⁸ Unsworn evidence is applicable to all witness who fit the category under s 13(5) regardless of age. The word “witness” may also include an accused. Furthermore, the provisions in these jurisdictions do not explicitly deny its use to an accused. I argue that the provision to give unsworn evidence in Malaysia should have followed the same approach. Instead of narrowing its application to a child witness, it should have broadened the scope by extending its use to other vulnerable witnesses, including vulnerable accused.

The Youth Justice and Evidence Act 1999(England and Wales) explains that a person is also considered a competent witness when he or she may give intelligible testimony.¹³⁹ To determine this, the court must ensure that the witness understands the question put to him or her and is able to give answers that are understandable.¹⁴⁰ These witnesses are allowed to give evidence without being sworn. It is vital for the judge to inform the witness about the importance of telling the truth when giving testimony in this way. In Australia, as it stands

¹³² Section 133A.

¹³³ Section 8.

¹³⁴ Youth Justice and Criminal Evidence Act 1999(E&W), ss 55(2) and 56(1) and (2).

¹³⁵ Evidence Act 2006(NZ).

¹³⁶ Section 77(2) and (3); Richard Mahoney & others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV77.04].

¹³⁷ Bruce Robertson (ed) *Adams on Criminal Law-Evidence* (online looseleaf ed, Brookers) at [EA77.04].

¹³⁸ Evidence Act 1995 (Cth), s 13(3) and (5).

¹³⁹ Youth Justice and Criminal Evidence Act 1999(E&W), s 55(3).

¹⁴⁰ Section 55(8); Phil Bates “The Youth Justice and Criminal Evidence Act - The Evidence of Children and Vulnerable Adults” (1999) 11 CFLQ 289 at 294.

now the law does not require the court to determine closely whether the witness knows the difference between telling the truth and lying in court as part of the test for competence to give unsworn evidence.¹⁴¹ It is sufficient for the court to inform the witness of the importance of telling the truth during their testimony. Likewise in New Zealand, the Law Commission recommended the removal of the test for competence to give unsworn evidence for children under 12 years and also other witnesses who are permitted by the court to give unsworn evidence, especially those who are intellectually disabled.¹⁴² Research also shows that children would have a better understanding of the concept of not telling lies than of a requirement that they must tell the truth.¹⁴³ Besides, the evaluation of the truthfulness of a witness's evidence may be made without the necessity to ensure that the witness understands the consequence of a promise.¹⁴⁴ Although the judge has no duty to make an inquiry as to whether the child or other witness understands the meaning of telling the truth, the judge still needs to inform the witness of the importance of telling the truth for the purpose of conveying the message to the witness of the seriousness of the occasion.¹⁴⁵

Even though there is leeway in giving evidence whereby no oath is required, it involves similar repercussions as evidence given on oath.¹⁴⁶ This is a wise step. It is a positive approach since it might prevent various interpretations in respect of the value of unsworn evidence, an issue that plagues the unsworn statement in Malaysia today. Furthermore, the witness giving unsworn evidence in various jurisdictions is not allowed to give false evidence. For example, in England and Wales, the provision is clear on the consequence of giving false evidence: the offence is stipulated in s 57.¹⁴⁷ It may prevent the accused from giving untruthful evidence as may happen in the unsworn statement, since there is no mechanism to prevent the accused from not doing so. Having analysed the approach of some of the Commonwealth jurisdictions in regard to unsworn evidence, I submit that England and Wales offers a better method. Compared with New Zealand and Australia, England and Wales provides a specific provision for unsworn evidence. This allows the characteristics of the unsworn evidence to be discussed in more detail by considering all the relevant factors to allow a better execution of the unsworn evidence in the case of vulnerable witnesses. Next, I discuss the proposal for reform on the unsworn statement.

¹⁴¹ Evidence Act 1995(Cth), s 13(5)(a) ; Stephen Odgers *Uniform Evidence Law* (10th ed, Thomson Reuters, Sydney, 2012) at [1.2.160].

¹⁴² Law Commission *Evidence Reform* (NZLC R55, 1999) at [353].

¹⁴³ At [355].

¹⁴⁴ At [357].

¹⁴⁵ At [354].

¹⁴⁶ Evidence Act 2006(NZ), s 74(4)(c); Youth Justice and Criminal Evidence Act 1999(E&W), s 56(3); Odgers, above n 141, at [1.2.160].

¹⁴⁷ Youth Justice and Criminal Evidence Act 1999(E&W).

E Recommendations: Modification of the Right to Give an Unsworn Statement

It is obvious from the discussion in this chapter that the Code, particularly s 173(ha), is hungry for change. While other Commonwealth jurisdictions have decided to get rid of the ancient law and practice of the English legal system, it may not be too late for Malaysia to take a similar approach. It has to be borne in mind that the RUS is a right introduced in the nineteenth century. Therefore, living in the twenty-first century, it is suggested that laws have to be amended to suit changing times. I suggest that there is an urgent need for the RUS to be reviewed for the benefit of vulnerable accused as well as of all parties involved in the criminal proceedings; and also to ensure that Malaysia is not left behind in the developments that have taken place in other jurisdictions of similar legal systems.

As discussed above, the RUS is now firmly established in Malaysian law and there is popular support for its retention. The attempt of the government to allow cross-examination on the statement received strong objections from the public. Therefore, taking this fact into consideration, a proper approach needs to be taken to recommending reform of the law without affecting the sensitivity of the public surrounding the issue. Moreover, it is necessary to respect the fact that there would be social, legal and cultural factors that bar its complete abolition at the moment. Thus, I propose to limit the RUS to vulnerable accused only to avoid abuse of the right.

My dissertation submits that some of the characteristics of unsworn evidence may be applicable to unsworn statements. However, the amendment would not affect the core characteristic of an unsworn statement, which is the restriction against cross-examination. It is undeniable that the absence of cross-examination of the unsworn statement is the most powerful disadvantage of the RUS and that it creates nuisance for the justice system. However, preserving the restriction allows greater assistance and protection to be given to vulnerable accused persons. It may be submitted that no matter how gentle the prosecution is during questioning, the process could still be considered to be frightening to vulnerable accused. In addition, under my proposed amendment, the accused may also be convicted of perjury resulting from a false statement. Hence, allowing cross-examination and convicted of perjury at the same time, as a result of giving unsworn statement, is not very different from the way sworn evidence is treated. Therefore, to provide a more effective right to protect a vulnerable accused facing the challenge of participating in criminal proceedings must be introduced. On that ground, my dissertation proposes a reform so that the RUS and its exemption from cross-examination is retained for a limited group of accused, but subjects the statement to all the other rules of evidence. A quite similar idea for reform was also seen in Victoria, Australia in 1986.¹⁴⁸ However, as it is now, the statute is not clear on the restriction

¹⁴⁸ See Law Reform Commission *Unsworn Statements in Criminal Trials* (VLRC R2,1985) at [3.19]-[3.31].

on cross-examination to an accused who gives unsworn evidence but states that the accused is allowed to be asked questions that resemble cross-examination.¹⁴⁹

The proposed formulation raises some difficult issues, not least of which is whether the unsworn statement as I cast it can be defined as “evidence” under Malaysian law. I now turn to my argument that unsworn statement can be considered as evidence next.

1 Unsworn statement is evidence

Evidence means a relevant “fact in issue or a collateral fact” and such fact must be proved in order to support one’s case.¹⁵⁰ When the evidence is admissible, then the weight is left to the court to decide. As Lord Simon of Glaisdale stated in the case of *DPP v Kilbourne*:¹⁵¹

"Weight" of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law (though its relevance may exceptionally, as will appear, be dependent on its evaluation by the tribunal of fact).

I submit that the unsworn statement could fall under the definition of evidence. Firstly, although it is a general rule that oral evidence has to be on oath, there are exceptions to the rule.¹⁵² One of the exceptions is unsworn evidence, whereby it is accepted by the law as being as though it were evidence made on oath. The same rule may also be applicable to the unsworn statement. Secondly, it is trite law that evidence needs to be tested in order to ascertain its truthfulness. However, my dissertation submits that evidence that has not been tested could also be received as evidence. Evidence consists of relevant facts, which are proved. The law of evidence in Malaysia clearly explains that a relevant fact is proved when the court either believes it exists or the existence is so probable that a sensible man would assume it exists.¹⁵³ Therefore, regardless of whether it is tested or not, judges have the duty to use their wisdom either to believe or disbelieve the existence of facts, which may also include a statement given by the accused from the dock. Hence, I conclude that an unsworn statement may carry probative value. In the case of *Sorgenfrie v The Queen*, the Federal Court of Australia held that:¹⁵⁴

To fail to direct the jury that the statements of fact in the unsworn statement were evidence, albeit with the infirmities mentioned, was an error of law. Had the trial judge considered the unsworn statement to be evidence having probative value if believed, it was essential that the jury be directed with reference to each defence that such evidence may have supported.

¹⁴⁹ Evidence Act 2008(Vic), s 13(5)(c).

¹⁵⁰ Andrew L-T Choo *Evidence* (Oxford University Press, New York, 2006) at 2.

¹⁵¹ *DPP v Kilbourne* [1973] AC 729 at 756 (HL)

¹⁵² Peter Murphy *Murphy on Evidence* (10th ed, Oxford University Press, New York, 2008) at [15.17].

¹⁵³ Evidence Act 1950(Malaysia), s 3.

¹⁵⁴ *Sorgenfrie v The Queen* [1981] 51 FLR 147 at 177 (FC).

I argue that some judges in Malaysia do regard unsworn statements as evidence. In the appeal case of *Ng Hoi Cheu v Public Prosecutor*, Chang Ming Tat J disagreed with Smith J in *Wong Heng Fatt v Public Prosecutor* that an unsworn statement is not evidence, and had this to say:¹⁵⁵

[9] With all respect, I find myself unable to agree. Section 4(1)(a) reads as follows:–

“Subject to the provisions of section 5 of this Ordinance, oaths shall be taken by the following persons–

witnesses, that is to say, all persons who may be lawfully examined, or give or be required to give evidence, by or before any court or person having, as mentioned in section 3 of this Ordinance, authority to examine such person or to receive evidence;”.

[10] Since an accused person can refuse to be examined or to give evidence under his undoubted right to elect to venture only a statement from the dock or to remain silent, he cannot come within the definition of “witness” in this Ordinance. He may well be a witness on his own behalf but this is only to say that he is a competent witness but he is never a compellable witness. As a witness, he cannot be administered an oath or an affirmation if he chooses to make a statement from the dock, but what he says therefrom comes fairly and squarely within the definition of “evidence” in the Evidence Ordinance.

Even though the view by Chang Ming Tat was not popular among some judges at the time,¹⁵⁶ that might have changed today. There was an attempt to re-establish the *ratio decidendi* in the case of *Ng Hoi Cheu* that an unsworn statement constitutes evidence. This is found in the case of *Azahan Bin Mohd Aminallah v Public Prosecutor*, whereby Gopal Sri Ram J held:¹⁵⁷

Without going into the matter in any detail, it suffices for us to say that there is a conflict among the High Courts as to whether an unsworn statement from the dock is evidence. *Wong Heng Fatt v Public Prosecutor* [1959] MLJ 20, *Public Prosecutor v Sanassi* [1970] 2 MLJ 198, and *Low Thim Fatt v Public Prosecutor* [1989] 1 MLJ 304 say that it is not evidence. By contrast, Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* [1968] 1 MLJ 53 held that it is evidence. And there are dicta in many other cases, Malaysian, Australian and at least one decided by the Privy Council which say quite emphatically that such an unsworn statement is evidence for the purposes of a trial. All the relevant cases may be found in two articles published in the Malayan Law Journal. The first is that by that very learned scholar Prof *Ahmad Ibrahim* in [1975] 2 MLJ vi. The other is by Professor *Mohd Akram* in [2003] 1 MLJ clxix.

In our judgment, in the context of s 257(1) the critical phrase is ‘elects to give evidence’ and

¹⁵⁵ *Ng Hoi Cheu v Public Prosecutor*, above n 94, at [9] and [10].

¹⁵⁶ See page 26 of this dissertation.

¹⁵⁷ *Azahan Bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334 at [17] and [18] (CA).

not ‘elects to give evidence on oath’. The former is much wider than the latter and must *ex necessitate rei* include the making of an unsworn statement from the dock. We are therefore persuaded that the reasoning of Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* is correct. Accordingly, the fact that the appellant elected to make an unsworn statement from the dock did not exclude the operation of s 257(1).

A consideration of the judgments of the courts clearly shows that some judges in Malaysia do regard unsworn statements as evidence even though there is neither proper explanation in the statute as to whether an unsworn statement falls under the definition of evidence, nor can the statement be tested by cross-examination. Hence, it is submitted that with more proper and clearer guidance on the application of the RUS in the legislation, it may not be difficult to accept an unsworn statement as evidence in Malaysia. My dissertation submits that the proposed amendment would assist the court in dealing with the issue of unsworn statements in the future. This is because, instead of depending on the case law to decide on the status of the statement, having clear guidelines in the statute is obviously a more persuasive approach.

(a) Recommendation 1

At the moment, the Malaysian Evidence Act 1950 does not provide a definition of “statement”. This is in contrast to the law in some other jurisdictions: for example, in New Zealand the term “statement” is clearly spelled out in the statute.¹⁵⁸ However, the law in Malaysia provides for the definition of “evidence”. Apparently, the word “statement” is one of the main elements in determining what is meant by evidence in Malaysia. However, the statute does not give a clear interpretation as to whether a statement made without an oath can be considered as evidence or not. This is one of the reasons why the status of the unsworn statement has become a difficult and longstanding issue. Towards this end, the Malaysian Evidence Act needs to be amended, particularly s 3. I propose that the definition of what constitutes “evidence” should also include an unsworn statement.

The original provision in s 3 is as follows:

Section 3. Interpretation

“evidence” includes—

- (a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;
- (b) all documents produced for the inspection of the court: such documents are called documentary evidence;

The suggested amendment is as follows:

¹⁵⁸ Evidence Act 2006(NZ), s 4.

“evidence” includes—

(a) all statements, **including an unsworn statement**, which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;

(b) all documents produced for the inspection of the court: such documents are called documentary evidence;

(b) Recommendation 2

To avoid any misuse of the RUS, it is also suggested that the application of the right should be limited only to the accused for whom it is really appropriate to use the right. As the RUS stands now, it is applicable to all accused in Malaysia. Therefore, the RUS is open to a degree of abuse that would eventually bring the criminal justice process into disrepute. The ability for all accused to give an unsworn statement also contributes to the notion that the RUS is out-dated and no longer relevant to the modern legal system, because the underpinning justification for the RUS does not apply to most accused. However, if the application of the RUS is narrowed down by empowering the court to use its discretion to determine whether the accused can give an unsworn statement or not, such undesirable perceptions may be reduced. It is submitted that nervousness or fear should not be sufficient grounds for entitling an accused to give an unsworn statement. This is because nervousness is not a sufficiently adequate means to measure one’s vulnerability. Besides, if this is allowed, it is not impossible that a majority of the accused would be entitled to choose this right.

