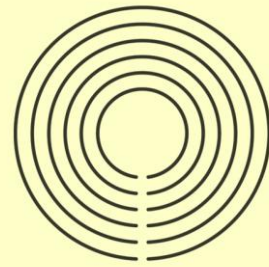


Issues Paper on Disclosure and Discovery in Criminal Cases (LRC IP 5-2014)



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

INTRODUCTION

The purpose of an Issues Paper is to provide a summary or outline of a project on which the Commission is embarking or on which work is already underway, and to provide readers with an opportunity to express views and to make suggestions and comments on specific questions. The Issues Papers are circulated to members of the legal professions and to other professional groups who are likely to have a particular interest in, or specialist knowledge of, the relevant topic. They are also published on the Commission's website (www.lawreform.ie) to ensure they are available to all members of the public.

Comments and suggestions are warmly welcomed on any of the questions asked from all interested parties and all responses will be treated in the strictest confidence unless indicated otherwise. These Issues Papers represent current thinking within the Commission on specific items where this is stated. This thinking should not be taken as representing a settled position taken by the Commission.

Please note that consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

These should be sent to the Law Reform Commission:

via email to consultation.disc@lawreform.ie with the subject line Disclosure and Discovery in Criminal Cases.

or

via post to IPC House, 35-39 Shelbourne Road, Dublin 4, marked for the attention of Karen McLaughlin.

We would like to receive replies by **9 May 2014** if possible.

Consultees should also note that the Commission will be holding a seminar on the issues raised in this Paper in order to inform its Report on Disclosure and Discovery in Criminal Cases and those who respond to the paper will be particularly welcome to the seminar. The details of the seminar are as follows:

Title: Seminar on issues related to Disclosure and Discovery in Criminal Cases

Date: 21 May 2014

Time: 4.30pm - 6.30pm with reception to follow

Venue: Distillery Building, Church Street, Dublin 7.

BACKGROUND

This Issues Paper forms part of the Commission's *Fourth Programme of Law Reform*,¹ which includes a project to review the law on disclosure and discovery in criminal cases.²

Overview of disclosure

In the context of criminal proceedings, "disclosure" has been defined as a constitutional duty on the prosecution to disclose and to make available to the defence any material in the possession or procurement of the prosecution which may be relevant to the case which could either help the defence or damage the prosecution.³ The duty of disclosure arises from the accused's constitutional rights to a trial in due course of the law and to fair procedures.⁴ The *Guidelines for Prosecutors* published by the Office of the Director for Public Prosecutions state that disclosure "is determined by concepts of constitutional justice, natural justice, fair procedures and due process of law as well as by statutory principles".⁵ The duty of disclosure itself does not exist in a legal vacuum and has influenced other obligations such as that placed on investigating and prosecuting authorities to seek out and preserve evidence.⁶ Indeed one commentator has stated that "the preservation of evidence is a crucial determining factor in deciding whether or not a person received or would receive a fair trial".⁷ The duty of disclosure also supplements the statutory duty on the prosecution to provide the accused, in advance of a trial on indictment, with a specified list of documents⁸ (commonly called the book of evidence). In certain civil proceedings, disclosure means the mutual exchange between the parties in advance of the hearing of specified documents, including reports prepared by expert witnesses. The *Rules of the Superior Courts (Disclosure of Reports and Statements) 1998*,⁹ which apply to High Court personal injuries actions only, require the parties to disclose to each other any report or statement from any expert which they intend to call to give evidence in relation to an issue in the case.

Overview of discovery

The "discovery of documents" is a process regulated by Rules of Court which enables litigants in civil cases to have access to "relevant" documentary evidence in limited circumstances. The rules relating to relevance provide a safeguard against one side using the discovery process in an excessively broad way to find out information from the other beyond the fair scope of the case – a so-called "fishing expedition." Discovery is only available upon application to the Court which rules upon relevance and identifies the

¹ *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 2.

² For a general overview of disclosure in criminal proceedings, see Abrahamson, Dwyer and Fitzpatrick *Discovery and Disclosure* 2nd ed (Round Hall, 2013).

³ *McKevitt v Director of Public Prosecutions*, Supreme Court, 18 March 2003, discussed below.

⁴ Article 38.1 of the Constitution of Ireland guarantees the right to a trial in due course of the law and Article 40.3 includes a right to fair procedures: see Hogan and Whyte (eds), *Kelly: The Irish Constitution* 4th ed (LexisNexis, 2003) at paragraphs 6.5.01-6.5.05; 6.5.66-6.5.70 and 7.1.90. The right to fair procedures includes the concept of equality of arms between the prosecution and defence: see *The People (DPP) v DO'S* [2006] IESC 12; [2006] 3 IR 57 at 66. In the context of the comparable right to fair procedures under Article 6 of the European Convention on Human Rights; see *Rowe and Davis v United Kingdom* (2000) 30 EHHR 1.

⁵ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors*, revised November 2010, at 9.3.

⁶ See *Braddish v Director of Public Prosecutions* [2001] 3 IR 127 and *Savage v Director of Public Prosecutions* [2008] IESC 39, [2009] 1 IR 185. In the *Savage* case the Supreme Court set out a list of 10 factors to be considered in determining whether the investigating authorities have complied with the duty to seek out and preserve evidence.

⁷ Glynn, "The Extent of the Duty of An Garda Síochána to Preserve Evidence" (2011) 29 ILT 109.

⁸ Section 4B of the *Criminal Procedure Act 1967*, as inserted by section 9 of the *Criminal Justice Act 1999*, discussed below.

⁹ SI No. 391 of 1998.

documents to be "discovered." This is done by way of a sworn affidavit of discovery which identifies (within precise schedules) the documents within the possession or power of procurement of the person which: (a) can be inspected, (b) existed but are no longer available for inspection (with reasons) and (c) are available but subject to claim of privilege. This process of discovery of documents is not available to the parties in criminal cases. The Supreme Court has held that, because discovery in civil proceedings is based on its mutual availability between the parties, it cannot be applied by analogy to criminal proceedings because no such principle of mutuality applies between the prosecution and the accused.¹⁰ It can be argued that discovery should not be available in criminal proceedings for other reasons, including the potential for delay, abuse and confusion because of the potential complexity of the discovery process in complex criminal cases. It has nonetheless been said that "a defendant may be needlessly prejudiced by the absence of any provision, in criminal cases, for discovery or something closely analogous to it"¹¹ and that the current lacuna in the law may require legislation to fill it.¹²

