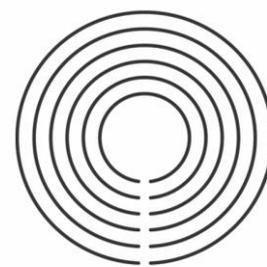


# Report of Seminar on Disclosure and Discovery in Criminal Cases

Distillery Building, Church St, Dublin 7  
21 May 2014 16:30-18:30



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

## 1. BACKGROUND

The Commission's *Fourth Programme of Law Reform*<sup>1</sup> includes a project to review the law on disclosure and discovery in criminal cases. In March 2014, the Commission published an *Issues Paper on Disclosure and Discovery in Criminal Cases* (LRC IP 5-2014)<sup>2</sup> which sought views in relation to the following:

1. The scope of the prosecution duty of disclosure;
2. The possibility of discovery in criminal cases;
3. The possibility of a procedure to provide the accused access to materials in the possession of third parties;
4. The interests of various parties in criminal proceedings, including claims to privilege.

As part of this consultation process the Commission held a public seminar on Disclosure and Discovery in Criminal Cases on 21 May 2014 which comprised two panels of five speakers and was chaired by Commissioner Tom O'Malley (co-ordinating Commissioner of the project). The views of the invited speakers and the audience will be considered alongside the written submissions received by the Commission when considering recommendations for inclusion in its forthcoming *Report on Disclosure and Discovery in Criminal Cases* to be published later in 2014. This report is a summary of the discussion at the seminar.

## 2. ATTENDEES

### *Invited Speakers*

#### Panel A

The Hon. Mr. Justice Frank Clarke; Peter Mullan, Chief Prosecution Solicitor; Remy Farrell SC; Dr. Liz Heffernan, Trinity College Dublin; Dara Robinson Solicitor, Partner, Sheehan and Partners.

#### Panel B

The Hon. Mr. Justice Patrick J. McCarthy; Kate Mulkerrins, Head of Policy and Research, Office of the DPP; Rebecca Smith BL; Caroline Counihan, Legal Director, Rape Crisis Network Ireland; Dr. Maeve Eogan, Medical Director, Sexual Assault Treatment Unit.

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<sup>1</sup> *Report on Fourth Programme of Law Reform* (LRC 110-2013).

<sup>2</sup> Available at: [http://www.lawreform.ie/\\_fileupload/Issues%20Papers/ip5Disc.pdf](http://www.lawreform.ie/_fileupload/Issues%20Papers/ip5Disc.pdf).

## *The Commission*

President John Quirke, Commissioner Tom O'Malley (co-ordinating Commissioner and Chair of seminar), Commissioner Finola Flanagan, Commissioner Marie Baker, Commissioner Donncha O'Connell. Most of the Commission staff were also in attendance.

## *Audience*

Over 100 people attended the seminar, including members of the Judiciary, barristers, solicitors, representatives from Government Departments and State bodies as well as psychiatrists, counsellors and representatives of victim support organisations.

## **3. MINUTES OF THE DISCUSSION**

### **A. Introduction**

**The President** welcomed everyone to the seminar and introduced the speakers.

**Commissioner O'Malley** in his introductory comments explained that the purpose of the occasion was to solicit as many views and perspectives as possible on the law and practice relating to disclosure in criminal cases. Referring to the presence of "discovery" in the title of the project, he said that while the Supreme Court had, of course, twice held that discovery is not available in criminal cases, the Court had not gone so far as to say that discovery in criminal proceedings would be unconstitutional. Therefore, it remained legitimate at least to consider the possibility of introducing discovery. He identified certain broad themes which were likely to occupy the Commission's deliberations on the matter. First, there was the general obligation resting on the prosecution to make disclosure to the defence, a duty which is derived from an accused person's express constitutional right to trial in due course of law. It is probably fair to say that this works reasonably well but there may be some aspects of it which require some examination. Secondly, there was the specific issue of disclosure in summary proceedings, a matter that might well be ripe for review at this point since it was exactly 20 years since the Supreme Court had handed down its *Gary Doyle* decision<sup>3</sup>. Thirdly, there was the difficult question of third party disclosure which had featured in many of the written submissions received to date. In so far as counselling and medical records of complainants of sexual offences were concerned, he noted that most submissions recommended that an acceptable balance had to be struck between the fair trial rights of accused persons and the complainants' reasonable expectation of privacy in regard to their personal records. He also drew attention to the reality that third party disclosure can arise in a variety of contexts, so that in Canada, for example, the precise rules governing third party disclosure depended on whether there was a complainant or other person with a reasonable expectation of privacy (as would most likely arise in a sexual offence case). He said that the Commission would be especially interested in views on the suitability, and possibly the constitutional compatibility, of the present provisions of the *Canadian Criminal Code* which might be considered as a useful model. (Later, in the course of the seminar, Commissioner O'Malley assured those attending that the Commission would still be very happy to receive written submissions and observations on any aspect of the topic).

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<sup>3</sup> *Director of Public Prosecutions v Doyle* [1994] 2 IR 286.

## B. Panel A: Issues 1 and 2 in the Issues Paper

**The Hon. Mr. Justice Frank Clarke (Judge of the Supreme Court)** spoke about his experience of case management, including the discovery regime, in corporate civil litigation and the challenges posed by complex "white-collar crime" prosecutions. Mr. Justice Clarke raised two particular issues related to the cost of discovery and electronic data.