Therefore, my dissertation suggests that new provisions are incorporated in chapter IX of the Malaysian Evidence Act 1950, that part being concerned with witnesses. Section 118 of the Malaysian Evidence Act concerning who is competent to testify could be referred to as a basis to determine who is eligible to give an unsworn statement. The reason I suggest the eligibility to give an unsworn statement could be based on s 118 rather than solely depending on the scope of a vulnerable person as proposed in s 2 of the Code is because the former provision deals with the issue of the competency of a witness in Malaysia more generally. Its scope is wider and therefore it allows the RUS to be extended to other vulnerable witnesses. Besides that, this provision explains what conditions in witnesses may affect their competence to testify in court. It clarifies that these types of witnesses may have difficulty in understanding the questions asked, which may hinder them from giving reasonable answers. The Evidence Act explains how a witness of tender years should be dealt with by the court.¹⁵⁹ However, nowhere does the statute explain the approach that should be taken by the court when dealing with witnesses who suffer from conditions other than “tender years”, as mentioned in the provision. Therefore, this dissertation suggests that the conditions set out in

¹⁵⁹ Section 133A

this provision may be a valuable yardstick to determine a person's eligibility to give an unsworn statement in court. Unlike the definition of vulnerable person in the proposed s 2 of the Code that deals specifically with a child or a person having a mental impairment, I argue the phrase "any other cause of the same kind" in s 118 gives wide discretion to the court to determine which other possible witness/accused that may fall under this category. I therefore submit, aboriginal people, who are vulnerable, may well fall under the same category.

Section 118 reads as follows:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation—A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

After identifying who is eligible to give an unsworn statement, the next important thing is to outline the characteristics of the RUS. At the moment, provisions that deal with the characteristics of an unsworn statement in Malaysia are very limited. Hence, I propose a new provision be inserted into the Evidence Act 1950 to define the characteristics of an unsworn statement. For this purpose, it appears that the Youth Justice and Criminal Evidence Act (England and Wales) 1999¹⁶⁰ offers a useful legislative model. The reason I choose to adopt the Youth Justice and Criminal Evidence Act 1999 is because this statute explains clearly how to deal with unsworn evidence. This may be a useful step-by-step guide for unsworn statements as well. It gives explicit guidelines not only to the court but also to other parties in the criminal proceedings as to what to expect when an unsworn statement is allowed by the court.

The insertion of these proposed sections could be made after the discussion on who may testify, as found in s 118. To avoid any disruption to other sections, these new sections may be drafted as s 118A and 118B.

The suggested additional provisions are as follows:

Section 118A

Reception of unsworn statement.

- (1) Subsections (2) and (3) apply to a person (of any age) who—
 - (a) is competent to give evidence in criminal proceedings, but

¹⁶⁰ Sections 56 and 57.

(b) by virtue of **section 118** is not competent to testify on oath in such proceedings **or who falls within the meaning of a vulnerable person in s 2 of the Criminal Procedure Code.**

(2) The **statement** in criminal proceedings of a person to whom this subsection applies shall be given unsworn **from the dock and no cross-examination is allowed.**

(3) A deposition of unsworn **statement** given by a person to whom this subsection applies may be taken for the purposes of criminal proceedings as if that **statement** had been given on oath.

(4) A court in criminal proceedings shall accordingly receive in evidence any **statement** given unsworn in pursuance of subsection (2) or (3).

(5) Where a person (“the witness”) who is competent to give evidence in criminal proceedings gives a **statement** in such proceedings unsworn, no conviction, a verdict or finding in those proceedings shall be taken to be unsafe for the purpose of **section 307 of the Criminal Procedure Code (procedure for appeal)** by reason only that it appears to the **Appellate Court** that the witness was a person **competent to testify** under section 118 (and should accordingly have given his evidence on oath).

Section 118B

Penalty for giving false unsworn statement

(1) If such a person wilfully gives a false **statement** in such circumstances that, had the evidence been given on oath, he would have been guilty of perjury, he shall be guilty of an offence and liable on summary conviction **under s 14 of the Oaths and Affirmations Act 1949.**

To suit the situation in Malaysia, some modifications are made to the original provisions in England and Wales. The modifications are as highlighted. The word “evidence” in the original provision is to be changed to “statement”. Section (1)(b) explicitly lays down the criteria for a person who is eligible to give an unsworn statement. Besides those who are not competent to testify under s 118, it also comprises the vulnerable person as defined in the Code, which includes vulnerable accused as well. Restriction of cross-examination is made clear, as found in subsection (2). The proposed s 118A(3) suggests that the unsworn statement should be treated as evidence given on oath. Therefore, I submit that the Malaysian Oaths and Affirmations Act 1949 is applicable. The statement will still be considered as evidence, but with a lesser weight since the statement is not tested. The same rule applies to unsworn evidence.¹⁶¹ This is to differentiate between sworn evidence and the unsworn statement. I submit, although the weight given is less, the situation is still much better than that relating to the current unsworn statement, where the evidential value is very ambiguous due to its uncertain evidential status. As for the provision in regard to summary conviction for giving false evidence in s 118B, my dissertation chooses not to lay down the

¹⁶¹ Murphy, above n 152, at [15.3.1].

sentence in the proposed section as can be seen in the original provision in the Youth Justice and Evidence Act 1999.¹⁶² However, this dissertation applies the provision in the Oaths and Affirmations Act 1949 in Malaysia, since that statute deals with summary punishment for perjury in open court.

(c) Recommendation 3

When the use of the RUS is clearer in the legislation, particularly the Malaysian Evidence Act 1950, it is submitted that the Code will need to be reviewed to avoid any unwelcome discussion on the application of the RUS in the future. Therefore, this dissertation suggests that s 173(ha) of the Code be amended accordingly. Currently, the provision is as follows:

Section 173. Procedure in summary trials.

The following procedure shall be observed by Magistrates in summary trials:

(ha)When the Court calls upon the accused to enter on his defence under subparagraph (h)(i), the Court shall read and explain the three options to the accused which are as follows:

- (i) to give sworn evidence in the witness box;
- (ii) to give unsworn statement from the dock; or
- (iii) to remain silent.

To suit the reform as proposed in the Malaysian Evidence Act 1950, this dissertation suggests the provision be amended as follows:

Section 173. Procedure in summary trials.

The following procedure shall be observed by Magistrates in summary trials:

(ha)When the Court calls upon the accused to enter on his defence under subparagraph (h)(i), the Court shall read and explain the three options to the accused which are as follows:

- (i) to give sworn evidence in the witness box;
- (ii) to give unsworn statement from the dock (**subject to the conditions set out in section 118A of the Evidence Act 1950**); or
- (iii) to remain silent.

¹⁶² Section 57.

F The possible Benefit from the Amendments

It is believed this modification will provide balance in regard to the RUS, since even though the accused can avoid cross-examination by the prosecution, he or she is still subject to certain rules and procedures. This can happen because, when the unsworn statement falls under the definition of evidence, the rules of evidence apply. It provides justice to the other parties in the criminal trial since the accused is not given total freedom when giving a statement from the dock. This may reduce the tendency of giving hearsay and/or irrelevant statements and the accused will be prohibited by the law from attacking the character of the prosecution's witness. Through this amendment, the court will have the power under the law to intervene and prohibit the accused from giving further irrelevant statements. In addition, the prosecution or the co-accused's counsel may also raise an objection about any statement that is irrelevant or inadmissible. The accused would also be subjected to a penalty if he or she tells lies in court. One major contribution from this proposal is that it would enhance the quality of the statement, as the vulnerable accused would no longer have the courage to give an untruthful statement.

This recommendation would also make a huge difference to the criminal justice system in Malaysia. This is because, by limiting the scope of the RUS (which would be allowed only to accused who are eligible), it may prevent the RUS from being abused further by those accused who do not need such protection. It also allows judges to exercise their judicial time more effectively since the time required for the court to hear the statement from the dock could be reduced. Furthermore, if the unsworn statement is given the same status as evidence given on oath, it may prevent further debate on its evidential value in the future. The reason is that the courts and legal practitioners have consistently formed different views on the evidential value of the statement from the dock and critiques are also seen from legal scholars on this matter.¹⁶³ It is submitted that these reform ideas could achieve the objective of the RUS – to reduce the risk of wrongful conviction of vulnerable or innocent accused – since the statement given falls under the definition of evidence and reduces the risk that it would not be taken into consideration by judges in coming to their verdicts.¹⁶⁴ This might not only assist vulnerable accused in facing the court process more confidently, but also might ensure that the statement given in court will be given weight as it should be.

¹⁶³ See page 26-28 of this dissertation.

¹⁶⁴ Law Reform Commission *Sworn and Unsworn Evidence* (ALRC SP6, 1982) at 110.

G Summary

After an in-depth analysis of the RUS in Malaysia, it is abundantly clear that the current features of the RUS are defective. However, to abolish the RUS is almost impossible in Malaysia, having considered the cultural background of the people and the public's objection to allowing cross-examination of accused who choose to give an unsworn statement. The above discussion also indicates that the RUS may actually operate as a protection to vulnerable accused if proper research is done on how it may work for that purpose. Therefore I have suggested modifications to the RUS by applying some of the characteristics of the unsworn evidence in the Youth Justice and Criminal Evidence Act 1999 of England and Wales that are relevant to an unsworn statement. I argued that it is possible for the unsworn statement to be given evidential status in the Malaysian Evidence Act 1950. I submit that this chapter gives a useful guideline to the Malaysian legislature to look at the RUS in a different perspective and make the RUS really effective as protection to vulnerable accused who choose to give a statement from the dock.

Next, I discuss the other current protection available in Malaysia, that is, the RRS, and examine why it does not help vulnerable accused much in criminal trials

IV *Current Protection: Right to Remain Silent*

Unlike the RUS, the RRS is still available in most Commonwealth jurisdictions. The two rights have similarities, and both face criticism; but the RRS is still accepted in the common law countries. One strong critic was Jeremy Bentham as cited by R H Helmholz, who contended that the RRS was “a product of irrational prejudice, one for which no convincing justification could be advanced.”¹⁶⁵ Regardless of the criticism, the RRS is seen as one of the protections for accused persons, especially vulnerable ones, against self-incriminatory statements in criminal trials. The overseas approach to the RRS is not quite the same as that in Malaysia. This is the main argument in this chapter. I argue that the objective of the RRS to protect vulnerable accused from making self-incriminatory statements in court is not fully recognised by the Malaysian criminal justice system. As a result, the RRS has become a sword rather than a shield for vulnerable accused.

To provide a better picture on how the RRS works in Malaysia, I discuss in Part A the original intention of the RRS and its relationship with the principle of a fair trial. In Part B, I explain that the RRS in Malaysia does not protect the vulnerable accused since the court has its own interpretation as to how to deal with the RRS. This happens when the RRS is heavily relied on to determine prima facie case. Furthermore, the current law does not give a clear guideline to the court on how to explain the effect of remaining silent at trial to the accused. This is detrimental to vulnerable accused, who may not understand the court procedures well. Hence, in Part C, I propose the Malaysian legislature introduce an adverse inference in the Code regarding the accused’s choice to remain silent at trial. I refer to the Singapore Criminal Procedure Code 2010 as a guideline for this amendment.

A *The Right to Remain Silent and Fair Trial Principle*

The RRS derived from the Latin maxim *nemo tenetur seipsum accusare* which means “no person shall be compelled to accuse himself.”¹⁶⁶ Historically, the RRS emerged as a result of the practices of the English Courts of Star Chamber and High Commission.¹⁶⁷ These courts were abolished in 1641 when the practices of the courts, which forced the accused to take an oath and, on failure to do that, caused the accused to be tortured, were ruled to be unlawful.¹⁶⁸ Therefore, to protect the accused against such improper procedure, the privilege against self-

¹⁶⁵ R H Helmholz “Introduction” in R H Helmholz and others (eds) *The Privilege Against Self-incrimination* (The University of Chicago Press, London, 1997) at 3.

¹⁶⁶ Abdul Rani bin Kamarudin “Rights of an Arrested Person to Counsel: Is It Not a Case of Too Little Too Late?” (2006) 2 MLJA 94 at 11 of the PDF version (no hardcopy available).

¹⁶⁷ Law Reform Commission *The Right to Silence* (NSWLRC DP 41,1998) at [2.7].

¹⁶⁸ At [2.7].

incrimination was introduced to allow the accused to say nothing that could incriminate them.¹⁶⁹ This was eventually accepted and practised by the Common Law courts.

The privilege against self-incrimination and the RRS have international recognition and are the main components for a fair trial procedure.¹⁷⁰ The case of *Saunders v United Kingdom* clearly explains the rationale of the right to remain silent and the privilege against self-incrimination as:¹⁷¹

Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6...The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6.2 of the Convention.

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.

The rights of the accused person pre-trial and at trial are safeguarded by the Universal Declaration of Human Rights 1948 (UDHR) and, since Malaysia is one of the United Nation's members, such rights are also recognised by the Malaysian justice system.¹⁷² Although the RRS is not explicitly mentioned in the UDHR, it may be inferred from some relevant provisions of the declaration.¹⁷³ In Malaysia, the rights of the accused are incorporated into its Federal Constitution and the rights against self-incrimination may be implied in art 5 of the Constitution. To determine whether the RRS in Malaysia meets the requirement for a fair trial in the UDHR, I discuss the elements of the fair trial principle next.

1 Protection to innocent accused

The original concept of the RRS is as a tool to protect an innocent accused from being wrongfully convicted.¹⁷⁴ This is because if innocent accused persons are put under pressure to speak, there is the risk that they will produce testimony unfavourable to their case.¹⁷⁵

¹⁶⁹Peiris, above n 88, at 238; Scott Henchcliffe "The Silent Accused at Trial- Consequences of an Accused's Failure to Give Evidence in Australia" (1997) 12 UQLJ 137 at 138.

¹⁷⁰*Saunders v United Kingdom* (1997) 23 EHRR 313; *Murray v. UK*, (1996) 22 EHRR 29, at [45] (ECtHR 1973)

¹⁷¹*Saunders v United Kingdom*, above n 170, at [68] and [69].

¹⁷²Jerald Gomez "Rights of Accused Persons – Are Safeguards being Reduced?" (2004) 1 MLJA 20 at 2 of the PDF version (no hardcopy available).

¹⁷³*Universal Declaration of Human Rights* GA Res 217A III, (1948), arts 3, 5, 9, 10 and 11; Gomez, above n 172, at 2.

¹⁷⁴Ian Dennis "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination" (1995) 54 Cambridge LJ 342 at 348; Shmuel Leshem "The Benefits of A Right to Silence for the Innocent" (2010) 41 The Rand Journal of Economics 398 at 399.

¹⁷⁵R Kent Greenwalt "Silence as a Moral Constitutional Right" (1981) 23 Wm & Mary L Rev 15 at 44; Roger Leng "The Right to Silence Reformed: A Re-Appraisal of the Royal Commission's Influence" [2001] 6 J Civ Lib 107 at 109.

However, some argue that innocent accused persons should not be afraid to testify in court if they have logical explanations to demonstrate their lack of involvement in criminal activities.¹⁷⁶ There are views that the RRS benefits not only the innocent but also those who are not.¹⁷⁷ Arguments that the RRS could protect an innocent accused from false conviction are probably relevant to a minority of cases.¹⁷⁸ This is because not every accused who chooses to remain silent is innocent, and it may not be an exaggeration to argue that most accused persons who choose to say nothing are those who are guilty and who want to escape conviction.¹⁷⁹ Moreover, allowing the accused to remain silent would cause a significant disadvantage to the government because it “may be denied access to a good deal of relevant and reliable evidence.”¹⁸⁰ As Glanville Williams stated, although juries would convict silent accused, there are circumstances under which these accused are acquitted for the reason that the juries are not keen to convict a person whom they do not hear.¹⁸¹ That might bring the criminal justice process into disrepute.

Nevertheless, just because the RRS might protect only a minority from wrongful conviction does not negate its usefulness in a due process context, and there may be many reasons why the accused would choose not to say anything during the trial.¹⁸² One of the reasons could be advice from the accused’s legal representatives, especially when the accused or suspects are vulnerable.¹⁸³ In addition, the accused may also refuse to testify for fear of not being able to give a good impression to the court because of an inability to respond to the questions well.¹⁸⁴ There is also the possibility that the accused would choose to remain silent because he or she may be protecting other persons or have done some immoral (but not illegal) activity that he or she does not want known to others.¹⁸⁵

Furthermore, to protect an accused from the negative effects of previous conviction(s) may also be one of the factors. This situation was explained in the case of *Blake v R* when Ronald Young J held:¹⁸⁶

However we are satisfied, given the appellant’s evidence before us, that if he had been accurately advised about the unlikely possibility of his previous convictions being the subject of cross-examination he would still have elected not to give evidence. Mr Blake made it clear in his evidence that he considered if the jury did get to hear of his previous convictions he had no possibility of a fair trial and no real hope of an acquittal. As he said in his affidavit, filed in

¹⁷⁶Leng, above n 175, at 116.