Centrality of disclosure to a fair trial

The Commission considers disclosure to be integral to ensuring that the accused is afforded a fair trial as he or she (or it in the case of a corporate accused) must have knowledge of the prosecution's case in order to be in a position to assess the case against them and defend themselves. In approaching this project, the Commission is conscious of the consequences of "grave shortcomings in disclosure".¹³ The Commission therefore considers the duty of disclosure to be central to the criminal justice process. However, the Commission notes that case law has demonstrated that uncertainty exists as the duty of disclosure and this is particularly the case in relation to: the scope of discharging the duty of disclosure; the absence of a clear procedure for seeking disclosure; and the operation of the duty in summary proceedings. By way of comparison, the Commission notes that in civil proceedings the process of discovery is clearly defined and serves a similar function whereby one party provides relevant evidence to another in advance of trial. However, the courts have held that discovery is not available in criminal proceedings.¹⁴

The Commission is therefore seeking views in relation to the following four issues:

1. The scope of the prosecution duty of disclosure (the relevant questions on this issue are on pages 5, 7, 8 and 10 of this Issues Paper);
2. The possibility of discovery in criminal cases (the relevant questions on this issue are on page 12 of this Issues Paper);
3. The possibility of a procedure to provide the accused access to materials in the possession of third parties (the relevant questions on this issue are on page 15 of this Issues Paper);
4. The interests of various parties in criminal proceedings, including claims to privilege (the relevant questions on this issue are on page 19 of this Issues Paper).

¹⁰ See *The People (DPP) v Flynn* [1996] 1 ILRM 317 and *The People (DPP) v Sweeney* [2001] 4 IR 102 discussed below.

¹¹ See *JB v Director of Public Prosecutions* [2006] IESC 66, discussed below.

¹² See *Health Service Executive v White* [2009] IEHC 242, discussed below.

¹³ This was the phrase used by Hardiman J in *PG v Director of Public Prosecutions* [2006] IESC 19, [2007] 3 IR 39, at 42, when referring to *The People (DPP) v Wall* [2005] IECCA 140 as an example where the non-disclosure of the fact that a prosecution witness had previously made a dubious allegation of rape led to a conviction and sentence of life imprisonment which was subsequently held to be a miscarriage of justice.

¹⁴ *The People (DPP) v Sweeney* [2001] 4 IR 102, discussed below.

ISSUE 1: THE SCOPE OF THE PROSECUTION DUTY OF DISCLOSURE

1.01 Disclosure is central to the effective administration of justice. However, the scope of the duty of disclosure has not been clearly defined and it can be said that the duty continues to evolve depending on the circumstances of each case. In addition, there are no procedural rules governing the practice of disclosure and therefore it often involves "general disclosure" by the prosecution which is then followed by a request by way of a letter from the accused for "specific disclosure." The absence of a specific procedure for seeking disclosure has been criticised by commentators¹⁵ as well as the judiciary.¹⁶ We therefore set out some of the cases and statutory provisions which provide guidance as to the scope of the duty in order to identify whether it would be beneficial to put in place a specific procedure concerning disclosure and, if so, what, if any, improvements might be made.

1.02 In *McKevitt v Director of Public Prosecutions*¹⁷ Keane CJ summarised the constitutional duty on the prosecution to disclose material to the defence as follows:

"[T]he prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution and that if there is such material which is in their possession they are under a constitutional duty to make that available to the defence."

1.03 The courts have repeatedly held that the right to a trial in due course of law and to fair procedures require that the prosecution provide an accused access to material that is relevant to the trial.¹⁸ This is sometimes described as "material evidence." For example, in *Director of Public Prosecutions v Special Criminal Court*¹⁹ the High Court held that all relevant evidence must be disclosed and this includes material that "might help the defence case, help to disparage the prosecution case or give a lead to other evidence."

1.04 It is clear that the substance of the material to be disclosed must be relevant to the trial but there are other elements of the scope of the duty that remain unclear. In *The People (DPP) v Nevin*²⁰ the Court of Criminal Appeal held that material in the "possession or procurement" of the prosecution must be disclosed. It has been noted that "procurement" in this context has not been defined in any detail and therefore it was suggested that, if there is no legal reason for a third party to refuse access to a document, the prosecution must seek to procure the document.²¹ The extension of "possession" to include "power or procurement" reflects the language relating to discovery used in both the *Rules of the Superior Courts 1986*²² and the *Circuit Court Rules 2001*²³ even though there is no procedure to compel

¹⁵ Abrahamson, Dwyer and Fitzpatrick *Discovery and Disclosure* 2nd ed (Round Hall, 2013) at 266.

¹⁶ For example, Hardiman J in *PG v Director of Public Prosecutions* [2006] IESC 19, [2007] 3 IR 39, at 42; and in *JB v Director of Public Prosecutions* [2006] IESC 66, discussed below.

¹⁷ Supreme Court, 18 March 2003 (*ex tempore* judgment of Keane CJ, with which Denham, McGuinness, Murray and Hardiman JJ concurred).

¹⁸ For an overview see Dwyer "The duty of disclosure in criminal proceedings" [1993] (1) *Irish Criminal Law Journal* 66.

¹⁹ [1999] 1 IR 60 at 76.

²⁰ Court of Criminal Appeal, 13 December 2001.

²¹ Coonan and O'Toole *Criminal Procedure in the District Court* (Round Hall Press 2011) at 238.

²² Order 31, rule 12 of the 1986 Rules, as inserted by the *Rules of the Superior Courts (Discovery) 2009* (SI No.93 of 2009).

²³ Order 32, rule 1 of the 2001 Rules.

the prosecution to procure material from a third party for the purposes of providing this material to the accused.²⁴ This is discussed in Issue 2(c) of this Paper, below.

1.05 Separately, section 4B of the *Criminal Procedure Act 1967*²⁵ provides that in a trial on indictment the prosecution must provide the accused with the following documents (commonly known as the book of evidence) before the case may be sent forward for trial:

- "(a) a statement of the charges against the accused;
- (b) a copy of any sworn information in writing upon which the proceedings were initiated;
- (c) a list of the witnesses whom it is proposed to call at the trial;
- (d) a statement of the evidence that is expected to be given by each of them;
- (e) a copy of any document containing information which is proposed to be given in evidence by virtue of Part II of the Criminal Evidence Act 1992;
- (f) where appropriate, a copy of a certificate pursuant to section 6(1) of the Criminal Evidence Act 1992; and
- (g) a list of exhibits (if any)."

1.06 In addition, section 4C of the 1967 Act²⁶ allows the prosecution to provide additional evidence to the defence at any time after the book of evidence is served. This is consistent with the continuing nature of the duty of disclosure.²⁷ The accused's right to disclosure of particular material in certain circumstances is also set out in statute. For example if an accused is detained at a Garda station, he or she is entitled to the custody record pertaining to the period of detention²⁸ and to apply for a copy of any recording of the questioning.²⁹ Having regard to this, the Commission seeks views on whether it would be beneficial to put in place a specific procedure concerning the duty of disclosure.

Question:

Q(1) (i) Do you consider that there should be a fixed procedure for seeking disclosure in criminal cases? If so, please state whether you consider this should be on a statutory footing or some other basis, such as a statutory code of practice or non-statutory guidelines.

