

## Disclosure and Discovery in Criminal Cases

The Commission's 2014 report [LRC 112-2014 Report on Disclosure and Discovery in Criminal Cases](#) recommends legislation to clarify how the prosecution duty of disclosure should operate to ensure fair trials.

In a criminal case, the prosecution must disclose to the defence all relevant evidence that it has gathered in its investigations. While the current arrangements for disclosure generally work well, difficulties have emerged in specific cases and with particular types of offence. For example, in sexual offence cases involving children, concern has been expressed about how the current disclosure process deals with therapeutic and counselling records, including whether disclosure of these records is actually relevant to a trial and whether disclosure may adversely affect a child's recovery. Against this background the Report recommends that legislation should be enacted that would set out a clear statutory framework for the prosecution's duty of disclosure. Among the key recommendations in the Report are the following:

- The proposed legislation should set out the general scope of the prosecution's duty of disclosure, including a process for listing or scheduling the material along the following lines: (a) material that is being disclosed; (b) material over which privilege is being claimed; and (c) material held by third parties, including for example therapeutic or counselling records. This scheduling of material has the advantage of clarifying what material cannot be disclosed because it is privileged, is of a confidential or sensitive nature or is held by a third party.
- Some material, such as CCTV footage, may need to be disclosed at an early stage, including when a person is detained in Garda custody.
- The following factors should determine whether disclosure is required in a summary criminal prosecution in the District Court: (a) the seriousness of the charge; (b) the importance of the prosecution material; (c) whether the accused has already been adequately informed of the nature and substance of the accusation; and (d) the likelihood of a risk of injustice from non-disclosure.
- The proposed legislation should include a procedure in which a court would resolve disputes about disclosure, such as where the prosecution (or a third party, such as a therapist or counsellor) argues that material should not be disclosed because it is subject to privilege or is not necessary for the defence case. This procedure should occur as early as possible, using the pre-trial preliminary envisaged in the General Scheme of a Criminal Procedure Bill published earlier this year by the Department of Justice and Equality.
- In such a pre-trial hearing, the court should have regard to the following factors in deciding whether disclosure is required: (a) the nature of the material sought and its likely probative value; (b) the extent to which access to the material appears necessary to secure the accused person's right to trial in due course of law while recognising the public interest in preserving the integrity of the judicial process; and (c) any rights of the person to whom the disputed material relates, such as privacy rights, and any harm that disclosure might cause to the person.
- In a sexual offence case, the court should have regard to the following additional factors: (a) society's interest in encouraging the reporting of sexual offences; (b) society's interest

in encouraging the obtaining of treatment by complainants of sexual offences; and (c) the public interest in ensuring that adequate records are kept of counselling communications.