¹⁷⁷At 116.

¹⁷⁸Glanville Williams “The Tactic of Silence” (1987) 137 NLJ 1107 at 3 of the electronic page (no hardcopy available).

¹⁷⁹At 3.

¹⁸⁰Dennis, above n 174, at 354.

¹⁸¹Williams “The Tactic of Silence”, above n 178, at 2.

¹⁸²A A S Zuckerman “Criminal Law Revision Committee 11th Report, Right of Silence” (1973) 36 MLR 509 at 511.

¹⁸³Leng, above n 175, at 113.

¹⁸⁴Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 264.

¹⁸⁵*Blake v R* [2010] NZCA 61 at [18].

¹⁸⁶At [33].

support of the appeal, “It was my view that I would inevitably be convicted if the jury learnt of this” (referring to his previous convictions).

2 *The presumption of innocence and the burden of proof*

Every human being should be treated as innocent until proven otherwise.¹⁸⁷ This presumption of innocence is one of the fundamental values in a criminal justice system.¹⁸⁸ Theoretically, the fundamental principle in a criminal case is that the burden to prove a case rests on the prosecution’s shoulders.¹⁸⁹ This principle is important to protect against error in the criminal process and also to balance the power and resources of the state and of the accused person.¹⁹⁰ Therefore, a person who is presumed innocent should not be compelled to give incriminatory evidence that would facilitate the prosecution’s case.¹⁹¹ This is the principle that connects the RRS and the privilege against self-incrimination.¹⁹² Wigmore described the criminal process as being like combat, and one should not be forced to assist the enemy’s case, which would affect his or her own victory.¹⁹³ It is undeniable that there are actual significant differences in power between the state and an individual. Therefore, it might be accepted that the RRS can work as a tool to minimise the differences and to benefit vulnerable accused. This is the reason the prosecution is bestowed with a heavy duty to prove its case beyond a reasonable doubt, which may be seen as one of the ways to reduce the inequality of arms.¹⁹⁴

As Lord Sankey LC in *Woolmington v DPP* says:¹⁹⁵

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.

Therefore, the accused is protected against self-incrimination and may refuse to give evidence since the burden to prove the case is on the prosecution at all times.¹⁹⁶ The principle of the privilege against self-incrimination is that since the state is obviously more powerful than the accused, the privilege that allows the accused to refrain from testifying could reduce

¹⁸⁷ Mike Redmayne “Rethinking the Privilege against Self-incrimination” (2007) 27 Oxford J Legal Stud 209 at 219.

¹⁸⁸ Dennis, above n 174, at 352; European Convention on Human Rights, art 6(2); *Woolmington v DPP* [1935] AC 462 (HL).

¹⁸⁹ Dennis, above n 174, at 353-354.

¹⁹⁰ Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, 2006) at 83.

¹⁹¹ Jenny McEwan *Evidence and the Adversarial Process The Modern Law* (Blackwell Business, Oxford, 1992) at 20.

¹⁹² Andrew Ashworth and Mike Redmayne *The Criminal Process* (4th Ed, Oxford University Press, Oxford, 2010) at 154.

¹⁹³ Susan Easton *The Case for the Right to Silence* (The Academic Publishing Group, England, 1991) at 32-33.

¹⁹⁴ Redmayne, above n 187, at 219.

¹⁹⁵ *Woolmington v DPP*, above n 188, at 481.

¹⁹⁶ Henchcliffe, above n 169, at 139.

the impact of non-cooperation with the state.¹⁹⁷ Furthermore, it is not proper to draw an inference on silence if there is no solid evidence to connect a person with the crime.¹⁹⁸

It may be reasonable to assert that there is a need to preserve the RRS for the benefit of the accused who refuse to say anything about the charge brought against them. Furthermore, one of the salient factors of the RRS is to ensure that no innocent person is convicted as a result of a self-incriminatory statement.¹⁹⁹ In addition, the availability of the RRS could also prevent miscarriage of justice as well as preventing the accused from facing unnecessary charges such as contempt of court for refusing to give evidence.

However, the benefit to the innocent accused is arguably limited.²⁰⁰ This particularly applies in the Malaysian context, where there is an absence of a clear provision regarding the RRS in the Constitution. The RRS could actually have a reverse effect for innocent people whereby the RRS, which is thought to be protecting vulnerable accused, could eventually lead to conviction because of the accused's failure to provide evidence to rebut the charge. To illustrate how this may occur, I now turn to the practice of the RRS in Malaysia.

B The Right to Remain Silent in Malaysian Criminal Trials

The RRS is crucial in other jurisdictions to minimise the risk of convicting the innocent,²⁰¹ but it has taken a different turn in Malaysia. It may be submitted that the purpose of inserting the RRS in the Code is not so much to provide protection to the accused against any incriminatory statement or to protect the innocent accused, but rather as a tool to determine the *prima facie* case. This has become the core issue when discussing the RRS in Malaysia. I argue that the choice to remain silent at trial as provided for in the Code is just an empty promise of the criminal justice system to a vulnerable accused person. To explain the situation better, I now turn the discussion to how the RRS is treated in Malaysian criminal trials.

1 Prima facie test

It is trite law that the prosecution needs only to prove a *prima facie* case at the end of the prosecution's case and that proof beyond reasonable doubt is required at the end of the

¹⁹⁷ Ashworth and Redmayne, above n 192, at 153.

¹⁹⁸ At 154.

¹⁹⁹ Wan Wai Yee "‘Right of Silence’ and Drawing of Adverse Inference on the Accused’s Refusal to Testify at Trial" [1996] 17 Sing L Rev 88 at 96.

²⁰⁰ John Jackson "Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard" (2009) 58 ICLQ 835 at 846-847.

²⁰¹ Leng, above n 175, at 111.

defence case.²⁰² If the prosecution fails to prove a prima facie case, the accused will be acquitted.²⁰³ However, the issue of prima facie in Malaysia is one of flux and debate; and that being so, there is detriment to the vulnerable accused in relying on the RRS because the applicable standard for prima facie is unclear and may vary. Until 1997, the required standard of proof at the end of the prosecution's case was proof beyond reasonable doubt, whereby it required maximum evaluation to be made on the prosecution's evidence.²⁰⁴ This is apparent from the wording of the provision that "if unrebutted would warrant his conviction".²⁰⁵

The Code was amended in 1997 to explain that the prosecution needs to prove a prima facie case before the accused could be called to enter a defence,²⁰⁶ but the term "prima facie" was not defined. The absence of a definition of prima facie for this purpose has caused uncertainty in the courts regarding the correct principle to apply; whether the maximum evaluation principle as decided by the Federal Court in the case of *Arulpragasam Sandaraju v Public Prosecutor*,²⁰⁷ or the minimum evaluation principle, as laid down by the Privy Council in the earlier case of *Haw Tua Tau*.²⁰⁸ Maximum evaluation would lead to immediate acquittal if the prosecution fails to prove the evidence beyond doubt, whereas minimum evaluation is where some believable evidence exists to secure a conviction and it would give the prosecution a second chance to get a conviction if there is weakness in the defence's evidence.²⁰⁹ The lack of a clear definition of the term "prima facie" in the statute at that time has affected the proper evaluation of the prosecution's evidence.²¹⁰ The court at that time tried to remedy the situation by coming out with its own interpretation of how to determine prima facie. In *Balachandran v Public Prosecutor*, the Federal Court held that if the accused does not give evidence during the trial, the correct test is:²¹¹

Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

This is when the dilemma concerning the RRS in Malaysia began. This test suggests that the term "if unrebutted" is inferred from the accused's silence. However, such requirement is not mentioned explicitly in the statute. It is a principle developed by the highest court of the land

²⁰² Criminal Procedure Code (Malaysia), s 173(f)(i) and s 173(m)(i) for Subordinate courts; s 180(1) and s 182A(1) for the High Court.

²⁰³ Section 173(f)(ii) and s 180(2).

²⁰⁴ *Khoo Hi Chiang v Public Prosecutor and Another Appeal* [1994] 1 MLJ 265 at 265 per Edgar Joseph Jr SCJ.

²⁰⁵ Choong Kwai Fatt "The Prima Facie Test Merry-Go-Round" (2009) 1 MLJA 163 at 2 of the PDF version (no hardcopy available)

²⁰⁶ Criminal Procedure Code (Amendment) Act 1997 (Malaysia), s 2.

²⁰⁷ *Arulpragasam Sandaraju v Public Prosecutor* [1997] 1 MLJ 597 at [1] (FC).

²⁰⁸ *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49(PC).

²⁰⁹ Michael Hor "The Persistent Problem of the Prosecutor's Prima Facie Burden" [1997] 9 S Ac L J 388 at 388.

²¹⁰ (18 July 2006) 48 MPD HR at 128.

²¹¹ *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 at [25] (FC).

that has now become the leading case on this issue. I submit that there is a flaw in the principle and it is misleading. It triggers two main questions. First, does the remaining silent here mean the accused's silence even if the defence leads other evidence? Or, second, does it mean the accused offers no evidence at all either himself or herself or through other witnesses? I argue that if the intention of the case is the accused's silence per se, it is in conflict with the original aims of the RRS, that is, to protect against self-incrimination. However, if it means that the accused does not offer any evidence, either himself or herself or through other witness, it should be made clear in the test that the silence means the defence offers no evidence at all. Even though subsequently the Code was amended on 7 September 2007 to explain that prima facie means "the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction"²¹² (with the intention to restore the principle in *Haw Tua Tau*: that prima facie requires minimum evaluation),²¹³ the principle in *Balachandran* continues to be followed.²¹⁴

This principle is not only conveniently followed by the judges, but also by legal scholars. Choong Kwai Fatt wrote in his article:²¹⁵

The accused cannot be compelled to give evidence but he must risk the consequences if he does not do so. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The judge has no alternative but to conclude that the accused is guilty of the events he is charged with and sentence him in accordance to the judicial principles and precedent cases.

It makes the position of the RRS in Malaysia complicated. It may not be correct to use the words "remain silent" to explain "if unrebutted or unexplained would warrant a conviction". In *Balachandran*'s case, the test as quoted above clearly explains that "if the accused elects to remain silent he must be convicted." The accused's silence should be treated individually and not to represent the absence of evidence in the defence case as a whole. This is where the situation of the RRS in Malaysia differs from the overseas approach. In other jurisdictions, the accused's silence alone should not infer guilt because there could be other evidence adduced to support his or her defence. Furthermore, silence of the accused is not used as a tool to determine prima facie case. The approach in New Zealand may be worth looking at on this issue. In a trial by judge alone, the relevant test applicable at the end of the prosecution's case is: "is there some evidence (not inherently credible) which, if accepted as accurate, would establish each element of the offence so that the trier of fact could convict?"²¹⁶ Hence,

²¹² Criminal Procedure Code(Malaysia), s 173(h)(iii) and 180(4).

²¹³ (18 July 2006) 48 MPD HR, above n 162, at 127.

²¹⁴ *Public Prosecutor v Ishak bin Ahmad* [2013] 7 MLJ 616 at [5]-[6].

²¹⁵ Fatt, above n 205, at 6.

²¹⁶ Janet November *Burdens and Standards of Proof in Criminal Cases* (Butterworths, Wellington, 2001) at [9.3.1].

the standard to be applied is of prima facie standard and not beyond reasonable doubt.²¹⁷ To add, Speight J says in the case of *Auckland City Council v Jenkins*:²¹⁸

Though this is English practice being discussed, the same procedure appears properly applicable in New Zealand. A tribunal deciding whether or not there is a case to answer must decide whether a finding of guilt could be made by a reasonable jury or a reasonable judicial officer sitting alone on the evidence thus far presented. He is ruling in fact whether it is "prima facie" — a well understood phrase. A ruling that there is a prima facie case does not mean that of necessity if there is no evidence by way of rebuttal that a conviction must follow. It is merely that a conviction can properly follow and not be upset as being one which could not be made by a fact finding tribunal acting reasonably.

I argue that the principle in *Balachandran*'s case may be misinterpreted by the courts of lower jurisdiction. It may not be too exaggerated to submit that some judges or magistrates might understand that the silence of the accused in itself means a prima facie case is proved (with the requirements of credible evidence adduced by the prosecution that proved each ingredient of the offence). Therefore, for vulnerable accused who may want to choose to remain silent in a criminal trial in Malaysia, this is the danger that they may face.

I argue that the principle in *Balachandran*'s case should no longer be followed by succeeding cases. It is my view that the current provision in the Code is sufficient to determine prima facie. This is because to require the prosecution to adduce credible evidence that proves each ingredient of the offence such that, if left unexplained, it would warrant a conviction should in itself be sufficient for the court to decide prima facie. It is very clear from the constructions of the words in the provision that prima facie is proved when there is no evidence at all adduced by the defence that could throw doubt on the prosecution's case. Hence, the silence of the accused should not be used as the yardstick to determine the same. Besides that, to put such a "test" at the stage of the prosecution's case to determine prima may be a judgmental approach. I therefore submit, to continue keeping the principle adopted in *Balachandran*'s case alive undermines the spirit of the RRS and is in conflict with the right against self-incrimination.

2 *Effect of the Right to Remain Silent*

Although s 173(ha) of the Code says that the court must "read and explain" to the accused the three choices available at the defence stage, it does not spell out clearly what are the proper words to be used to make sure the accused understands the implications of the choices well; especially on the RRS. Without a clear warning about the ramifications of remaining silent, it may be impossible for an accused, particularly a vulnerable accused, to understand the effect of remaining silent. It is arguable that this provision does not really provide sufficient

²¹⁷ *F v R* (Court of Appeal CA 211/00, 16 August 2000) at 8.

²¹⁸ *Auckland City Council v Jenkins* [1981] 2 NZLR 363 at 365.

protection to any accused, but particularly the vulnerable accused. The situation is worsened when the accused is not legally represented. Therefore, I argue that it is time for the Malaysian legislature to consider a possible mechanism that would at least reduce the risk of a vulnerable accused choosing the RRS. The approaches by other jurisdictions in this respect are worth considering.

(a) Adverse inference

The popular approach in dealing with the accused's silence is to draw an adverse inference. In England and Wales, under the Criminal Justice and Public Order Act 1994, the law permits the court or the jury to draw an inference against the accused for their failure to answer the case without good reason.²¹⁹ Compared with the law in England, the Australian courts will not draw an inference on an accused's statement in court that was never offered during investigation at the pre-trial stage.²²⁰ The court is allowed to comment if the accused chooses not to give evidence in court, with the exception of the prosecution.²²¹ Although the judge is allowed to comment, it must not imply that the accused is guilty of the offence because he or she chooses to remain silent.²²² A rather similar approach is seen in New Zealand. The statute allows comment to be made by the judges, the accused and the accused's counsel, but not by the prosecution.²²³ In the case of *R v Accused*, the court held that the reason comment by the prosecution on the accused's failure to testify is prohibited is to avoid undermining the accused when they choose to exercise the right.²²⁴ This protection is further strengthened by the existence of the same restriction in the New Zealand Bill of Rights Act 1990.²²⁵

To argue whether adverse inference is practical or not in Malaysia since trial is by judge alone, I submit that the best example for Malaysia is Singapore. Singapore, like Malaysia, uses trial by judge alone and no longer has a jury system. The law in Singapore, a neighbouring country with an equivalent legal system, has improved significantly over the years. Its criminal justice system also provides RRS to the accused at trial,²²⁶ but the RRS does not receive the same treatment as in Malaysia. The RRS will not guarantee the prosecution a conviction but instead the statute explains that the court may draw an inference on the accused's silence after the prosecution has successfully proved its case.²²⁷ Singapore's Criminal Procedure Code 2010 requires the judge to inform the accused that, upon their failure to testify in court, an adverse inference will be drawn and the court may use that

²¹⁹ Section 35.