1.07 The Commission also seeks views on three particular issues related to the scope of the duty of disclosure: (a) the test for determining the relevance of material; (b) the possibility of disclosure by the accused; and (c) the extent of the duty in respect of indictable offences tried summarily in the District Court.

²⁴ *The People (DPP) v Sweeney* [2001] 4 IR 102.

²⁵ Section 4B of the *Criminal Procedure Act 1967*, as inserted by section 9 of the *Criminal Justice Act 1999*.

²⁶ As inserted by section 9 of the *Criminal Justice Act 1999*.

²⁷ *The People (DPP) v Nevin*, Court of Criminal Appeal, 13 December 2001.

²⁸ Section 56 of the *Criminal Justice Act 2007*, replacing regulation 24(2) of the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987* (SI No.119 of 1987).

²⁹ Regulation 16 of the *Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997* (SI No.74 of 1997).

1(a) **Determining relevance of material**

1.08 The issue of determining relevance of material is significant because the accused may apply to court to have access to material that may not have been deemed relevant by the prosecution. The High Court held in *Director of Public Prosecutions v Special Criminal Court*³⁰ that relevant evidence includes material that "might help the defence case, help to disparage the prosecution case or give a lead to other evidence".³¹ In the Commission's view, the Director of Public Prosecutions' *Guidelines for Prosecutors* provide useful general and specific guidance on the issue of relevance. The *Guidelines* state that "if it is reasonably possible that something is relevant and if there is no other obstacle to disclosure the balance is in favour of disclosure".³² The *Guidelines* also state that some material may be excluded on the basis of public interest concerns and as a result some relevant factors to be taken into consideration when deciding whether or not to disclose certain material are:

- "(a) whether the material is protected by legal professional privilege. The public policy which protects communications between lawyer and client extends to communications between the Director and her or his professional officers, solicitors and counsel as to prosecutions by her or him which are in being or contemplated;
- (b) whether the material, if it became known, might facilitate the commission of other offences or alert a person to Garda investigations;
- (c) whether the material would be of assistance to criminals by revealing methods of detection or combating crime;
- (d) whether the material involves the security of the State;
- (e) whether disclosure of the document would lead to the publication of the names of others in respect of whom further investigative discussions are to take place or in respect of whom enquiries have been made in certain circumstances where all the parties involved have an entitlement to the presumption of innocence;
- (f) where the circumstances require, a prosecutor may seek an undertaking that the material will not be disclosed to parties other than the accused's legal advisers and the accused".³³

1.09 The *Guidelines for Prosecutors* also provide that:

"... the following information should ordinarily be disclosed if relevant:

- (a) information not in statement form of which the prosecution is aware whether intended to be used by the prosecution or not and whether considered reliable or not;
- (b) in the case of material not in the possession or procurement of the prosecution but of which it is aware the existence of that material should be disclosed;
- (c) information regarding proposed prosecution witnesses which might reasonably be considered relevant to their credibility, such as criminal convictions, an adverse finding in other proceedings, relationship with a victim or another witness or any possible personal interest in the outcome of a case;
- (d) details of any physical or mental condition which may affect reliability;

³⁰ [1999] 1 IR 60 at 76.

³¹ *Ibid* at 76.

³² Office of the Director of Public Prosecutions, *Guidelines for Prosecutors*, revised November 2010, at 9.22.

³³ *Ibid* at paragraph 9.24.

(e) details of any immunity from prosecution provided to a witness with respect to his or her involvement in criminal activities. Where a witness is admitted to a witness protection programme the fact of such an admission should be disclosed;

(f) where the witness participated in the criminal activity the subject of the charges against the defendant, whether the witness has been dealt with in respect of his or her own involvement and, if so, whether the sentence imposed on the witness took into account any cooperation with law enforcement authorities in relation to the current matter;

(g) statements not included in the book of evidence which could be of assistance to the defence;

(h) the unedited version of statements prepared for inclusion in the book of evidence;

(i) items not included in the list of exhibits in the book of evidence which could reasonably be of assistance to the defence;

(j) sworn information and warrants where relevant;

(k) particulars of the accused's prior convictions;

(l) any prior inconsistent statements of witnesses whom the prosecution intend to call to give evidence;

(m) copies of all electronically or mechanically recorded statements obtained from the accused;

(n) copies of any photographs, plans, documents or other representations that might be tendered by the prosecution at trial or which, even though not intended to be so tendered, might reasonably be relevant to the defence. The defence should also be provided with reasonable access to inspect exhibits and, where it is practicable to do, photocopies or photographs of such exhibits;

(o) where the prosecutor declines to call a witness whose statement is contained in the book of evidence, the defence should be given details of any material or statements which may be relevant and if requested the prosecution should make the witness available for the defence to call (see paragraph 8.6 to 8.8);³⁴

(p) any other relevant document."³⁵

1.10 The Commission is inclined to the view that, as these factors have been developed with the benefit of extensive experience of criminal prosecutions, they are likely to set out the key issues that arise in determining relevance for the purposes of disclosure. Notwithstanding this, if consultees consider (in response to Q(1)(i), above) that it is desirable to introduce a specific form of procedure for disclosure, the Commission considers that it would be of assistance to obtain views as to whether any matters may usefully be added to the list of factors.

Questions:

Q(1): (ii) Do you consider that the factors listed in the *Guidelines for Prosecutors* are sufficient? If not, please indicate why and set out any other factors that you would suggest for inclusion.

Q(1): (iii) Do you consider that the factors listed in the *Guidelines for Prosecutors* (and any other factors you suggest) should be placed on a statutory footing (or some other form, such as a statutory code of practice or non-statutory guidelines)?

³⁴ Paragraphs 8.6-8.8 of the *Guidelines for Prosecutors* relate to the role of the prosecutor in court and obligations to call witnesses.

³⁵ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors*, revised November 2010, at paragraph 9.11.

1(b) The possibility of disclosure by the accused

1.11 It has been noted above that the duty of disclosure has been placed on the prosecution in order to uphold the accused's constitutional rights to a trial in due course of the law and to fair procedures. Given the importance attached to these rights, including the right to silence, in criminal proceedings there is no general obligation on the accused to provide details of the defence to the prosecution in advance of trial. There are some limited instances in which the accused is required to give some advance notice to the prosecution. For example, if the accused proposes to put forward an alibi defence, the prosecution must be notified of this and the name of the person who is to provide the alibi must be provided to the prosecution in advance of trial.³⁶ The accused must also notify the prosecution of the name of any expert witness he or she proposes to call in the trial.³⁷ In addition section 15 of the *Criminal Justice Act 2011* provides that a member of the Garda Síochána may apply to the District Court for an order directed to "a person" to produce documents or provide information in connection with the investigation of any of the "relevant offences" listed in the Schedule of the 2011 Act. These offences include what are commonly referred to as "white collar" offences.³⁸ It has been suggested that the 2011 Act may "undermine the argument which underpins the rationale against the availability of discovery in criminal cases".³⁹