²²⁰ Mckillop, above 49, at 526; Evidence Act 1995 (NSW), s 89.

²²¹ Evidence Act 1995 (Cth), s 20(2); *RPS v The Queen* (2000) 199 CLR 620; 74 ALJR 449; [2000] HCA 3 at [20].

²²² Mckillop, above n 49, at 526; Evidence Act 1995 (NSW), s 20; Evidence Act 2001 (Tas), s 20; *Azzopardi v The Queen* [2001] 205 CLR 50 at [51].

²²³ Evidence Act 2006(NZ), s 33.

²²⁴ *R v Accused* (1995) 13 CRNZ 301 at 303.

²²⁵ Section 23(4).

²²⁶ Criminal Procedure Code 2010(Singapore), s 230(1)(m).

²²⁷ Yee, above n 199, at 88; Heong, above n 51, at 244; *Haw Tua Tau v Public Prosecutor*, above n 208.

silence against him or her.²²⁸ The accused is not convicted on his or her silence but for the reason that the prosecution has adduced sufficient evidence to prove his or her involvement in the crime.²²⁹ The proper words on how to warn the accused are explicitly mentioned in the provision. Through this clarity, the accused will understand better the effect of his or her choice to remain silent.

However, such a warning does not exist in Malaysia's criminal procedure code. This is where the implication of having the RUS as a precondition to determine prima facie is detrimental to an accused who is not well versed with the court's process. Section 173(ha) of the Code does not deal with this requirement in detail. It only explicates briefly on the need to read and explain the options to the accused, but without proper guidance. Therefore, the court is not procedurally wrong if it does not explain in detail or effectively the effect of remaining silent at trial. This is where the choice to remain silent starts to become ineffective as a protection to vulnerable accused, as there is a strong possibility that vulnerable accused would be more comfortable choosing to remain silent in court.

I argue that although Malaysian law does not provide an express provision on the drawing of an adverse inference, the court is actually drawing an adverse inference from an accused's silence, whereby if the accused chooses to remain silent when the defence case is called, the court may convict him or her for the offence since no sufficient evidence is adduced to rebut the prosecution's case.²³⁰ Therefore, it would be wise to have the provision on the drawing of an adverse inference stated explicitly in the Code. This may help to avoid the confusion on how to deal with the accused's silence. There may be possible objections towards introducing an adverse inference on the accused's silence. Some argue that allowing the court to draw an adverse inference may encourage the accused to give evidence in court.²³¹ Hence, there is a view that even though such a step may sound just, the fundamental right to "liberty, dignity and privacy" of a person should not be taken lightly and it is the responsibility of the law maker to ensure that there is a balance between the interest of the individual in a criminal proceeding through the provision of proper safeguards and the interest of society.²³² However, I consider this is a better approach rather than providing nothing to alert the accused about the consequences of his or her choice when the ramifications of it are grave.

Moreover, allowing an adverse inference may not necessarily do an injustice to the accused who choose to remain silent in court. As Lord Diplock mentioned in *Haw Tua Tau v Public Prosecutor*:²³³

²²⁸ Section 230(1)(m).

²²⁹ Yee, above n 199, at 99.

²³⁰ *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613 (FC)

²³¹ Harbajan Singh "Reform in the Law of Evidence: Some Observations" (1975) 17 Malaya L Rev 160 at 161.

²³² At 161 and 166.

²³³ *Haw Tua Tau v Public Prosecutor*, above n 208, at 52.

English law has always recognised the right of the decider of fact in a criminal trial to draw inferences from the failure of a defendant to exercise his right to give evidence and thereby submit to cross-examination. It would in any event be hopeless to expect jurors or Judges, as reasonable men, to refrain from doing so. Although the Criminal Evidence Act 1898 prohibited the prosecution itself from inviting the jury to draw inferences from the accused's failure to testify in his own defence, it did not prohibit Judges from commenting on such failure: very often the Judge did comment and draw to the attention of the jury inferences that they may properly draw, if they thought fit, from the failure of the accused to go into the witness box to contradict the evidence of the prosecution on matters that were within his own knowledge or to displace a natural inference as to his mental attitude at the time of the alleged offence that, in the absence of some other explanation, would properly be drawn by any reasonable person from his conduct at that time.

After analysing the RRS in Malaysia, it is obvious that there are flaws on how the RRS is dealt with by the Malaysian judiciary. To rectify the defect, I recommend the introduction of a proviso on the drawing of an adverse inference from the exercise of the option to remain silent at trial in order to alert the accused to the effect of his or her decision.

C Recommendation: To provide a Proviso on the Drawing of an Adverse Inference from the Accused's Choice to Remain Silent in Court

I suggest the Malaysian legislature consider introducing a proviso on the drawing of an adverse inference on the accused's silence at trial. To do this, the Singapore Criminal Procedure Code 2010 is a useful reference since the statute clearly spells out the warning that needs to be read to the accused before they choose how or whether to give evidence at the defence stage.²³⁴ However, to suit the Malaysian situation, some modifications are necessary. Instead of suggesting the introduction of the full proviso, I propose the Malaysian legislature adopt the relevant part for the right to silence only.

I propose s 173(ha)(iii) be amended as follows:

Section 173(ha)

(iii) to remain silent.

“if you elect not to give evidence in the witness box, that is to say, remain silent, then I must tell you that the court in deciding whether you are guilty or not, may draw such inferences as appear proper from your refusal to give evidence, including inferences that may be adverse to you.

²³⁴ Section 230(m).

Let me also say, whichever course you take, it is open to you to call other evidence in your own defence. You may confer with your counsel on the course you wish to take.

I now call upon you to give evidence in your own defence. How do you elect?"

D The possible Benefit from the Amendment

I submit that if the law is amended to include this explanation of the provision to remain silent, the confusion regarding the RRS may cease. This is because this amended provision is very clear that an accused's silence per se does not warrant a conviction. It makes it clear that the absence of any evidence (either by the accused or other witnesses) during the defence's case is the actual meaning of "if unrebutted or unexplained would warrant a conviction". I argue that this amendment would stop the heavy reliance on the principle in *Balachandran*'s case that creates a misconception between RRS and the prima facie standard. Furthermore, it may also alert a vulnerable accused who intends to remain silent. He or she may reasonably expect the outcome of the choice. Currently, the law does not set out how to explain to the accused the consequences of electing to remain silent. This proposal may also help the court to find the correct terms to explain these consequences to the accused.

E Summary

On the surface, the concept of the presumption of innocence and the legal burden of proof in Malaysia is similar to overseas jurisdictions. However, the issue of how the burden is discharged to some extent varies from other jurisdictions. This is because, as discussed above, choosing to exercise the RRS no longer functions as a protection to accused persons; it becomes a sword against them. Therefore, it is submitted that the RRS as it currently operates has little actual legal function in the Malaysian criminal justice system, and little value to the accused. It makes no sense for the accused in Malaysia to choose to remain silent at trial if that would warrant their conviction. In contrast, the right may still hold true in the other common law jurisdictions. In England and Wales, Australia, New Zealand and Singapore, although the law permits adverse inference and comment to be made, the court or the jury is not allowed to think that the failure to testify means the accused is guilty. The approaches taken by those jurisdictions are logical, having considered the nature of the right to protect against self-incrimination, and it preserves the true intention of the right.

In my view, the interests of vulnerable accused need to be given some priority to ensure a fair process at trial. Nevertheless, the question that arises is: how does the right to remain silent actually assist the vulnerable accused during the trial? The answer is in the negative. Until the principle of the Federal Court in *Balachandran* is not overturned by courts of concurrent jurisdiction, as the law stands now that is how prima facie is determined in Malaysia. To take

away the right or to modify the character of the right to what it is being practised now might distract from the court's ability to determine *prima facie*. However, to allow the practice might infringe the concept of fairness in a criminal trial. Therefore, I submit that to recommend an adverse inference to be introduced in the Code might at least help to clear the muddy water. It could also persuade the courts to move away from the principle in *Balachandran*.

After discussion is made on how the RUS and the RRS work in Malaysia, it is obvious that the Malaysian legislation is lacking in protections for vulnerable accused. However, the proposed reformation may resolve the problems. These recommendations may be useful for those vulnerable accused who either choose to give statement from the dock or to choose to say nothing at the defence stage. In the next chapter, I discuss other potential protections that are worth considering by the Malaysian legislature, particularly for vulnerable accused who choose to give sworn evidence in court. I submit that one of the best ways to assist vulnerable accused in court is through an intermediary. I propose that an intermediary service for vulnerable accused be introduced in the Malaysian criminal justice system.

V *Introduction of an Intermediary System for Vulnerable Accused in the Malaysian Criminal Trial*

In Chapters III and IV, I discussed how to improve the current protections to vulnerable accused who choose not to give a sworn evidence at trial, either through giving an unsworn statement or by remaining silent. Now, I turn to another possible protection for vulnerable accused who wish to give sworn testimony in court. The Malaysian criminal justice system provides for an intermediary service. However, this service is limited to a child witness, that is, a person under the age of sixteen (except for child offenders).²³⁵ There is no similar service provided to other vulnerable witnesses, including vulnerable accused. It is apparent that the function of the intermediary system is to protect a child witness or victim when giving evidence in court. It is unfortunate for the vulnerable accused in Malaysia that the absence of the application of the service to them in the legislation has denied them access to an intermediary. It causes the vulnerable accused to go through the same process as all other accused, including those who are not particularly vulnerable. I argue that an intermediary service should be made available to vulnerable accused persons. This could be one of the best approaches to effectively help the vulnerable accused who chooses to give evidence on oath in court. Since the intermediary system is not given a wide exposure in Malaysia, its characteristics are also not clearly known. For this reason, the use of the system in other Commonwealth countries is a useful starting point for discussion.

Therefore, in Part A, I discuss the intermediary service in England and Wales and how it might help vulnerable accused. I analyse the function of an intermediary during a trial. In Part B, I examine the appropriate stage to identify a vulnerable person so that relevant assistance can be made available to him or her as soon as possible. In Part C, I highlight the arguments for and against an intermediary service. I discover that despite disapproval of the service by some scholars, the advantage it offers to vulnerable accused is appealing. However, before suggesting the service be introduced for the benefit of vulnerable accused in the Malaysian criminal proceedings, in Part D, I discuss whether it is practical to extend the service to vulnerable accused taking into account the cost it might incur. I found that it might be worth the money if this service is offered to vulnerable accused. Therefore, in Part E, I recommend that an intermediary service be offered to vulnerable accused who choose to give sworn evidence in court. I suggest reference to the legislation in England and Wales as a source of reference.

A *Intermediary Service for Vulnerable Accused*

Due to an awareness of the need to protect a vulnerable witness in court, the Home Office interdepartmental working group in England and Wales (hereinafter referred to as “the

²³⁵Evidence of Child Witness Act 2007(Malaysia), s 8.

working group”) recommended that a professionally trained intermediary should help disadvantaged children and adults in dealing with the courts.²³⁶ Vulnerable witnesses include “those with mental illness; all witnesses aged under 17; those with a physical disability or physical disorder and those with a learning disability.”²³⁷ The law in England and Wales provides for assistance to the vulnerable witness (excluding the accused) during trial, as evident from the Youth Justice and Criminal Evidence Act 1999, whereby special measures directions are provided for the purpose of assisting witnesses who meet the definition of a vulnerable witness under s 16.²³⁸ Such witnesses may apply to be examined through registered intermediaries.²³⁹ In order to ensure efficiency in providing services to vulnerable witnesses, a registered intermediary has to be a qualified and trained person with a psychology, speech and language therapy, social work, nursing or teaching background.²⁴⁰ They are also accredited by the Ministry of Justice.²⁴¹ Apart from that, impartiality is the most important criterion, as intermediaries work neither for the prosecution nor the defence.²⁴² An intermediary may also be an interpreter approved by the court.²⁴³ Since the service involves testimony of the witness, an intermediary faces the same consequence as an interpreter if the former commits perjury.²⁴⁴

This provision on intermediary in England and Wales is not available to an accused, since the accused is considered as having sufficient protection from the statute in addition to their rights in the common law and the European Convention of Human Rights.²⁴⁵ However, it is undeniable that some accused persons do have difficulties in testifying in court, just like other vulnerable witnesses.²⁴⁶ The same situation happens in Malaysia whereby the intermediary is available only for a child witness. An intermediary is not even allowed for a child offender, let alone adult vulnerable accused. This creates unfairness in the court process and raises the issue of inequality of arms. For some accused, particularly those who suffer from intellectual disability, court proceedings may be intimidating. Therefore, some judges and lawyers in England and Wales were of the view that such support should be made available to vulnerable accused as well as vulnerable witnesses.²⁴⁷ For this reason, there was an amendment in the Coroners and Justice Act 2009 (England and Wales) to allow a vulnerable accused person to get assistance from an intermediary.²⁴⁸ The application of the intermediary

²³⁶ Home Office *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) at 57.

²³⁷ O’Mahony, above n 7, at 233.

²³⁸ Jonathan Doak “Confrontation in the Courtroom: Shielding Vulnerable Witnesses from the Adversarial Showdown” (2000) 5 J Civ Lib 296 at 302.

²³⁹ At 302.

²⁴⁰ O’Mahony, above n 7, at 233.

²⁴¹ Jenny Talbot *Fair Access to Justice?* (The Prison Reform Trust, June 2012) at 15.

²⁴² O’Mahony, above n 7, at 233.

²⁴³ Youth Justice and Criminal Evidence Act 1999(E&W), s 29(1).

²⁴⁴ Youth Justice and Criminal Evidence Act 1999(E&W), s 29(7); Perjury Act 1911(E&W), s 1.

²⁴⁵ Doak, above n 238, at 305.

²⁴⁶ At 299.

²⁴⁷ O’Mahony, above n 7, at 234.

²⁴⁸ Section 104; O’Mahony, above n 7, at 234.

service to the accused is well explained in s 104 of the Act. However, the legislation has yet to be enforced in England and Wales.²⁴⁹ Therefore, since the legislation regarding the intermediary service for the vulnerable accused is not being exercised in England and Wales at the moment, the court is invoking its inherent jurisdiction by appointing non-registered intermediaries to assist a vulnerable accused at trial whenever the situation warrants it in order to uphold the right to a fair trial.²⁵⁰ In addition, courts consider the importance of providing such assistance to vulnerable accused as it would help the accused to have more effective participation in the criminal trial. The case to illustrate the concern is *R v Walls*, where Thomas LJ held that:²⁵¹

There are available to those with learning disabilities in this age, facilities that can assist. Consideration can now be given to the use of an intermediary under the court's inherent powers as described in the Sevenoaks case, pending the bringing into force of s.33BA (3) and (4) of the Youth and Criminal Evidence Act 1999 (added by the Coroners and Justice Act 2009). Plainly consideration should be given to the use of these powers or other ways in which the characteristics of a defendant evident from a psychological or psychiatric report can be accommodated with the trial process so that his limitations can be understood by the jury, before a court takes the very significant step of embarking on a trial of fitness to plead.

1 Function of an intermediary in court

The function of an intermediary in court is to communicate and interpret the questions put to the witness by counsel and "repeating the answer given by the witness back to the court."²⁵² Some argue that the function of an intermediary is restricted to communicating the questions and the answers to the court and is not to highlight to the court any questions that they would think inappropriate.²⁵³ This is because it is the duty of the judge to determine whether the questioning during cross-examination is suitable or not, and to grant such a role to the intermediary would lead to a conflict in the theory of the adversarial trial process.²⁵⁴

Concern has also been raised that since the obligations to determine improper questions still rest on the shoulders of the judge or counsel, in a proceeding involving intermediaries the judge or the counsel is less willing to interfere with the proceedings when improper questions are asked.²⁵⁵ This would therefore be to the disadvantage of the witness/accused.²⁵⁶ However, there are different opinions on this issue. Empirical research on questioning witnesses with

²⁴⁹Brendan M O'Mahony, Becky Milne and Tim Grant "To Challenge, or not to Challenge? Best Practice when Interviewing Vulnerable Suspects" (2012) 6 Policing 301 at 310; Talbot, above n 241, at 13.

²⁵⁰O'Mahony, Milne and Grant, above n 249, at 318; Talbot, above n 241, at 9 and 14.

²⁵¹*R v Walls* [2011] EWCA Crim 443.

²⁵²Doak, above n 238, at 303.

²⁵³Louise Ellison "The Mosaic Art? Cross-examination and the Vulnerable Witness" (2001) 21 LS 353 at 366.

²⁵⁴At 366.

²⁵⁵Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 310-311.

²⁵⁶At 311.

disabilities shows that most lawyers do not change the pattern of their questions for disabled witnesses.²⁵⁷ The situation is even more troubling during the cross-examination process.²⁵⁸ This is because a person with disabilities is thought to be more likely to agree with leading questions, compared with a person without any disabilities.²⁵⁹ Furthermore, some scholars have claimed a registered intermediary may serve to alert the court to particular questions in cross-examination that are not appropriate to the vulnerable witness, and which the judge may not have recognised as inappropriate otherwise.²⁶⁰ In my view, it is proper that an intermediary should be allowed to interfere when the questions asked are inappropriate, since it would be one of the purposes of having the intermediary in court. If the function of an intermediary is restricted to communicating the questions and answers, then the role would not be dissimilar to a court interpreter, and the special expertise of the intermediary would not be taken full advantage of.

In New Zealand, even though there is no express legislative provision regarding an intermediary service for vulnerable accused,²⁶¹ the court has the discretion to allow such assistance if the situation warrants it. This is seen in the case of *R v Kaukasi* when the court accepted a recommendation to use special measures when dealing with a vulnerable accused and modified the trial procedure to minimise the stress that a vulnerable accused might have faced during the trial process.²⁶² The approach in *Kaukasi*'s case has become a useful guide to succeeding cases in meeting the needs of vulnerable accused.²⁶³

It is prudent to venture into the service provided by an intermediary more deeply. Besides assisting vulnerable accused at trial, the service is also very useful for the vulnerable person pre-trial. I now turn to discuss the possibility of having an intermediary as early as during the police investigation.

B How Early should an Intermediary be Available to a Vulnerable Accused?

Studies show that the role of a registered intermediary can start as early as at the stage of police interview in order to identify a vulnerable suspect who would later become a

²⁵⁷ Mark R Kebbell, Christopher Hatton and Shane D Johnson "Witnesses with Intellectual Disabilities in Court: What Questions are Asked and What Influence do They Have?" (2004) 9 Legal and Criminological Psychology 23 at 30.

²⁵⁸ At 31.

²⁵⁹ At 32.

²⁶⁰ O'Mahony, Milne and Grant, above n 249, at 310.

²⁶¹ McDonald and Tinsley, above n 255, at 309

²⁶² *R v Kaukasi* (Minute No 5) HC Auckland T014047, 4 July 2002 at [24]-[30].

²⁶³ *Te Wini v R* [2011] NZCA 405 at [19].

vulnerable accused in a court of law.²⁶⁴ In England and Wales, although the special measures directions might be considered a successful step in assisting vulnerable and intimidated witnesses, improvement is still needed, especially in terms of the police and the prosecution identifying a witness that requires such assistance as early as possible.²⁶⁵ The approach to assisting vulnerable accused becomes more effective if this type of accused is identified at an early stage of proceedings, for example during the police interviews. Studies have also shown that a person with mental/learning disability often does not get assistance either at the stage of police investigation or of prosecution due to the failure of the police to recognise the problem.²⁶⁶ The vulnerability of an accused person could also be identified by his or her own counsel. Counsel could later inform the police about the need to provide appropriate assistance. However, it is undeniable that it is difficult for the police to recognise an accused of this category.²⁶⁷ Some of the reasons this is happening are the “lack of training for professionals in the criminal justice system; and a lack of time to identify vulnerable offenders.”²⁶⁸

One of the questions that would help the police in the task is, “Where did the witness go to school?”²⁶⁹ However, though such a question may give some guidance in identifying vulnerable accused, it is doubtful that it would ease the burden as children with learning disabilities are now given more opportunities to join mainstream schools rather than attending schools with special services.²⁷⁰ This will make the task more difficult for the police. Even though the law allows the vulnerable suspect in England and Wales to be accompanied by an “Appropriate Adult” during the interview (e.g. parents who are not involved in the crime in question),²⁷¹ that is more in the nature of “a supportive role rather than the role of a communication expert”, especially for vulnerable suspects.²⁷² Although the presence of an Appropriate Adult does have an effective impact on the behaviour of police and lawyers during the police interview, for a better effect, it is important for an Appropriate Adult to participate more actively during the interview and to interfere when it is necessary.²⁷³ For this

²⁶⁴O’Mahony, Milne and Grant, above n 249, at 310; Richard Crant and Penny Standen “What Professionals Think about Offenders with Learning Disabilities in the Criminal Justice System” (2007) 35 *British Journal of Learning Disabilities* 174 at 178; O’Mahony, above n 7, at 236.

²⁶⁵ Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, New York, 2010) at 463.

²⁶⁶Jenny McEwan “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999” (2000) 4 *Int’l J Evidence & Proof* 1, at 16.

²⁶⁷O’Mahony, above n 7, at 234.

²⁶⁸Brendan M O’Mahony, Kevin Smith and Becky Milne “The Early Identification of Vulnerable Witnesses Prior to an Investigation Interview” (2011) 13 *British Journal of Forensic Practice* 114 at 116.

²⁶⁹O’Mahony, above n 7, at 234.

²⁷⁰Crant and Standen, above n 264, at 178.

²⁷¹Police and Criminal Evidence Act 1984 (E&W), Code C: Codes of Practice for the Detention, Treatment and Questioning of Persons by Police Officers at [3.15]-[3.20].

²⁷²O’Mahony, Milne and Grant, above n 249, at 309; Police and Criminal Evidence Act (E&W), Code C: Codes of Practice for the Detention, Treatment and Questioning of Persons by Police Officers at [11.17].

²⁷³Brendan O’Mahony “Accused of Murder: Supporting the Communication Needs of a Vulnerable Defendant at Court and the Police Station” (2012) 3 *Journal of Learning Disabilities and Offending Behaviour* 77 at 79.

to happen, a professionally trained Appropriate Adult is needed so that he or she can intervene when comprehension of questions or language is an issue.²⁷⁴

However, besides having assistance from intermediaries, there is also a suggestion that the police caution should be made simpler and more understandable to the accused, especially accused with disabilities.²⁷⁵ Furthermore, the line of questioning by defence counsel during the cross-examination should be made less complex and more directly to the point,²⁷⁶ which is a fair suggestion for the benefit of a vulnerable accused. However, to suggest straightforward questions in cross-examination generally would benefit an accused without any disabilities. Hence, it may not be just to counsel, since cross-examination is the most effective weapon in a trial to shake the opponent's case in a trial.

Next, I analyse the views for and against the intermediary service.

C Diversity of Views on the Intermediary Service

An intermediary service does not receive total support from scholars. They form different views on the effectiveness of intermediaries in criminal proceedings. In this part, I examine the variety of opinions on this issue to determine the extent to which the service is desirable for vulnerable accused in Malaysians criminal courts.

1 Arguments for the intermediary service

Having an intermediary available to vulnerable accused could eliminate a perception of inequality of arms in a criminal trial. Besides, the use of an intermediary might make it easier for the accused to give evidence in court in the same way as it helps witnesses for the same purpose. This is because the intermediary might use a softer tone of voice to the accused when communicating the questions put to him or her by the prosecution during cross-examination.²⁷⁷ The availability of an intermediary may also help parties in the proceedings other than the accused, because the task of explaining a question to a vulnerable accused with mental impairment might be daunting to the counsel or the judge. Therefore, with the right technique and expertise, an intermediary might actually expedite the process of questioning in court rather than confirming negative perceptions that an intermediary might contribute to delays in the court process.

The other advantage that the intermediary system may offer is that it could boost the self-esteem of the accused and this might improve the criminal justice system as the accused

²⁷⁴ At 82.

²⁷⁵ At 82.

²⁷⁶ O'Mahony, Smith and Milne, above n 268, at 119.

²⁷⁷ Doak, above n 238, at 305.

could testify with confidence in court. This is seen from the experience shared by O'Mahony when he mentioned:²⁷⁸

...it appears that the defendant may have gained confidence from the support of an intermediary standing in the witness box beside her and that she began to understand my role in intervening and requesting breaks which in turn led to her asserting her needs.

A good justice system is important to guarantee an accused of a fair trial.²⁷⁹ Louise Ellison explained that the report by the working group shows that the advantage of having a registered intermediary is that it “would improve the quality of the evidence received, save court time and diffuse the pressure of cross-examination on vulnerable witnesses.”²⁸⁰ Therefore, it might be suggested that the same advantage would be applicable to the accused if the assistance of the intermediary is extended to a vulnerable accused. This helps to achieve a more effective court process. The impartiality of the intermediary in assisting the communication between the defendant and the defence counsel might not be an issue as the communications are protected because the meeting is subject to legal privilege.²⁸¹

2 *Arguments against the intermediary service*

However, some do not observe the service as positive. There is an argument that the existence of an intermediary might disturb the art of cross-examination, as the intermediary might advise the prosecution against asking leading questions of the vulnerable accused.²⁸² Further, the intermediary could cause the contact between the prosecutor and the accused to become indirect and could eventually prevent the prosecution from exercising an efficient cross-examination.²⁸³ Even though it may not seem fair, since leading questions are the heart of cross-examination because that is where the case of one party could be strengthened, it should not be overlooked that vulnerable people with learning disabilities are the type of people who normally are confused easily and who are likely eventually to agree with leading questions.²⁸⁴ Therefore, their answers to the questions may not represent the truth, due to difficulty in coping with the cross-examination process. Furthermore such questions would contain “developmentally inappropriate language and interrogative devices better suited to obfuscation, intimidation and coercion than effective ‘testing’ of evidence.”²⁸⁵ Therefore, it may be submitted that the existence of a registered intermediary would assist a vulnerable

²⁷⁸ O'Mahony, above n 273, at 82.

²⁷⁹ Kirsten Hanna and others “Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models in New Zealand” [2012] Australian and New Zealand Association of Psychiatry, Psychology and Law 1 at 1.

²⁸⁰ At 362.

²⁸¹ O'Mahony, above n 7, at 236.

²⁸² O'Mahony, Milne and Grant, above n 249, at 311.

²⁸³ Doak, above n 238, at 317.

²⁸⁴ At 307; Ellison, above n 253, at 359.

²⁸⁵ Ellison, above n 253, at 354.

accused against the abuse of cross-examination. Furthermore, the service would not deviate from an adversarial system since the intermediary is not allowed to form his or her own questions but merely to clarify and explain the questions in simple language which can be better understood by the vulnerable accused.²⁸⁶

There is also the issue that this service might have negative ramifications for the intermediaries themselves, as they might have to attend a lengthy trial, especially when the judge demands the intermediaries be in court throughout the trial. Furthermore, unlike registered intermediaries, non-registered intermediaries consist of untrained individuals (professional or not) who have no accreditation from the Ministry of Justice.²⁸⁷ Therefore, there are concerns whether the quality of the services provided to vulnerable accused is at the same level as the quality of services provided to vulnerable witnesses through registered intermediaries.²⁸⁸

Although the English statute is not yet enforced, debates on its application have arisen. There are arguments on what would happen to the vulnerable accused throughout the trial since the statute provides for the service of intermediaries only during the giving of evidence in court.²⁸⁹ However, judges in some cases prefer the service to be available for the rest of the proceedings.²⁹⁰ Hence, it leads to a question: would that practice remain when the statute is implemented?²⁹¹ This is similar to the situation in Malaysia. The intermediary service in the Malaysian Evidence of Child Witness Act 2007 provides for the service only during examination of the child. I submit that concern regarding this matter is justifiable, as it is important to ensure that the vulnerable accused understands the proceedings from beginning to the end. However, the fact that the legislation is not drafted in such a way as to allow the intermediaries to accompany the accused throughout the entire trial may also have reasonable grounds. The service of an intermediary may not only be costly but also takes time. The crucial part in a trial proceeding for a vulnerable accused is during testimony. Therefore, to have an intermediary during that process is sufficient as far as a fair trial concept is concerned. Suppose a trial lasts for five days and the accused gives evidence during the third day of the proceeding; retaining intermediaries for the remaining days may not be effective in terms of the concept of the intermediary system itself. It might be better if the intermediary were available for other vulnerable accused who would need the service instead.

Regardless of the dissenting views on the intermediary service, I submit that the service sounds promising for vulnerable accused. Hence, the same approach should be considered by the Malaysian criminal justice system. This is because it is evident from the existing law and procedures that such assistance to a vulnerable accused is wanting. However, it is important

²⁸⁶At 364.

²⁸⁷Talbot, above n 241, at 15.

²⁸⁸At 15.

²⁸⁹O'Mahony, Smith and Milne, above n 268 at 119.

²⁹⁰At 119.

²⁹¹At 119.

to identify whether the service is relevant or not to Malaysia. For this reason, I discuss the practicality of introducing the intermediary service to vulnerable accused in the Malaysian criminal justice system.

D Is the Intermediary Service Practical in Malaysia?

Before the service of registered intermediaries was used across England and Wales, a pilot study on the effectiveness of the service was conducted in six different places in England and Wales.²⁹² It may be suggested that the same approach could be taken by the Malaysian criminal system to find out how far the idea suits the criminal justice system in the country. To introduce this system might be costly and thorough research as to its practicality in Malaysia is worthwhile. For this purpose, the research conducted by Elisabeth McDonald and Yvette Tinsley on the practicality of the intermediary system is useful.²⁹³ They have set out the obstacles that may exist if this system is implemented. The use of intermediaries may delay the trial process as the witnesses may take a longer time than they usually do when giving evidence.²⁹⁴ This may happen because the intermediaries may take time to ensure the accused understands the questions. The possible delay that could be perceived when using such a service in the court trial is, the intermediaries may advise or request the court to have regular breaks during the process or the trial might need to be adjourned early because the accused is exhausted by the process.²⁹⁵ From a different perspective, if an intermediary is given greater responsibility in relation to questions asked, there would be a risk that such questions are not presented as they should have been, and this could lead to the possibility of appeal.²⁹⁶ These are justifiable concerns that should be given due attention. I argue that the aim of introducing a better justice system is to benefit all parties in criminal proceedings and not to deprive anyone of a fair trial. This includes the vulnerable accused. It may not do justice to vulnerable accused if they are refused relevant assistance on the ground that it will be time consuming. I also argue that this might not be a usual event in court, since this is a specific service for selected accused only.

In considering whether an intermediary service is practical or not in New Zealand, the issue of jurisdiction was raised. There was a concern that the implementation of the intermediary system in New Zealand may be an issue in terms of training sufficient intermediaries, as the jurisdiction is small.²⁹⁷ To relate this problem to the Malaysian context, it is useful to discuss the issue geographically. Malaysia comprises thirteen states and the federal territories of Kuala Lumpur, Putrajaya and Labuan.²⁹⁸ Malaysia has a population of 28.3 million as at

²⁹²O'Mahony, above n 7, at 233.