1.12 The Commission notes that, in England and Wales, in a criminal case the defence is required to provide statements in advance of the trial to the prosecution.⁴⁰ It may be argued that, since Irish law already has two statutory provisions requiring advance notice by the accused of alibi evidence and of expert witnesses and a third provision requiring production of documents in connection with certain offences, the issue arises as to whether further such exceptions should be made. The Commission notes that previous analysis on this matter strongly leans against any such general extension. In 2003, the *Report of the Working Group on the Jurisdiction of the Courts*⁴¹ noted that there was no "basis for contemplating alteration of the present constitutionally ordained balance between the rights of the accused and the legitimate interests of the prosecution in criminal proceedings." This view was echoed in the 2007 *Final Report of the Balance in the Criminal Law Review Group*.⁴² Furthermore, in *Markey v Minister for Justice and Law Reform*⁴³ the High Court held that "there is nothing to prevent the defence from lying in wait to ambush the prosecution, perhaps on some point of technical proof".⁴⁴ Nonetheless, the Commission would welcome views on this matter.

Question:

- Q(1) (iv) Do you consider that further circumstances should be provided for in which the accused would be required to provide advance notice of evidence to the prosecution?**
- (v) Do you consider that provision should be made for disclosure by the accused by extending the list of offences to which section 15 of the *Criminal Justice Act 2011* applies or by a specific procedure for disclosure by the accused?**

³⁶ Section 20 of the *Criminal Justice Act 1984*.

³⁷ Section 34 of the *Criminal Procedure Act 2010*.

³⁸ For example, offences relating to banking, investment of funds and other financial activities, certain offences under the *Companies Acts 1963 to 2012*, money laundering and terrorist offences, offences under the *Criminal Justice (Theft and Fraud Offences) Act 2001* and bribery offences.

³⁹ Mulcahy "The Criminal Justice Act 2011, Criminal Discovery, and egalite des armes" (2012) (1) *Bar Review* 21, at 24.

⁴⁰ Sections 6 to 6E of the English *Criminal Procedure and Investigations Act 1996*.

⁴¹ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (the Fennelly Group Report) (Courts Service, 2003), at paragraph 772.

⁴² Available at www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf.

⁴³ [2011] IEHC 39; [2012] 1 IR 62.

⁴⁴ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (The Courts Service Stationary Office, 2003), at paragraph 775.

1(c) *The duty of disclosure in summary proceedings*

1.13 The overwhelming majority of prosecutions are dealt with summarily in Ireland. Thus, over 500,000 criminal prosecutions are dealt with each year in the District Court on summary trial; and in the order of 7,000 prosecutions on indictment are dealt with annually (in the Circuit Criminal Court and Central Criminal Court).⁴⁵ While many of the offences prosecuted in the District Court are summary offences it is also possible for indictable offences to be tried summarily. This is because many criminal offences are "hybrid offences" which may be tried either summarily or on indictment, it being primarily within the discretion of the Director of Public Prosecutions to determine whether to prosecute an indictable offence in the District Court (subject to the judge of the District Court declining to accept jurisdiction if he or she considers that the matter requires to be prosecuted on indictment). In summary criminal prosecutions there is no equivalent to the statutory duty on the prosecution in section 4B of the *Criminal Procedure Act 1967* to provide the accused with the list of specified documents.⁴⁶ In *Clune v Director of Public Prosecutions*,⁴⁷ the High Court held that the rationale for this is that a summary trial may be undertaken with some degree of expedition and informality while remaining in compliance with the principles of justice.⁴⁸ In *The State (Healy) v Donoghue*,⁴⁹ the Supreme Court noted that Article 38 of the Constitution requires that every criminal trial must be conducted in accordance with the concept of justice and that this includes that the accused be given "every opportunity"⁵⁰ to put forward his or her defence.

1.14 In *Director of Public Prosecutions v Doyle*,⁵¹ the Supreme Court held that where indictable offences are prosecuted summarily in the District Court it is necessary to provide the accused with certain material in order to ensure a trial in due course of law. The accused was charged with four indictable charges under the *Larceny Act 1916* (since replaced by the *Criminal Justice (Theft and Fraud Offences) Act 2001*), and was prosecuted summarily. He had made an inculpatory statement while being interviewed by a member of the Garda Síochána in relation to a number of burglaries. The prosecution provided him with his own statement but refused to provide him with copies of statements made by four other persons. The High Court was asked on a case stated whether an indictable charge being disposed of summarily attracted the same disclosure obligations as would be required if the charge was prosecuted by way of trial on indictment. The High Court held that there was no general obligation on the prosecution in a summary case to provide the accused with witness statements but, on appeal, the Supreme Court held that the right to a trial in due course of law may require an order for disclosure to be granted in some summary cases. The Supreme Court added that in deciding in a specific case whether this was required, a judge of the District Court should consider the following matters:

"(a) the seriousness of the charge;

(b) the importance of the statements or documents;

(c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;

⁴⁵ See the statistics on criminal trials in the Courts Service's *Annual Report 2012* (Courts Service, 2013).

⁴⁶ For a general overview of disclosure in summary prosecutions see Coonan and O'Toole *Criminal Procedure in the District Court* (Round Hall, 2011) at 233-253.

⁴⁷ [1981] ILRM 17.

⁴⁸ *Ibid.*

⁴⁹ [1976] 1 IR 325.

⁵⁰ *Ibid* at 349 (O'Higgins CJ).

⁵¹ [1994] 2 IR 286.

(d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused."⁵²

1.15 Applying these matters the Supreme Court held that the applicant should be provided with copies of the statements requested. In *Director of Public Prosecutions v Browne*⁵³ the High Court stated that in summary proceedings justice should be dispensed in a simple and speedy manner, and that inordinate expense must be avoided. The High Court added that common sense and proportionality are also factors which have to be considered in determining whether disclosure is required.

1.16 Issues in relation to disclosure have arisen more recently in summary prosecutions for drink-driving. The issue has been raised by posing the question whether the material is actually in the possession or control of the prosecution or of a third party. For example, in *Thompkins v Director of Public Prosecutions*⁵⁴ the applicants, who had been charged with drink-driving offences, claimed that to vindicate their right to a fair trial they were entitled to information relating to the blood-alcohol tests undertaken by the Medical Bureau of Road Safety (MBRS). In the High Court, O'Neill J held that the information sought was "not evidence... but, rather [was an application] for an inquiry to take place to elicit if evidence exists" and therefore disclosure was refused.⁵⁵ In *Director of Public Prosecutions v O'Malley*,⁵⁶ also a drink-driving case, the accused sought information in relation to how the breath specimen taken from him was treated by the MBRS. In the High Court, Gilligan J held that the MBRS, as a State entity, was part of the prosecution and was therefore obliged to disclose the information.⁵⁷

1.17 While some of these decisions provide valuable guidance, they also illustrate differences in approach particularly in the drink-driving cases. It has been suggested that in practice both the circumstances in which such disclosure orders are granted and the content of particular orders vary greatly.⁵⁸ It is also noted that in England and Wales the accused is entitled to be informed of his or her right to seek disclosure of a copy of statements or a précis of the evidence "as soon as practicable" after charge or summons.⁵⁹

Questions:

- Q(1) (vi) Do you consider that the disclosure regime for indictable offences tried summarily, as set out in *Director of Public Prosecutions v Doyle*, is adequate? If not, can you suggest other factors which should be included?**
- Q(1) (vii) Do you consider that the factors listed in *Doyle* (and any other factors you suggest) should be placed on a statutory footing (or some other form, such as a statutory code of practice or non-statutory guidelines)?**

⁵² *Ibid* at 302.