²⁹³McDonald and Tinsley, above n 255.

²⁹⁴At 302.

²⁹⁵O'Mahony, above n 273 at 78-79.

²⁹⁶McDonald and Tinsley, above n 255, at 312.

²⁹⁷At 310.

²⁹⁸Federal Constitution (Malaysia), art 1.

2010,²⁹⁹ while the population of New Zealand was 4,405,200 million as at 2011.³⁰⁰ In Malaysia the important legislation relevant to the proposed reform, namely the Criminal Procedure Code and the Evidence Act 1950, are federal law and therefore applicable to all the states and all ethnic communities.³⁰¹ In addition, it may be argued that the larger the population, the more crime likely to happen. Another potential problem of using this system concerns the perception of the jury and how their decision-making might be affected when an intermediary sits next to the accused in the dock.³⁰² I submit that this might not raise alarm in Malaysia, since it has no jury system and the judge is a sole decision maker. Therefore, the system could be more practical in Malaysia and the money and time spent to recruit professional intermediaries might be well worth while.

I also argue that even though the Code provides for the services of an interpreter,³⁰³ it merely offers help to an accused or witness who does not speak or understand the Malay language, as Malay is the official language of the court in Malaysia.³⁰⁴ The interpreter has no responsibility to go beyond that, i.e. to determine the accused's intellectual comprehension of the proceedings. Interpreters do not have the expertise to deal with vulnerable accused, who may not only have difficulty with translation from one language to another, but with more fundamental aspects of questions. Intermediaries are skilled in assisting vulnerable accused with more serious conditions to cope with the court's processes better. Similarly, in New Zealand the Evidence Act 2006 allows for "communication assistance."³⁰⁵ This is in compliance with the New Zealand Bill of Rights Act 1990.³⁰⁶ Nevertheless, the application of the assistance is limited to communication disabilities, for example those who have difficulty in understanding the questions. Therefore, there are recommendations that the interpretation of the term "communication assistance" in the New Zealand Evidence Act 2006 to be amended so that the assistance is available not only to those who have language barriers or a communication disability as defined under the law,³⁰⁷ but also includes witnesses or accused who might have difficulty in grasping the meaning of the questions put to them.³⁰⁸

Hence, the discussion in this section obviously shows the necessity of having proper communication aids for vulnerable accused who may have difficulty in understanding the court process in Malaysia. I therefore suggest that an intermediary may be the perfect role for this purpose.

²⁹⁹Department of Statistics, Malaysia "Preliminary Count Report, Population and Housing Census, Malaysia 2010" <www.statistics.gov.my>.

³⁰⁰ Statistics New Zealand "New Zealand in Profile: 2012" < www.stats.govt.nz>.

³⁰¹Salim Ali Farrar "Crime and Criminal Justice in Malaysia" in Jianhong Liu, Bill Heberton, Susyan Jou (eds) *Handbook of Asian Criminology* (Springer New York, New York, 2013) 231 at 231.

³⁰²O'Mahony, above n 7, at 236.

³⁰³Section 270.

³⁰⁴Federal Constitution, s 152(4) and (5).

³⁰⁵Section 80.

³⁰⁶Section 24(g).

³⁰⁷Section 4.

³⁰⁸McDonald and Tinsley, above n 255, at 313.

Next, I make recommendations for an intermediary service in Malaysia.

E Recommendations: Introduce an Intermediary Service to Vulnerable Accused who Choose to give Sworn Evidence in the Malaysian Criminal Trials

The intermediary system is one of the best assistance and worthy of consideration. This system is not new in Malaysia since it is available specifically to child witnesses. Therefore it is apparent that trained people in this field are available (although they may have specialised in working with children) and it is only a matter of expanding their services to vulnerable accused with some relevant training. Therefore, to provide a better criminal justice system, I recommend introducing an intermediary service for vulnerable accused in Malaysia.

1 Recommendation 1

For the detailed characteristics of the intermediary system, this dissertation proposes to follow the provision as found in the Coroners and Justice Act 2009³⁰⁹ in England and Wales, but with some modifications. The reason this particular statute is referred to, instead of s 8 of the Malaysian Evidence of Child Witness Act 2007 that deals with the provision of an intermediary, is because the former explains explicitly how the duties of an intermediary for an accused should be carried out. The proposed new provision could be incorporated under chapter XXIV of the Malaysian Criminal Procedure Code, which deals with the general provisions of inquiries and trials. It is also suggested that the new provision be inserted after the discussion regarding an accused who does not understand proceedings in s 258. The proposed provision is as follows:-

Section 258A Examination of accused through intermediary

(1) This section applies to any proceedings (whether in a magistrates' court or before the **High Court**) against a person for an offence.

(2) The court may, on the application of the accused, give a direction under subsection (3) if it is satisfied—

(a) that the conditions in **section 2 of the Code** are met in relation to a **vulnerable person**, and

(b) that making the direction is necessary in order to ensure that the accused receives a fair trial.

(3) A direction under this subsection is a direction that provides for any examination of the accused to be conducted through an interpreter or other person approved by the court for the purposes of this section (“an intermediary”).

³⁰⁹ Section 104.

(4) The function of an intermediary is to communicate—

- (a) to the accused, questions put to the accused, and
- (b) to any person asking such questions, the answers given by the accused in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the accused or the person in question.

(5) Any examination of the accused in pursuance of a direction under subsection (3) must take place in the presence of such persons and in circumstances in which—

- (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the accused and to communicate with the intermediary,
- (b) where there are two or more accused in the proceedings, each of the other accused is able to see and hear the examination of the accused.

For the purposes of this subsection any impairment of eyesight or hearing is to be disregarded.

(6) Where two or more legal representatives are acting for a party to the proceedings, subsection (5)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.

(7) A person may not act as an intermediary in a particular case except after making a declaration, that the person will faithfully perform the function of an intermediary.

(8) **Section 191 of the Penal Code** (giving false evidence) applies in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding

The modifications are as highlighted to accord with the Malaysian situation. The omission of subsection (5) and (6) of the Coroners and Justice Act 2009 is suggested because those subsections discuss the conditions of accused who may be eligible for intermediary assistance. However, this dissertation has suggested that the eligibility of the accused to use the service in Malaysia is determined by whether an accused falls under the definition of “vulnerable person” of the suggested provision in the Code as discussed in Chapter II of this dissertation.

2 *Recommendation 2*

My dissertation also proposes an additional provision be introduced in Malaysia. It is a provision as to how to identify vulnerable person who deserve the service of an intermediary. This has been an issue in England and Wales and there are views that it is useful to help the

vulnerable accused at an early stage; at the investigation process.³¹⁰ This would prevent unfairness to the vulnerable accused who is not identified sooner and eventually has to go through the same procedures as a normal accused. This dissertation proposes that the new provision should be inserted after s 112 of the Code, which deals with the examination of witnesses by the police. I argue that this proposal is in line with the proposed s 2 of the Code since it also deals with a witness who is vulnerable.³¹¹ The proposed new provision is as follows:

Section 112A Examination of witnesses by police in the presence of an intermediary.

(1) A person who falls under the definition of vulnerable person for the purpose of this Code is allowed to be examined by the police in the presence of an intermediary.

(2) Application for an intermediary may be made by the person or the person's counsel or a police officer of that police station

F Possible Benefit from the Amendment

If the Code is amended to allow an intermediary service to a vulnerable accused, I argue it helps the criminal justice system in Malaysia become more sound and fair. This is because to leave the vulnerable accused in court without proper assistance is highly prejudicial to them. They may not understand the court process as much as an accused without any disabilities would. Furthermore, the presence of an intermediary during the trial process would have a positive impact on the court and the prosecution. This is because they have no expertise to deal with accused with vulnerability. Therefore, it may be difficult for them to handle the situation if the accused becomes uncontrollable. In addition, it may also reduce the incidence of miscarriage of justice since there would be no fear that the vulnerable accused suffered from any mistreatment during the trial process. I also submit that a greater justice is served to the vulnerable accused/witness when a proper assistance is provided to them as early as at the stage of police investigation.

G Summary

I argue that the potential of an intermediary in Malaysia is not fully discovered. The reason is that it is apparent from the discussion above that this service is in fact available but is limited only to child witnesses. Therefore, I suggest that this service is also relevant to accused who are vulnerable, as is seen by other jurisdictions. It is time for the Malaysian legislature to be more active in protecting the interest of vulnerable accused, and one way to do so is to allow

³¹⁰ O Mahony, Milne and Grant, above n 249, at 311; O Mahony, above n 7, at 236.

³¹¹ See page 10 of this dissertation.

an intermediary service for vulnerable accused. To this effect, I suggested in this Chapter that the Code be amended to allow an intermediary service for vulnerable accused/suspects pre-trial and during trial.

Besides providing physical assistance to vulnerable accused, it is also important to make sure the psychological aspects of the accused are well taken care of. This is because vulnerable accused may be more comfortable to go through the court process with adequate support. Hence, in the next Chapter I propose that a support person be made available to vulnerable accused, if the court thinks it is proper.

VI *Other Modes of Assistance: Support Persons*

A vulnerable accused may not only physically but also emotionally and mentally fragile. The provision of useful assistance to address this issue may be beneficial not only to the accused, but also to everyone involved in the court proceedings. This is because it may help the smooth running of the court trial. Therefore, in this Chapter, I discuss emotional assistance to vulnerable accused through a support person. The presence of a support person may help the vulnerable accused to be more comfortable during the court proceedings.

In Part A, I discuss the functions of a support person and how such a person may help the vulnerable accused. I also explain that a rather similar assistance is also available in Malaysia but it only benefits the child witness. Due to the benefits that could be derived from this assistance in terms of emotional support to vulnerable accused, in Part B I propose a provision on support persons for vulnerable accused that I recommend be inserted into the Code.

A *Support Persons*

The law in New Zealand allows a support person to accompany a complainant or a witness when giving evidence in court.³¹² The provision of a support person may be extended to an accused with the permission of the judge.³¹³ Although the function of the support person is not very different from the role of an Appropriate Adult as available in England and Wales, the difference is that for the latter, such assistance is for a suspect pre-trial. Meanwhile, in New Zealand, the role of support persons is rather concerned with supporting the emotional and psychological well-being of a vulnerable witness or accused at trial. This may create a more comfortable environment for them when giving evidence in court. Nevertheless, the support person is not allowed to interfere during the trial process. The role of a support person is well-defined by the New Zealand Law Commission as:³¹⁴

The function of a support person is solely to help reduce stress or trauma for the witness and does not include giving advice or prompting. A support person cannot take the role of a McKenzie friend – that is, provide advice or assistance in court to an unrepresented litigant, as such assistance goes beyond mere support. A support person should not speak with the witness unless the judge gives permission.

A quite similar provision is also seen in New South Wales, Australia. Its Criminal Procedure Act 1986 also provides for a support person to be present when a vulnerable person in giving

³¹² Evidence Act 2006(NZ), s 79.

³¹³ Section 79(2); *TeWini v R*, above n 263; Robertson, above n 137, at [EA79.02].

³¹⁴ Law Commission *Evidence Code and Commentary* (NZLC R55, Vol 2) at 199.

evidence in court.³¹⁵ I submit that the law in Malaysia does provide for a presence of an adult as company in any of the proceedings, but it is only applicable to a child witness.³¹⁶ As with the intermediary service, this assistance is also not allowed for child accused.³¹⁷ I submit that this situation is not surprising because if very little attention is given to the physical needs of the vulnerable accused at trial, then it might be difficult to expect the justice system to provide for emotional support for them. Even though the statute in Malaysia does not use the word “support person” or “Appropriate Adult”, the role of the adult mentioned in the provision is similar; to make the child witness more comfortable when giving evidence in court. I also argue that the support of an adult should also be extended to a vulnerable accused. This is because accused of this nature often have trust issues. They may be comfortable only when around people they are used to. To have an adult close to them during the trial process may at least give a sense of comfort to them. Therefore, I find this assistance is very useful towards their emotional well-being.

The reason I consider it is useful to introduce a support person into the Malaysian legislation is because, even though the court would allow an intermediary to assist the vulnerable accused in the trial process (if the law is amended accordingly), that function does no more than ensure the questions are put in a manner that can be understood by the vulnerable accused. Furthermore, there may be a trust issue since the accused does not know the parties involved in the proceedings. To have someone who is close to the accused and allowed to sit next to them might help them to settle more calmly in the proceedings. This is a fair approach.

B Recommendation: Provision for Support Persons

It is time for Malaysian criminal justice to consider reform in its justice system to include a support person in criminal proceedings. Vulnerable accused persons need do not only physical assistance, but also psychological assistance. These accused come from different backgrounds from normal individuals. They may have trust issues that can be overcome only by having persons that they are comfortable with around them. However, my dissertation does not suggest that every vulnerable accused needs such help. This support person should be available only to accused who need psychological support.

Since quite similar support is available in s 9 of the Evidence of Child Witness Act 2007 in Malaysia, I submit that the proposed provision for the accused in the Code should follow that source. However, some modifications of the provision will be made by making reference to s 79 of the New Zealand Evidence Act 2006 and s 306ZK of the Criminal Procedure Act 1986

³¹⁵ Criminal Procedure Act 1986(NSW), s 306ZK.

³¹⁶ Evidence of Child Witness Act 2007(Malaysia), s 9.

³¹⁷ Section 2.

of New South Wales. These are good combinations of legislation to achieve an effective provision regarding a support person. Section 9(3) of the Evidence of Child Witness Act 2007 explains clearly the restriction to the support person when accompanying a child witness in court. The New Zealand law states only generally that the court will give directions on how this support person operates. However, the requirement to disclose the information of the support person to all the parties involved, as required by the New Zealand law in s 79(4), is absent in the Malaysian law. I further suggest application of the requirement in s 306ZK (2) of the Criminal Procedure Act 1986 in New South Wales because that subsection explains explicitly that vulnerable persons are permitted to choose who is the support person that they would like to accompany them. Rationally, a support person has to be someone that the vulnerable persons are comfortable to be with, hence by making it clear in the statute that the choice is the vulnerable person's, is a good approach. This newly proposed provision may be known as s 258B of the Code. Therefore, taking into account all the necessary elements of the provision, I propose the new provision as follows:

Section 258B Support persons

- (1) The Court may allow a **vulnerable person** to be accompanied by a support person while giving evidence in any proceedings.
- (2) The Court may permit more than one **support person** to accompany the **vulnerable person** if the Court considers it in the interests of justice to do so.
- (3) **A vulnerable person who gives evidence in a proceeding to which this section applies is entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence.**
- (4) A **support person** accompanying the **vulnerable person** shall not—
 - (a) prompt the **vulnerable person** to answer any question;
 - (b) influence the answers of the **vulnerable person** ; or
 - (c) disrupt the questioning of the **vulnerable person**.
- (5) **Despite subsections (1) and (2), the Court may, in the interest of justice, direct that support may not be provided to a vulnerable person by—**
 - (a) any person; or
 - (b) a particular person.
- (6) **A vulnerable person who is to have a support person near him or her while giving evidence must, unless the Court orders otherwise, disclose to all parties as soon as practicable the name of each person who is to provide that support.**

The modifications from s 9 of the Malaysian Evidence of Child Witness Act 2007 are as highlighted. Since I suggest this provision should be inserted into the Code, the words “child witness” in the original provision will be replaced with the words “vulnerable person” for the purpose of the Code. Meanwhile the word “adults” will be replaced with the words “support

person”. It may be a good approach if the proper term is introduced into the statute. I submit that if the provision is amended to replace the words “an adult” with “support person”, it may have a better impact on the provision. The term “support person” is self-explanatory of its function, while “an adult” is rather vague. The elements that I proposed in this provision would ensure that justice is served to other parties in the proceeding as well. This is because, as seen in subsection (6), the other parties will have knowledge of who is the support person allowed by the court to accompany the vulnerable accused. Furthermore, the functions as mentioned in subsection (4) do not allow any participation or influence over evidence given. In addition, even though subsection (3) gives permission to the vulnerable person to choose the support person to be with them while giving evidence, subsection (5) gives wide power to the court to eliminate a support person if the court believes, in the interest of justice that there is an abuse of the process by the support person or the vulnerable person.³¹⁸

C Possible Benefit from the Amendment

It may not be too overstated to submit that a support person is the most important assistance a vulnerable accused would wish for. The environment in a criminal trial proceeding can be very intimidating. The presence of a support person may build a vulnerable person’s confidence in the trial process. This may make things a lot easier for the other parties in the proceedings as well since, when a vulnerable accused is calm and confident, the questioning process may also be trouble-free. This allows the parties to focus on their own duties rather than be concerned with the accused’s unstable emotions.