⁵³ [2008] IEHC 391.

⁵⁴ [2010] IEHC 58.

⁵⁵ *Ibid* at paragraph 4.10.

⁵⁶ [2008] IEHC 117.

⁵⁷ *Ibid* at paragraph 19.

⁵⁸ Abrahamson, Dwyer and Fitzpatrick *Discovery and Disclosure* 2nd ed (Round Hall, 2013) at 354.

⁵⁹ Under the English *Magistrates' Courts (Advance Information) Rules 1985*, rule 4.

ISSUE 2: THE POSSIBILITY OF DISCOVERY IN CRIMINAL CASES

2.01 Discovery involves an evaluation of the relevance of material in a particular legal matter and the provision of the material to the other party to the proceedings.⁶⁰ Order 31, rule 12 of the *Rules of the Superior Courts 1986*, as amended,⁶¹ sets out in detail the process of discovery of documents between parties in civil proceedings. The 1986 Rules provide that parties should, initially, seek to agree discovery on a voluntary basis. In civil proceedings a party is allowed access by way of discovery to a specific document under the control of another party if it can be shown that the document in question relates to the matters at issue in the civil claim and that it contains information that *may*—not necessarily *must*—directly or indirectly enable the party either to advance their own case or to damage the case of the other party.⁶² In the absence of agreement between the parties, a party seeking discovery in a civil case must demonstrate that the documents sought are relevant to the matters at issue in the case and must also satisfy a necessity requirement. The rules relating to relevance safeguard against discovery being used as a so-called fishing expedition. If an order for discovery is granted, the other party must swear an affidavit which identifies and categorises in a prescribed form all documents currently or previously in the possession, power or procurement of that party. The sworn affidavit therefore represents a formal acknowledgement by that party of his or her awareness of the relevant material in a particular case.

2.02 Discovery in civil cases is considered a mutual procedure, in which both the plaintiff and defendant may be required to provide access to relevant documents that provide both sides with information of benefit to their claim or, as the case may be, defence to the claim.⁶³ In addition, Order 31, rule 29 of the *Rules of the Superior Courts 1986* provides that third party (non-party) discovery may be ordered where it is likely that a document or other relevant material in the possession of a third party would be of relevance to the proceedings. In *Allied Irish Banks plc v Ernst & Whinney*,⁶⁴ McCarthy J stated that this "extended the scope of discovery in a very material and helpful way".⁶⁵

2.03 The Commission notes, on the one hand, that the advantage of having a process akin to discovery in criminal proceedings would be a fixed formal procedure for seeking access to relevant material. In turn, such a process would clarify the scope of the duty of disclosure on investigating and prosecuting authorities as it would require an affidavit to be sworn in respect of all known material in a particular case. On the other hand, the Commission is also aware that there are many criticisms of the operation of the discovery process in civil proceedings, notably the potential to abuse the discovery process by using it as a delaying tactic.⁶⁶ As well as delays there can be significant cost implications connected to a process of discovery particularly in commercial litigation given the volume of documentation that is often involved. However, as noted extra-judicially by Clarke J "the benefits of

⁶⁰ See generally Delany and McGrath *Civil Procedure in the Superior Courts* 3rd ed (Round Hall, 2012), Chapter 10.

⁶¹ As inserted by the *Rules of the Superior Courts (Discovery) 2009* (SI No. 93 of 2009). The 2009 Rules substituted a completely new text of Order 31, rule 12. While retaining the principal elements of the pre-2009 discovery process, the 2009 Rules introduced a new requirement on the parties initially to seek to arrange voluntary discovery.

⁶² See Delany and McGrath *Civil Procedure in the Superior Courts* 3rd ed (Round Hall Press 2012), at paragraph 10-22.

⁶³ See *Allied Irish Banks plc v Ernst & Whinney* [1993] 1 IR 375 at 390.

⁶⁴ [1993] 1 IR 375.

⁶⁵ *Ibid* at 393.

⁶⁶ Delany and McGrath *Civil Procedure in the Superior Courts* (3rd ed Round Hall Press 2012), at paragraph 10-08.

discovery should not... be underestimated "particularly since it may "play an important role in keeping witnesses honest".⁶⁷

2.04 The Commission notes that the courts have pointed to important differences relevant to discovery between civil and criminal proceedings. For example, in *The People (DPP) v Sweeney*⁶⁸ the Supreme Court held that there was no jurisdiction to grant an order for third party discovery in a criminal case under Order 31, rule 29 of the *Rules of the Superior Courts 1986*. In *Sweeney*, Geoghegan J approved the analysis in *The People (DPP) v Flynn*⁶⁹ where it was noted that certain key matters were relevant only in the criminal process, such as that the entire burden of proof was placed on the prosecution, which was at variance with the concept of mutuality in third party discovery in civil proceedings.⁷⁰ In *DH v Groarke*⁷¹ Keane CJ noted that, in *Sweeney*, Geoghegan J had drawn a distinction between the prosecution's duty to disclose and "the inappropriate use of the civil machinery of discovery".⁷² Moreover, in the context of sexual offence cases it has been suggested that applications for third party discovery may merely amount to a "fishing expedition" with a view to obtaining information about the victim that could then be used in cross-examination.⁷³

Questions:

- Q(2) (i) Do you consider that discovery should be available in criminal cases?**
- Q(2) (ii) If so, please say whether the current form of discovery as applied in civil proceedings should be available or whether certain procedural elements of civil discovery should be used to develop a new procedure designed for criminal proceedings?**
- Q(2) (iii) If so, please also say whether it should be available in the following contexts:**
- (a) to both the defence and the prosecution, that is, mutual discovery?**
- (b) to the defence only?**

⁶⁷ See Clarke J's Foreword to Commercial Litigation Association of Ireland *Good Practice Discovery Guide* (March 2014), available at www.clai.ie.

⁶⁸ [2001] 4 IR 102.

⁶⁹ [1996] 1 ILRM 317.

⁷⁰ *Ibid* at 319.

⁷¹ [2002] 3 IR 522.

⁷² *Ibid* at 530.

⁷³ Leahy "The Defendant's Right or a Bridge too Far? Regulating Defence Access to Complainants' Counseling Records in Trials for Sexual Offences-Part 2" (2012) (2) Irish Criminal Law Journal 34.

ISSUE 3: THE POSSIBILITY OF A PROCEDURE TO PROVIDE ACCESS TO THE ACCUSED TO MATERIALS IN THE POSSESSION OF THIRD PARTIES

3.01 Accused persons have often applied for access to certain material held by a third party. Typically this has involved seeking access to medical records, therapeutic documents and notes or other confidential reports. Irish law does not provide for granting a specific order requiring the prosecution or a third party to provide the accused with access to certain documents. As discussed above the scope of the prosecution's duty of disclosure does not extend so far as to provide the accused with relevant material in the possession of third parties. In addition, the Supreme Court has held that third party discovery is not available in criminal cases. In this section, the Commission seeks views as to whether a procedure should exist which would provide such access.

3.02 In *The People (DPP) v Flynn*,⁷⁴ a prosecution for conspiracy to defraud, it was noted that there was no jurisdiction to grant an order for third party discovery in a criminal case. He held that the fundamental rationale for this was the accusatorial nature of the criminal process, in particular that the entire burden of proof falls on the prosecution, that there is not in that sense any procedural mutuality between the prosecution and the accused because it is not open to the prosecution to seek material in the possession of the accused, which is to be contrasted with the mutuality that arises in civil proceedings.⁷⁵ In *The People (DPP) v Sweeney*⁷⁶ the Supreme Court approved the analysis in *Flynn* and confirmed that third party discovery of documents is not available in criminal cases. In *Sweeney* the accused had been charged with rape and he sought an order for the discovery of therapeutic records concerning the complainant which were in the possession of a third party, the Rape Crisis Centre. The High Court made an order for third party discovery by analogy with the procedure in civil cases under the *Rules of the Superior Courts 1986*. On appeal, the Supreme Court overturned this order.

3.03 *Sweeney* was confirmed by the Supreme Court in *DH v Groarke*,⁷⁷ another sexual offence prosecution. Keane CJ, following *Sweeney*, commented that Geoghegan J drew a distinction between the prosecution's duty to disclose and "the inappropriate use of the civil machinery of discovery".⁷⁸ It was also suggested in *DH* that a *subpoena duces tecum* might be used in place of an application for third party discovery but this was rejected by the Supreme Court in *JF v Director of Public Prosecutions*.⁷⁹ A *subpoena duces tecum* may not address the issue of access to material because, while it requires a person to attend to give evidence and to bring the documents specified in the subpoena with them, it does not entitle the accused to have access to the documents before trial.

3.04 *Health Service Executive v White*⁸⁰ arose in the context of a manslaughter prosecution following the death of an elderly woman while in the care of the two accused who were family members. During their trial they sought an order for disclosure of documents relating to an independent review of the circumstances of the death of the deceased which had been commissioned by the Health Service Executive (HSE). The respondent trial judge made an order directing the HSE to make all the material relating to the investigation available to the Director of Public Prosecutions for onward transmission in accordance with the usual criteria to the defence. The High Court quashed the order on the ground that the respondent trial judge had acted in excess of jurisdiction for a number of reasons. These included

⁷⁴ [1996] 1 ILRM 317.

⁷⁵ *Ibid* at 319.

⁷⁶ [2001] 4 IR 102.

⁷⁷ [2002] 3 IR 522.

⁷⁸ *Ibid* at 530.

⁷⁹ [2007] IESC 32.

⁸⁰ [2009] IEHC 242.

that he had ensured that the accused would have access to the materials that would be available to the prosecution. Edwards J concluded that the respondent trial judge made a "novel order" which exceeded his jurisdiction and that in seeking to balance the rights of both parties the trial judge was not required to "do so at all costs and by resorting to extraordinary measures".⁸¹ Edwards J also commented that "the present lacuna in the law is unsatisfactory" and that the "door remains open" for further debate on the issue of an accused's access to documents in the possession of third parties where this is considered to be necessary to ensure a fair trial, but that this was a matter for legislative reform.⁸² This decision was appealed to the Supreme Court but a settlement was reached between the principal parties and the appeal was struck out. Since the decision in *White*, the Office of the Director of Public Prosecutions signed a Memorandum of Understanding (MoU) with the HSE which the Director of Public Prosecutions has stated "provides for the disclosure of information in a consistent manner (with the informed consent of the complainant) in all requests for information made by the Office to the HSE in relation to criminal prosecutions."⁸³

3.05 The Commission is inclined to agree with the comments of Edwards J in *White* that this is a matter that requires legislative reform. The absence of a clear procedure in this area has been the subject of criticism,⁸⁴ and Hardiman J in *JB v Director of Public Prosecutions*⁸⁵ stated that "a defendant may be needlessly prejudiced by the absence of any provision, in criminal cases, for discovery or something closely analogous to it." The Commission is also inclined to the view that there is no reason in principle to prevent a suitable procedural mechanism to provide for access to relevant material held by any person, including third parties.

3.06 In considering the options for such a procedure it is noted there is provision for third party disclosure in England and Wales. Section 2 of the *Criminal Procedure (Attendance of Witnesses) Act 1965*, as amended by section 66 of the *Criminal Procedure and Investigations Act 1996*, introduced a special procedure for third party disclosure. In general terms the English procedure envisages a two stage process where the materiality of documents is assessed and then the court is required to apply a public interest immunity test.⁸⁶ The English procedure is supplemented by guidelines from the Attorney

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Claire Loftus, Director of Public Prosecutions, "Opening Remarks at 14th Annual National Prosecutors' Conference" 19 October 2013, available at: http://www.dppireland.ie/filestore/documents/Director's_Opening_Address_2013.pdf (last accessed on 21 February 2014). At the time of writing, this Memorandum of Understanding has not been published. In addition, similar Memorandums of Understanding have been concluded with the following non-governmental organisations: the Dublin Rape Crisis Centre, One in Four, the Cork Sexual Violence Centre and Towards Healing.

⁸⁴ The lack of such a procedure has been described as "regrettable" in Abrahamson, Dwyer and Fitzpatrick *Discovery and Disclosure* 2nd ed (Round Hall, 2013) at 335. Particular criticism of the lacuna in the law has arisen in the context of sexual offence cases: see *Fourth Report of the Special Rapporteur on Child Protection*, December 2010, at 16; Counihan, "Rape Crisis Network Ireland perspectives on sexual violence and the criminal justice system"[2013] 23(4) ICLJ115; Charleton & Reidy "Disclosure in criminal cases: Tripping up the prosecution in a legal vacuum" (Pts 1 & 2) [2010] ICLJ; Leahy "The Defendant's Right or a Bridge too Far? Regulating Defence Access to Complainants' Counselling Records in Trials for Sexual Offences" (Pts 1 & 2) [2012] ICLJ.