³¹⁸Robertson, above n 137, at [EA79.03].

VII Conclusion

As discussed above, it is apparent that relevant methods of assistance for vulnerable witnesses are available in the Malaysian criminal justice system. However, the scope of the assistance is very narrow, and focuses only on child witnesses. It is an undeniable fact that a child is vulnerable and requires protection, but there are other groups of people that fall within the same category of vulnerability. This might include an accused person. The failure of the justice system to recognise the need to provide extra assistance to a vulnerable accused occurs because of a lack of understanding of the definition of a vulnerable accused person in Malaysia. I argue that if there is awareness by the relevant authorities to address this issue, there are great possibilities for the relevant assistance to be provided to vulnerable accused. Therefore, after discussing the laws in other Commonwealth jurisdictions in respect of the protections available to the disadvantaged and vulnerable accused in a criminal trial, it is clear that there are flaws in Malaysian law, which is therefore in need of review. Not only are some laws and procedures lacking compliance with overseas approaches, but I consider that they are also unfair and out-dated.

The RUS and RRS provided in the Malaysian laws are no longer relevant in the way they are utilised currently. The general application of the RUS has caused the right to become abused by irresponsible accused. Meanwhile, automatic conviction if the accused chooses to remain silent as provided for by the law is actually undermining the spirit of the right. Evidently, this situation is suppressing an accused who is vulnerable. Therefore, in order to produce a better justice system and to provide fairness to less fortunate accused, amendments to the law in Malaysia are crucial.

To remedy the situation, I propose the definition of the term “vulnerable person” is clearly spelled out in s 2 of the Code. This amendment might highlight the need to provide further relevant assistance for vulnerable accused in the future. My dissertation also proposes that the RUS is retained in Malaysia but the characteristics of the right should be modified to suit the current practice. It is proposed that the unsworn statement should only be available to a vulnerable person who demonstrates he or she might have difficulty in engaging with the court process. I propose a new provision be inserted into the Malaysian Evidence Act 1950 to incorporate the conditions that have to be fulfilled by the accused before an unsworn statement can be made in court. This new provision is known as s 118A. In addition, s 3 of the Evidence Act 1950 needs to be amended to clarify that the unsworn statement falls within the meaning of evidence. This could have a positive contribution to the law of evidence in Malaysia since it might resolve the debate regarding the evidential value of the unsworn statement. I further recommend the amendment of s 173(ha)(ii) of the Code to apply the restriction clearly to the application of the RUS. This amendment could also expedite the disposal of criminal cases since judges could exercise their judicial time more effectively. This might happen because the application of the RUS is limited. Currently, Malaysian

judges have no choice but to allow any accused person to give an unsworn statement if he or she chooses to do so. This could lead to a backlog of cases in Malaysian criminal court since time has to be spent hearing the statement from the dock, which could take hours of the court's time. A limitation of the RUS to those who are vulnerable, and putting beyond doubt its status as evidence, will act to rectify some of the efficiency issues resulting from the operation of what is now a broad, uncertain right.

I also propose s 173(ha)(iii) of the Code be amended by the insertion of a proviso for adverse inference. This will allow the court to give proper warning to the accused, particularly vulnerable accused, of the effect of remaining silent during trial. I suggest this is a fair approach since the accused is alerted to the outcome of the choice that he or she makes.

It is further recommended that an intermediary service be introduced into the Code for vulnerable accused who choose to give sworn evidence in court. This is a practical method since it might allow the vulnerable accused to give evidence in a proper manner. For this reason, I recommend the insertion of a new provision known as s 258A to allow intermediary assistance to vulnerable accused during trial. I also suggest the inclusion of a provision for intermediary assistance during police investigations in s 112A of the Code. This is to ensure a vulnerable person receives appropriate treatment throughout the process. Then, I also propose a support person be available for the vulnerable accused at trial, should the accused so wish. This is important because some vulnerable accused suffer from emotional and psychological disorders. To have someone that they can trust may help them to cope better in court. The new provision is to be inserted after the provision that deals with an intermediary service in the Code. It is known as s 258B of the Code.

It is an indisputable fact that disadvantaged and vulnerable accused will feel intimidated by legal procedures no matter how detailed the legislation that is drafted to protect their interests.³¹⁹ Therefore, no matter how well a law is drafted, it can never be perfect. However, the recommendations in this dissertation might help to produce a better criminal justice system in Malaysia. This is important, since it cannot be denied that the resources available to the prosecution outweigh those available to the defence.³²⁰ Hence, the reforms I suggest could at least minimise the inequality of arms between the prosecution and the accused.

Although a man-made law can never be perfect, a sound and justifiable law is close to perfection in the eyes of the people. Hence, it is the basic aim of this dissertation to humbly propose amendments to the Malaysian law to provide more efficient and effective rights to the vulnerable accused, who deserve to be treated fairly by the law. Lord Woolf CJ explains:³²¹

³¹⁹Bates, above n 140, at 303.

³²⁰ Andrew Sanders, Richard Young and Mandy Burton *Criminal Justice* (4th ed, Oxford University Press, New York, 2010) at 580.

³²¹ *R v B* [2003] 2 Cr App R 197 at 204.

At the heart of our criminal justice system is the principle that while it is important that justice is done to the prosecution and justice is done to the victim, in the final analysis the fact remains that it is even more important that an injustice is not done to a defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted.

Appendix (Statutory Suggestions According to Chapters)

II Vulnerable Person in the Context of Criminal Trial

A Malaysian Criminal Procedure Code

Section 2. Interpretation

(2) In this Code-

"vulnerable person" means a witness or accused person who is a child or cognitively impaired of any age. For the purpose of this Code, a "cognitive impairment" includes any of the following:

- (a) an intellectual disability,
- (b) a developmental disorder (including an autistic spectrum disorder),
- (c) a neurological disorder,
- (d) dementia,
- (e) a mental disorder (has the same meaning as s 2 of the Mental Health Act 2001),
- (f) a brain injury.

III Current Protection: A Critical Analysis of the Rights to give an Unsworn Statement in Malaysian Criminal Trials

A Malaysian Evidence Act 1950

Section 3. Interpretation

"evidence" includes—

- (a) all statements, including an unsworn statement, which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;
- (b) all documents produced for the inspection of the court: such documents are called documentary evidence;

Section 118A

Reception of unsworn statement.

(1) Subsections (2) and (3) apply to a person (of any age) who—

(a) is competent to give evidence in criminal proceedings, but

(b) by virtue of section 118 is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings or who falls within the meaning of a vulnerable person in s 2 of the Criminal Procedure Code.

(2) The statement in criminal proceedings of a person to whom this subsection applies shall be given unsworn from the dock and no cross-examination is allowed.

(3) A deposition of unsworn statement given by a person to whom this subsection applies may be taken for the purposes of criminal proceedings as if that statement had been given on oath.

(4) A court in criminal proceedings shall accordingly receive in evidence any statement given unsworn in pursuance of subsection (2) or (3).

(5) Where a person (“the witness”) who is competent to give evidence in criminal proceedings gives a statement in such proceedings unsworn, no conviction, a verdict or finding in those proceedings shall be taken to be unsafe for the purpose of sections 307 of the Criminal Procedure Code (procedure for appeal) by reason only that it appears to the Appellate Court that the witness was a person competent to testify section 118 (and should accordingly have given his evidence on oath).

Section 118B

Penalty for giving false unsworn statement

(1) If such a person wilfully gives false statement in such circumstances that, had the evidence been given on oath, he would have been guilty of perjury, he shall be guilty of an offence and liable on summary conviction under s 14 of the Oaths and Affirmations Act 1949.

B Malaysian Criminal Procedure Code

Section 173. Procedure in summary trials.

The following procedure shall be observed by Magistrates in summary trials:

(ha) When the Court calls upon the accused to enter on his defence under

subparagraph (h)(i), the Court shall read and explain the three options to the accused which are as follows:

- (i) to give sworn evidence in the witness box;
- (ii) to give unsworn statement from the dock (subject to the conditions set out in section 118 of the Evidence Act); or
- (iii) to remain silent.

IV Current Protection: Right to Remain Silent

A Malaysian Criminal Procedure Code

Section 173(ha)

(iii) to remain silent.

“if you elect not to give evidence in the witness box, that is to say, remain silent, then I must tell you that the court in deciding whether you are guilty or not, may draw such inferences as appear proper from your refusal to give evidence, including inferences that may be adverse to you.

Let me also say, whichever course you take, it is open to you to call other evidence in your own defence. You may confer with your counsel on the course you wish to take.

I now call upon you to give evidence in your own defence. How do you elect?”

V Alternative Approach: Introduction of an Intermediary System for Vulnerable Accused in the Malaysian Criminal Trial

A Malaysian Criminal Procedure Code

Section 112A Examination of witnesses by police in the presence of an intermediary.

(1) A person who falls under the definition of vulnerable person for the purpose of this Code may be allowed to be examined by the police in the presence of an intermediary.

(2) Application for intermediary may be made by the person or the person’s counsel or a police officer of that police station

Section 258A Examination of accused through intermediary

(1) This section applies to any proceedings (whether in a magistrates' court or before the High Court) against a person for an offence.

(2) The court may, on the application of the accused, give a direction under subsection

(3) if it is satisfied—

(a) that the conditions in section 2 of the Code are met in relation to a vulnerable person, and

(b) that making the direction is necessary in order to ensure that the accused receives a fair trial.

(3) A direction under this subsection is a direction that provides for any examination of the accused to be conducted through an interpreter or other person approved by the court for the purposes of this section (“an intermediary”).

(4) The function of an intermediary is to communicate—

(a) to the accused, questions put to the accused, and

(b) to any person asking such questions, the answers given by the accused in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the accused or the person in question.

(5) Any examination of the accused in pursuance of a direction under subsection (3) must take place in the presence of such persons and in circumstances in which—

(a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the accused and to communicate with the intermediary,

(b) where there are two or more accused in the proceedings, each of the other accused is able to see and hear the examination of the accused.

For the purposes of this subsection any impairment of eyesight or hearing is to be disregarded.

(6) Where two or more legal representatives are acting for a party to the proceedings, subsection (5)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.

(7) A person may not act as an intermediary in a particular case except after making a declaration, that the person will faithfully perform the function of an intermediary.

(8)Section 191 of the Penal Code (giving false evidence) applies in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding

VI Other Modes of Assistance: Support Persons

A Malaysian Criminal Procedure Code

Section 258B Support persons

- (1) The Court may allow a vulnerable person to be accompanied by a support person while giving evidence in any proceedings.
- (2) The Court may permit more than one support person to accompany the vulnerable person if the Court considers it in the interests of justice to do so.
- (3) A vulnerable person who gives evidence in a proceeding to which this section applies is entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence.
- (4) A support person accompanying the vulnerable person shall not—
 - (a) prompt the vulnerable person to answer any question;
 - (b) influence the answers of the vulnerable person ; or
 - (c) disrupt the questioning of the vulnerable person.
- (5) Despite subsections (1) and (2), the Court may, in the interest of justice, direct that support may not be provided to a vulnerable person by—
 - (a) any person; or
 - (b) a particular person.
- (6) A vulnerable person who is to have a support person near him or her while giving evidence must, unless the Court orders otherwise, disclose to all parties as soon as practicable the name of each person who is to provide that support.

Bibliography

Primary Sources

A *Cases*

1 New Zealand

Auckland City Council v Jenkins [1981] 2 NZLR 363.
Barton v R [2012] NZLJ 269 .
Blake v R [2010] NZCA 61.
Condon v R [2007] 1 NZLR 300.
Davis v R [2011] NZCA 380.
F v R (Court of Appeal CA 211/00, 16 August 2000).
R v Accused (1995) 13 CRNZ 301.
R v B [2003] 2 Cr App R 197.
R v Daniel [2007] NZCA 15.
R v K [1995] 2 NZLR 440.
R v Kaukasi (Minute No 5) HC Auckland T014047, 4 July 2002.
R v McCarthy [1992] 2 NZLR 550 (CA).
R v Roberts (No 2) HC Auckland CRI-2005-092-14492, 22/11/06.
R v Wanhalla [2007] 2 NZLR 573(CA).
R v Woodhouse CA117/06, 12 October 2006.
SR v R [2011] NZCA 409, [2011] 3 NZLR 638.
Te Wini v R [2011] NZCA 405.

2 Australia

Azzopardi v The Queen[2001] 205 CLR 50; 119 A Crim R 8.
Eastman v R [2000] HCA 29.
Pretty v The Queen(1991) 173 CLR 95.
R v Kilby [1970] 1 NSW 158.
RPS v The Queen (2000) 199 CLR 620; 74 ALJR 449; [2000] HCA 3.
R v Sexton (2000) 77 SASR 405.
Sorgenfrie v The Queen [1981] 51 FLR 147(FC).
Stuart v The Queen (1959) 101 CLR 1.
Weissensteiner v The Queen (1993) 178 CLR 217.

3 *England and Wales*

DPP v Kilbourne [1973] AC 729(HL).
Hall v R [1971] 1 All ER 3.
Haw Tua Tau [1981] 3 All ER 14.
Public Prosecutor v Yuvaraj [1970] 2 WLR 226.
R v Bathurst [1968] 2 QB 99.
R v Becouarn [2005] UKHL 55.
R v Howell [2003] Crim L R 405.
R v Pope [1902] 18 TLR 717.
R v Pritchard (1836) 7 Car & P 303,(1836) 173 ER 135.
R v Walls [2011] EWCA Crim 443.
Stephens [2002] EWCA Crim 1529.
Woolmington v DPP [1935] AC 462(HL).

4 *Europe*

Heany and McGuinness v Ireland (2001) 33 EHRR 12.
Jalloh v Germany (2007) 44 EHRR 32.
Murray v. UK, (1996) 22 EHRR 29.
Salabiaku v France (1988) 13 EHRR 379.
Saunders v United Kingdom(1997) 23 EHRR.

5 *Malaysia*

Ahmad Faizal bin Aulad Ali &Ors v Public Prosecutor [2010] 2 MLJ 547.
Ahmad Najib bin Aris v Public Prosecutor [2009] 2 MLJ 613.
Arulpragasam Sandaraju v Public Prosecutor [1997] 1 MLJ 597(FC).
Azahan Bin Mohd Aminallah v Public Prosecutor [2005] 5 MLJ 334(CA).
Er Ah Kiat v Public Prosecutor [1965] 2MLJ 238 (FC).
Ghazalee bin Kassim & Ors v Public Prosecutor and other appeals [2008] 3 MLJ 473.
Haw Tua Tau v Public Prosecutor [1981] 2 MLJ 49(PC).
Khoo Hi Chiang v Public Prosecutor and Another Appeal [1994] 1 MLJ 265 (SC).
Looi Kow Chai &Anor v Public Prosecutor [2003] 2 MLJ 65.
Mohamed Salleh v PP [1969] 1MLJ 104 (FC).
Ng Hoi Cheu v Public Prosecutor[1968] 1 MLJ 53(HC).
Public Prosecutor v Azilah bin Hadri&Ors [2012] 8 MLJ 222(HC).
Public Prosecutor v Dato' Seri Anwar Ibrahim [Criminal Trial No: 45-9-2009].
Public Prosecutor v Ishak bin Ahmad [2013] 7 MLJ 616.
Public Prosecutor v Ismail Bin Ibrahim [1998] 3 MLJ 243.
Public Prosecutor v Misbah bin Saat[1997] 3 MLJ 495.