⁸⁵ [2006] IESC 66.

⁸⁶ This procedure allows for the denial of disclosure of relevant but sensitive material as provided for in Part II of the 1965 Act, as amended by the 1996 Act. In the UK House of Lords decision in *D v NSPCC* [1977] 1 All ER 589 at 605-618, Lord Edmund-Davies stated that public interest immunity may be used by a witness to resist a summons by claiming public interest immunity on the ground that "a confidential relationship exists... and disclosure would be in breach of some ethical or social value involving the public interest".

General for England and Wales.⁸⁷ While these guidelines are not legally binding officials from the Office of the Director for Public Prosecutions have commented that their counterparts in England and Wales have found the guidelines to be very useful in practice.⁸⁸ The guidelines place an obligation on the prosecution to pursue all reasonable lines of enquiry in relation to material held by third parties within the UK. A similar statutory disclosure regime was put in place in Scotland in 2010.⁸⁹ Counsel for the Public Prosecution Service of Canada expressed the desire to replace both the "common law and constitutionally based system of disclosure [in Canada] with a comprehensive statutory regime, as exists in England".⁹⁰ However, commenting on the protocols which exist in England and Wales, the Head of the Prosecution Policy Unit in the Office of the Director of Public Prosecutions has cautioned, that legislative measures alone may not lead to a more effective system of disclosure.⁹¹

Questions:

- Q(3) (i) Do you consider that a formal process analogous to third-party discovery should be available in criminal cases?**
- Q(3) (ii) If not, do you consider that a statutory procedure should be enacted to deal with applications by an accused for access to relevant material in the possession of a third party?**

⁸⁷ Office of the Attorney General for England and Wales *Attorney General's Guidelines on Disclosure: For investigators, prosecutors and defence practitioners*, December 2013, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf (last accessed on 10 December 2013).

⁸⁸ See Mulkerrins (Head of Prosecution Policy Unit, Office of the DPP) "HSE Disclosure - An Agreed Perspective", 13th Annual National Prosecutors' Conference, 19 May 2012.

⁸⁹ Part 6 of the *Criminal Justice and Licensing (Scotland) Act 2010*.

⁹⁰ Ives "R v McNeil: Narrowing the gap between disclosure and production" (2009) 13 *International Journal of Evidence and Proof* 225, at 231.

⁹¹ Mulkerrins "HSE Disclosure - An Agreed Perspective", 13th Annual National Prosecutors' Conference, 19/05/2012.

ISSUE 4: CONSIDERATION OF INTERESTS OF VARIOUS PARTIES IN CRIMINAL PROCEEDINGS

4.01 In *Rowe and Davis v United Kingdom*,⁹² the European Court of Human Rights (ECtHR) recognised that "the entitlement to disclosure of relevant evidence is not an absolute right".⁹³ The ECtHR also observed that the rights of the accused may have to be weighed against competing interests, such as national security, protection of witnesses, upholding an individual's fundamental rights or to safeguard a public interest.⁹⁴ Increasingly in criminal cases in Ireland, efforts have been made to take into account the position of the accused, the victim and his or her family, and the public.⁹⁵ Thus, in *The People (DPP) v Nevin*⁹⁶ the Court of Criminal Appeal noted that the constitutional duty of disclosure of the prosecution was subject to some limitations such as the public interest privilege that arises in the context of certain communications between the investigating authorities and the Director of Public Prosecutions. Nevertheless, in *D v Director of Public Prosecutions*⁹⁷ it was held that "on a hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute". Therefore, it may not be the case in Ireland that community rights or interests will, in general, be given more weight than the right to a fair trial. In addition, given the case law on the hierarchy of constitutional rights, and the primacy of the right to a fair trial within that hierarchy, it would appear that this reasoning would also apply where there are competing individual rights at stake.⁹⁸

4.02 Many of the cases in which the individual right to privacy arises are sexual offence cases in respect of counselling or other medical records of the complainant. Such cases require due consideration to be given to the right of the complainant to privacy.⁹⁹ Privacy is an unenumerated right under Article 40.3 of the Constitution. The right to privacy is also enshrined in Article 8 of the European Convention on Human Rights. In addition, the 2012 EU Directive on Victims of Crime, Directive 2012/29/EU, includes two specific rights which are of relevance: Article 18 provides that the victim has a right to protection, which safeguards against re-victimisation, and Article 21 of the Directive enshrines the victim's right to privacy.

4.03 Therefore, the Commission considers that if it is accepted that the accused should have access to materials in the possession of third parties in some circumstances, it is necessary to devise a procedure which takes account of the various interests and fundamental rights at stake. The Commission notes that in 2013 the Oireachtas considered a private members Bill on this issue in the context of sexual assaults involving children.¹⁰⁰ This proposed a test of admissibility that would consider three factors:

⁹² (2000) 30 EHHR 1.

⁹³ *Ibid* at paragraph 61.

⁹⁴ *Ibid*.

⁹⁵ See Lord Steyn in *Attorney-General's Reference (No.3 of 1999)* [2001] 2 AC 91 at 118, cited with approval in *DPP (Walsh) v Cash* [2007] IEHC 108 at paragraph 49.

⁹⁶ Court of Criminal Appeal, 13 December 2001.

⁹⁷ [1994] 2 IR 465 at 474.

⁹⁸ For example *The People (DPP) v Shaw* [1982] 1 IR 1.

⁹⁹ In *Doorson v The Netherlands* (1996) 22 EHHR 330at paragraph 70, the ECtHR held that the principles of fair trial rights of the accused are weighed against those of witnesses or victims in criminal proceedings.

¹⁰⁰ In the Oireachtas debates on the *Courts and Civil Law (Miscellaneous Provisions) Bill 2013* a proposal was made to provide for a specific procedure to determine the admissibility of counselling records in relation to a sexual assault of a person under 18. In response the Government indicated that it would consider including such a procedure in its forthcoming Sexual Offences Bill. At the time of writing it is expected that the Scheme of a Sexual Offences Bill will be published in 2014.

- (a) the evidence must have substantial probative value;
- (b) there must be no other evidence which could prove the disputed facts; and
- (c) the public interest in disclosure outweighs the potential harm to the complainant.¹⁰¹

4.04 The terms of this Bill reflect legislative provisions and judicially sanctioned arrangements in a number of other jurisdictions. Bearing that in mind, the Commission seeks views as to the suitability of two such models which might be applied in Ireland.

4(a) Privilege and the New South Wales model

4.05 Privilege is a long-established legal concept which allows parties in legal proceedings, both civil and criminal, to refuse access to material in certain contexts. The list of recognised grounds of privilege is much more extensive in civil proceedings.¹⁰² Privilege is most commonly claimed on the grounds of public interest in criminal proceedings.¹⁰³ Informer privilege is another well-established exception to the general obligation of the prosecution to disclose all relevant material to the defence.¹⁰⁴ Other examples of grounds of privilege include the security of the state and confidentiality.¹⁰⁵ In relation to confidentiality, it should also be noted that the courts have drawn a clear distinction between confidential material and privileged material.¹⁰⁶ Nevertheless, the concept of confidentiality forms the basis for other grounds of privilege such as legal professional privilege which applies to both criminal and civil proceedings. By way of analogy it has been suggested that there should be a form of privilege to protect communications or material between a patient and a psychiatrist.¹⁰⁷

4.06 In the Australian state of New South Wales the *Criminal Procedure Act 1986*, as amended by the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999*, provides for privilege for counselling communications in sexual assault cases. The provision envisages a balancing exercise which tests whether the documents are of substantial probative value, whether there is any other evidence available and whether there is a public interest in preserving confidentiality. The court must also take into account any harm, including emotional and psychological harm, caused to the alleged victim. Harm is defined as "actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm such as shame, humiliation and fear". It has been argued that this broad mechanism has been interpreted narrowly in the New South Wales courts and would

¹⁰¹ Proposed section by Senator van Turnhout, Courts and Civil Law (Miscellaneous Provisions) Bill 2013 Report and Final Stages [Seanad debates 2 July 2013].

¹⁰² See Fennell *The Law of Evidence in Ireland* (3rd Ed. Bloomsbury 2009).

¹⁰³ O'Malley *The Criminal Process* (Round Hall 2009), at 699.

¹⁰⁴ *DPP(Hanley) v Holly* [1984] ILRM 149. In *Donohoe v Ireland*, Application no. 19165/08, 13 December 2013, the European Court of Human Rights held that informer privilege is compatible with the right to a fair trial under the European Convention on Human Rights. This is subject to the 'innocence at stake' exception, which provides that the informer's identity may be revealed if this is necessary to indicate the accused's innocence; see *Marks v Beyfus* (1890) 25 QBD 494 (CA).

¹⁰⁵ For example *Burke v Central Independent Television* [1994] 2 IR 61.

¹⁰⁶ In *Traynor v Delahunt* [2008] IEHC 272, [2008] IR 605 the Garda Síochána Complaints Board pleaded that all documents gathered during the course of investigation should remain confidential until the investigation had been completed and that disclosure would frustrate the functioning of the Board. McMahon J held that "fair procedures and the right of the accused to a fair trial should always be the priority of the court" when weighing competing interests in relation to disclosure.

¹⁰⁷ For discussion on this point see O' Leary "A Privilege for Psychotherapy? - Part 2" (2007) 2 *Bar Review* 76.

therefore require an alleged victim of sexual assault to be diagnosed with a recognised psychiatric illness before privilege would attach to counselling documents.¹⁰⁸

4(b) The Canadian model

4.07 The issue of access to therapeutic records was considered by the Supreme Court of Canada in *R v O'Connor*.¹⁰⁹ When the prosecution failed to disclose and produce the complainant's medical, counselling and school records the accused sought a stay of proceedings. The Court concluded that privacy must be "balanced against legitimate societal needs"¹¹⁰ and set out a two-stage test for the disclosure and production of relevant materials in the possession of a third party. The first limb of the test requires the trial judge to decide whether the records sought were likely to be relevant to the proceedings. The second limb of the test provides that a judge, having inspected the documents, might determine whether or not they are to be produced and provided to the accused. In weighing up these considerations it was suggested that the trial judge should take the following factors into consideration:

- "(1) the extent to which the record is necessary for the accused to make full answer and defence;
- (2) the probative value of the record;
- (3) the nature and extent of the reasonable expectation of privacy vested in the record;
- (4) whether production of the record would be premised upon any discriminatory belief or bias;
- (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record;
- (6) the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and
- (7) the effect on the integrity of the trial process of producing, or failing to produce, the record... "¹¹¹

4.08 Soon after the decision in *O'Connor*, the Canadian Federal Parliament amended section 278 of the *Canadian Criminal Code*. This introduced a two-part test of "likely relevance" and "necessity" where the accused seeks access to therapeutic records in a sexual offences case. It also set out eight factors that a trial judge should take into consideration when weighing the right of the accused to a fair trial against the right of the complainant to privacy:

- "(a) the extent to which the record is necessary for the accused to make a full answer and defence;
- (b) the probative value of the record;
- (c) the nature and extent of the reasonable expectation of privacy with respect to the record;

¹⁰⁸ For example in *R v Norman Lee* [2000] NSWCCA 444. See Longdill "Regulating Access to Therapeutic Records of Sexual Assault Complainants: An Analysis and Critique of the Current New Zealand Procedure" (2000-2003) *Auckland University Law Review* 764, at 796.

¹⁰⁹ [1995] 4 SCR 411.

¹¹⁰ *Ibid* at paragraph 117.

¹¹¹ *Ibid* at paragraph 156.

- (d) whether production of the record is based on a discriminatory belief or bias;
- (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- (f) society's interest in encouraging the reporting of sexual offences;
- (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- (h) the effect of the determination on the integrity of the trial process."¹¹²

4.09 Section 278 provides that the defence must file a written pre-trial notice of motion setting out the reasons why the records are being sought. This is to be accompanied by a supporting affidavit and the third party in possession as well as other interested parties must also be notified. The first hearing based on the likely relevance of the documents sought is then heard *in camera* and the person in possession or the complainant may appear and make submissions. If production is ordered the judge is required to ensure that interference with privacy is kept to a minimum by attaching conditions to the production where appropriate.

4.10 Section 278 includes additional consideration of the impact on victims of disclosure which did not feature as strongly in the *O'Connor* test. A number of Canadian commentators have criticised the application of the section 278 regime primarily on the basis that case law appears to emphasise the fair trial right aspect of the test which has resulted in disclosure being granted in the great majority of cases.¹¹³ It has been suggested that section 278 would be "an inherently sensible solution to fill the current gap in Irish law".¹¹⁴

Questions:

- Q(4) (i) Do you consider that professional privilege should be available to psychiatrists and counsellors as an additional exception?**
- Q(4) (ii) Which of the following do you consider to be a suitable model to follow in Irish law:**
- (a) the counselling communications privilege in the New South Wales Criminal Procedure Act 1986, as amended?**
 - (b) the regime set down by the Supreme Court of Canada in *R v O'Connor*?**
 - (c) section 278 of the *Canadian Criminal Code*?**
 - (d) any other regime?**

¹¹² Section 278.5(2) of the *Canadian Criminal Code*.

¹¹³ See Gotell "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the *Criminal Code*" (2008) *Canadian Journal of Women and Law* 111. See also Busby "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1999) (9) *Canadian Journal of Women and Law* 148.

¹¹⁴ Leahy "The Defendant's Right or a Bridge too Far? Regulating Defence Access to Complainants' Counselling Records in Trials for Sexual Offences-Part 2" (2012) (2) *Irish Criminal Law Journal* 34.