Public Prosecutor v Othman bin A Aziz [2013] 7 MLJ 650(HC).

Public Prosecutor v Saare Hama & Anor [2001] 4 MLJ 480.

Public Prosecutor v Sanassi [1970] 2 MLJ 198(HC).

Public Prosecutor v Shariff Kadir [1997] 5 CLJ 463.

Suhaime bin Haji Serat v Reg [1956] 1 MLJ 252.

6 *United States*

United States v Garsson 291 F 646 (SD NY 1923).

B *Legislation*

1 *New Zealand*

Crimes Act 1961.

Crimes Amendment Act 1966 (1966 No 98).

Criminal Justice Act 1985.

Criminal Procedure (Mentally Impaired Persons) Act 2003.

Evidence Act 2006.

Evidence Act 2006(2006 No 69).

Summary Proceedings Amendment Act 1973.

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

Mental Health (Compulsory Assessment and Treatment) Act 1992.

New Zealand Bill of Rights Act 1990.

2 *Australia*

Crimes Act 1900 (ACT).

Criminal Code Act 1995 (Cth).

Criminal Code (NT).

Criminal Code of Queensland (former statute).

Criminal Justice (Mental Impairment) Act 1999 (Tas).

Criminal Law Consolidation Act 1935 (SA).

Criminal Law (Mentally Impaired Accused) Act 1996 (WA).

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997(Vic).

Criminal Procedure Act 1986(NSW).

Evidence Act 2011(ACT).

Evidence Act 1995 (Cth).

Evidence Act 1995 (NSW).

Evidence Act 1977(Qld).

Evidence Act 1929 (SA).

Evidence Act 2001(Tas).

Evidence Act 2008 (Vic).

Evidence Act 1906(WA)

3 *England and Wales*

Criminal Evidence Act 1898.

Coroners and Justice Act 2009.

Criminal Justice Act 1982.

Criminal Justice and Public Order Act 1994.

Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

Perjury Act 1911.

Police and Criminal Evidence Act 1984.

Youth Justice and Criminal Evidence Act 1999.

4 *Malaysia*

Aboriginal Peoples Act 1954.

Criminal Procedure Code (Amendment) Act 1997.

Criminal Procedure Code (Amendment) Act 2006.

Criminal Procedure Code.

Evidence Act 1950.

Evidence of Child Witness Act 2007.

Federal Constitution.

Mental Health Act 2001.

Oaths and Affirmations Act 1949.

Penal Code.

Persons with Disabilities Act 2008.

5 *Singapore*

Criminal Procedure Code 2010.

Statutes (Miscellaneous) (Amendment) Act 1997.

Secondary sources

C *Books and Chapters in Books*

Mark I Aronson, Jill B Hunter and Mark S Weinberg *Litigation Evidence & Procedure* (4th ed, Butterworths, Sydney, 1988).

Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, 2006)

Andrew Ashworth and Mike Redmayne *The Criminal Process* (4th Ed, Oxford University Press, Oxford, 2010).

Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011).

M E Casey *Garrow and Casey's Principles of the Law of Evidence* (8th ed, Butterworths, Wellington, 1996).

Andrew L-T Choo *Evidence* (Oxford University Press, New York, 2006).

Susan Easton *The Case for the Right to Silence* (The Academic Publishing Group, England, 1991).

Salim Ali Farrar "Crime and Criminal Justice in Malaysia" in Jianhong Liu, Bill Heberton, Susyan Jou (eds) *Handbook of Asian Criminology* (Springer New York, New York, 2013).

Chris Gallavin *Evidence* (Lexis Nexis, Wellington, 2008).

R H Helmholz "Introduction" in R H Helmholz and others (eds) *The Privilege Against Self-incrimination* (The University of Chicago Press, London, 1997).

William C Hodge Doyle and Hodge *Criminal Procedure in New Zealand* (3rd ed, The Law Book Company Limited, Sydney, 1991).

John H Langbein "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries" in R H Helmholz and others (eds) *The Privilege Against Self-incrimination* (The University of Chicago Press, London, 1997).

A L C Ligertwood *Australian Evidence* (Butterworths, Sydney, 1988).

Richard Mahoney & others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010).

Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012).
Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

Jenny McEwan *Evidence and the Adversarial Process The Modern Law* (Blackwell Business, Oxford, 1992).

R A McGechan *Garrow and McGechan's Principles of the Law of Evidence* (7thed, Butterworths, Wellington, 1984).

Peter Murphy *Murphy on Evidence* (10th ed, Oxford University Press, New York, 2008).

Janet November *Burdens and Standards of Proof in Criminal Cases* (Butterworths, Wellington, 2001).

Stephen Odgers *Uniform Evidence Law* (10thed, Thomson Reuters, Sydney, 2012).

Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nded, Oxford University Press, New York, 2010).

Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers).

Andrew Sanders, Richard Young and Mandy Burton *Criminal Justice* (4thed, Oxford University Press, New York, 2010).

Philip C. Stenning *The Modern Prosecution Process in New Zealand* (Victoria University Press, Wellington, 2008).

P K Waight and C R Williams *Cases & Materials on Evidence* (2nded, The Law Book Company, Sydney, 1985).

Journal Articles

Wendy Amigo “Uncorroborated Confessions: Recent Decisions in the New South Wales Court of Criminal Appeal”(1979) 3 UNSWLJ 321.

Hadar Aviram “ Packer in Context: Formalism and Fairness in the Due Process Model” (2011) 36 L & Soc Inquiry 237.

Abdul Aziz Bari “The Indigenous Roots of the Malaysian Constitution- The Provisions and the Implications: (2008) 6 CLJ(A) xxxiii.

Mose E Boiarsky “The Right of the Accused in a Criminal Case not to be Compelled to be a Witness Against Himself”(1929) 35 WVLQ 126.

David Brown “Silencing in Courts: The Abolition of the Dock Statement in New South Wales”(1994) 6 CICJ 158.

Phil Bates “The Youth Justice and Criminal Evidence Act - The Evidence of Children and Vulnerable Adults” (1999) 11 CFLQ 289.

Richard Crant and Penny Standen “What Professionals Think about Offenders with Learning Disabilities in the Criminal Justice System” (2007) 35 British Journal of Learning Disabilities 174.

Ian Dennis “Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-incrimination” (1995) 54 Cambridge LJ 342

Jonathan Doak “Confrontation in the Courtroom: Shielding Vulnerable Witnesses from the Adversarial Showdown” (2000) 5 J Civ Lib 296.

Frank H Easterbrook “Substance and Due Process”[1982] Sup Ct Rev 85.

Louise Ellison “The Mosaic Art? Cross-examination and the Vulnerable Witness” (2001) 21 LS 353.

Salim Ali Farrar “The ‘New’ Malaysian Criminal Procedure: Criminal Procedure (Amendment) Act 2006” (2009) 4 Asian Criminology 129.

Choong Kwai Fatt “The Prima Facie Test Merry-Go-Round” (2009) 1 MLJA 163.

Abraham S Goldstein “The State and the Accused: Balance of Advantage in Criminal Procedure”(1960) 69 Yale L J 1149.

Jerald Gomez “Rights of Accused Persons – Are Safeguards being Reduced?” (2004) 1 MLJA 20

R Kent Greenwalt “Silence as a Moral Constitutional Right” (1981) 23 Wm & Mary L Rev 15.

Kirsten Hanna and others “Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models in New Zealand” [2012] Australian and New Zealand Association of Psychiatry, Psychology and Law 1.

Scott Henchcliffe “The Silent Accused at Trial- Consequences of an Accused’s Failure to Give Evidence in Australia”(1997) 12 UQLJ 137.

Stanley Yeo Meng Heong “My Lord, the Defendant Chooses to Remain Silent”(1981) 23 Malaya L Rev 237.

J D Heydon “Current Trends in the Law of Evidence” (1977) 8 Syd L Rev 305.

Michael Hor “The Persistent Problem of the Prosecutor’s Prima Facie Burden” [1997] 9 S Ac L J 388.

Ahmad Ibrahim “Unsworn Statement from the Dock”[1975] 2 MLJ vi.

John Jackson “Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard” (2009) 58 ICLQ 835.

Abdul Rani bin Kamarudin “Rights of an Arrested Person to Counsel: Is It Not a Case of Too Little Too Late?” (2006) 2 MLJA 94.

Mark R Kebbell, Christopher Hatton and Shane D Johnson “Witnesses with Intellectual Disabilities in Court: What Questions are Asked and What Influence do They Have?” (2004) 9 Legal and Criminological Psychology 23.

Chan Sek Keong “The Criminal Process- The Singapore Model” [1996]17 Sing L Rev 433

Michael Kirby” Black and White Lessons for the Australian Judiciary”(2002) 23 Adel L Rev 195.

Roger Leng “The Right to Silence Reformed: A Re-Appraisal of the Royal Commission’s Influence” [2001] 6 J Civ Lib 107.

Shmuel Leshem “The Benefits of A Right to Silence for the Innocent” (2010) 41 The Rand Journal of Economics 398.

Leveson “Criminal Justice in the 21th Century”(2012) 1LNS(A)xix.

K H Marks ““Thinking Up”” about the Right of Silence and Unsworn Statements” [1984] LIJ 360.

Jenny McEwan “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999” (2000) 4 Int’l J Evidence & Proof 1.

Bron McKillop “The Position of Accused Persons Under the Common Law System in Australia (More Particularly in New South Wales) and the Civil Law System in France”(2003) 26 UNSWLJ 515.

Mohd Akram b Shair Mohamed “The Evidential Value of an Accused’s Unsworn Statement from the Dock”(2003) 1 MLJA 169.

James Mullineux “Re-examining the Common Law Right of an Accused not to Testify”(2001) 12 Crim LF 359.

Brendon M O’Mahony “Accused of Murder: Supporting the Communication Needs of a Vulnerable Defendant at Court and the Police Station” (2012) 2 Journal of Learning Disabilities and Offending Behaviour 77.

Brendan M O’Mahony “The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary” (2009)38 British Journal of Learning Disabilities 232.

Brendan M O’Mahony, Becky Milne and Tim Grant “To Challenge, or not to Challenge? Best Practice when Interviewing Vulnerable Suspects” (2012) 6 Policing 301.

Brendan M O'Mahony, Kevin Smith and Becky Milne "The Early Identification of Vulnerable Witnesses Prior to an Investigation Interview" (2011) 13 British Journal of Forensic Practice 114.

Timothy P O'Neil "Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-The-Record Waiver" (1989) 51 U Pitt L Rev 809.

Gregory W O'Reilly "England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice"(1994) 85 J Crim L & Criminology 402.

Herbert L Packer "Two Models of the Criminal Process" (1964) 113 U Pa L Rev 1.

S Augustine Paul "Dock Statement – Reality or Myth" (1991) 2 CLJ xli.

G L Peiris "Law enforcement and Protection of the Rights of the Accused: A Comparative Analysis of Modern Legal Systems" (1980) 22 Malaya L Rev 238.

Anita Abdul Rahim "The Plea of Insanity and Diminished Responsibility Under the Malaysian and the English Criminal Law: A Comparative Approach" (2011) 1 LNS (A) liv.

Law Reform *Criminal Law and Procedure Australia-Victoria* (1986) 12 CLB 446

Mike Redmayne "Rethinking the Privilege against Self-incrimination" (2007) 27 Oxford J Legal Stud 209.

Kent Roach "Four Models of the Criminal Process" (1999) 89 J Crim L & Criminology 671.

Kent Roach *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*(University of Toronto Press, Canada, 1999).

Harbajan Singh "Reform in the Law of Evidence: Some Observations" (1975) 17 Malaya L Rev 160.

Linda J Skitka and David A Houston "When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocent"(2001)14 Social Justice Research 305.

Adam Sutton and Nick Koshnitsky "Comment on the Naffin Rape Inquiry The Case for Empirical Studies"(1984) 9 LSB 162.

Joyce Chao Suling "Singapore Legislation Digest of Acts Passed Between March and September 1997"(1997) 9 SAcLJ 433.

Wayne T Westling "Anglo-Australian Criminal Procedure the Right of Silence" (1975) 7 Tex Tech L Rev 1.

C R Williams "Silence and the Unsworn Statement: An Accused's Alternatives To Giving Sworn Evidence" (1976)10 Melb U L Rev 481.

Glanville Williams "The Tactic of Silence" (1987) 137 NLJ 1107.

Wan Wai Yee “”Right of Silence” and Drawing of Adverse Inference on the Accused’s Refusal to Testify at Trial” [1996] 17 Sing L Rev 88.

A A S Zuckerman “Criminal Law Revision Committee 11th Report, Right of Silence” (1973) 36 MLR 509.

Parliamentary and Government Materials

(15 June 1966) 346 NZPD 490.

(13 July 2006) 46 MPD HR.

(18 July 2006) 48 MPD HR.

Reports

(English) Criminal Law Revision Committee, Eleventh Report *Evidence* (Command Paper No.4991, 1972).

Home Office *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998).

Law Reform Commission *Criminal Procedure: Unsworn Statements of Accused Persons* (NSWLRC R45, 1985).

Law Reform Commission *The Right to Silence*, (NSWLRC R95, 2000).

Law Reform Commission *Sworn and Unsworn Evidence* (ALRC R26, 1985).

Law Reform Commission *Recognition of Aboriginal Customary Laws*(ALRC R31, 1986).

Law Reform Commission *The Right to Silence* (NSWLRC DP 41,1998).

Law Commission *Evidence: Reform of the Law* (NZLC R55, Vol 1, 1999).

Law Commission *Evidence Reform of the Law* (NZLC R55 Vol 2, 1999).

Law Commission *Evidence Code and Commentary* (NZLC R55, Vol 2).

Law Reform Commission *Sworn and Unsworn Evidence* (ALRC SP6, 1982).

Royal Commission on Criminal Procedure (Command Paper No. 8092, 1981).

Law Reform Committee *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (VLRC PP216, 2013).

Law Reform Commission *Unsworn Statements in Criminal Trials* (VLRC R2,1985).

Jenny Talbot *Fair Access to Justice?*(The Prison Reform Trust, June 2012).

Internet Resources

Judicial Commission of New South Wales “Bench Book” <www.judcom.nsw.gov.au/bench-books> .

Jennie Curtin “Govt Urged to End Unsworn Statements” *The Sydney Morning Herald* (online ed, Australia, 5 June 1992).

Department of Statistics, Malaysia “Preliminary Count Report, Population and Housing Census, Malaysia 2010”<www.statistics.gov.my>.

C L D Meares “Judges Support Removal of Dock Statement” *The Sydney Morning Herald* (online ed, Australia, 2 May 1994).

Ministry of Justice “The Consolidated Criminal Practice Direction”<www.justice.gov.uk>.

Statistics New Zealand “New Zealand in Profile: 2012” < www.stats.govt.nz>.

Speeches

James Gobbo, Governor of Victoria “The Legal Profession in Victoria-Idealism under Stress” (Leo Cussen Memorial Lecture 2000, Leo Cussen Institute, Victoria, 18 October 2000).

Other Resources

Universal Declaration of Human Rights GA Res 217A III, (1948).

European Convention on Human Rights.