Firstly, the cost of complying with discovery in civil litigation can be enormous. For example, in the *Madoff* litigation discovery cost an estimated €7 million for one party, albeit the one who had the most substantial obligations in discovery, due to the complexity of the case and the volume of documentation. It is difficult to envisage how the budget of the Office of the Director of Public Prosecutions or the criminal legal aid budget would be adequate to cover such costs.

Secondly, due to technological advancements more records are being stored electronically and even though this data can be deleted it is often retrievable. In the information age it would seem that information may be stored indefinitely. The decision of the Court of Justice of the EU (CJEU) in *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD) and González*<sup>4</sup>, which dealt with the issue of whether there is a "right to be forgotten", may have implications concerning the disclosure of electronic data. Moreover, there may be problems associated with the retrieval of information stored in "the cloud".

Experience in other jurisdictions such as the USA and UK suggests that software solutions may be used in the discovery process to reduce costs. In the UK, regulatory authorities and prosecutors involved in white-collar crime cases are concerned that there is potential to abuse the disclosure regime for the purposes of delaying cases. For example, the defence may make what seems to be a "reasonable demand" but which is not strictly necessary for the right to a fair trial, and this may be used as a tactic to stymie a prosecution.

**Peter Mullan (Chief Prosecution Solicitor)** spoke about his experience as Chief Prosecution Solicitor and presented the views of the Director of Public Prosecutions (DPP) on some of the issues discussed in the Issues Paper. He made the following comments:

Disclosure is an integral part of the criminal justice system and it is necessary for the guarantee of the accused's right to a fair trial. The current practice in the DPP's office is that as the book of evidence is being prepared, the material for disclosure is also marshalled. The disclosure material is served on the defendant after the return for trial but before the defendant's second appearance for arraignment which is usually about 12 months before the trial date.

Practice directions introduced on 17 October 2012 in relation to pre-trial hearings and case management in the Circuit Criminal Court have resulted in fewer delays.<sup>5</sup> In general, a pre-trial hearing is held about six to eight weeks before the trial date for the specific purpose of confirming that the prosecution and defence are ready for hearing. This is to avoid having to stay the trial (for up to a year) if there is an unanticipated request for late disclosure. As a result of the practice directions the general position is that all parties are ready once the trial date is fixed and there is little possibility that the prosecution will be stayed, as a stay is not in anyone's interest.

It is the DPP's view that the Guidelines for Prosecutors are sufficient and are working in practice. It is necessary for the Guidelines to be broad and general in nature as each case

<sup>4</sup> Case C-131/12 (judgment of 13 May 2014).

<sup>5</sup> See:

[http://www.courts.ie/80256DEA003609EA.nsf/0/41FC36C4B425F33A80257A9B004E85F5?Open&Highlight=0,pre-trial,-language\\_en~](http://www.courts.ie/80256DEA003609EA.nsf/0/41FC36C4B425F33A80257A9B004E85F5?Open&Highlight=0,pre-trial,-language_en~).

will present different material which may be considered relevant. It would be preferable to develop practice guidelines rather than introduce a statutory framework for disclosure. However, it may be possible to address some issues in statute such as time limits. When the defence makes a request for disclosure the material sought should be specified with as much particularity as possible as this would lead to a fairer process for all. It might be necessary to consider introducing court-ordered sanctions for late disclosure requests.

**Remy Farrell SC** stated that Ireland's disclosure regime is quite good by international standards, even when compared to neighbouring jurisdictions such as Scotland. He made the following comments with respect to three particular problems in relation to the current disclosure regime:

Firstly, whilst the DPP's Guidelines for Prosecutors work quite well and in particular the DPP takes an expansive view of the concept of "material", when privilege is claimed in respect of material arising out of Garda investigations this can lead to large amounts of relevant material not being handed over to the Office of the DPP and in turn to the defence. Garda reports attract privilege and therefore there is a tendency to regard all documents which are described as "reports" created in the course of an investigation as being privileged. However, all the information in Garda reports or other material created in the course of a Garda investigation may not be privileged and should be disclosed where relevant. Moreover, due to both the complexity of cases and the vast amount of data available in a particular case, disclosure is becoming more important. For example, the data stored on a smartphone can produce vast amounts of information, especially if disclosed as a paper-based printout that includes irrelevant material such as family photographs, all of which may have to be considered by the defence. This illustrates the imbalance in investigative resources between the Gardaí and the defence.

Secondly, disclosure is only delivered in paper format and no electronic material is provided. It is the policy of the Chief Prosecution Solicitor's office not to attach any documents to emails. Given the vast amount of information that may be disclosed in a particular case, material should be available in electronic format.

Thirdly, application of the civil discovery regime to criminal proceedings would not be a solution to the problems with disclosure. Instead the Office of the DPP should adopt a more "hands-on" approach in overseeing disclosure by An Garda Síochána. A process must be put in place to ensure confidence in the criminal justice system which means that the disclosure regime, particularly as operated by An Garda Síochána, must be uniformly applied and transparent, particularly since the Gardaí play a crucial role in disclosure due to their direct involvement in the investigation.

**Dr. Liz Heffernan (Associate Professor, Trinity College Dublin)** spoke about disclosure from first principles, taking the right to a fair trial, as guaranteed by Article 38 of the Constitution, as a point of departure. She made the following points:

Firstly, discussion concerning the criminal justice system can often focus on practical considerations such as efficiency and cost but it is important that the constitutional context is borne in mind when seeking to address the problems with the disclosure regime. Such problems include: privilege, third party disclosure, electronic disclosure, methods of furnishing and inspecting materials as well as the absence of a formal procedure for requesting material which is not being used as evidence. The concept of the right to a fair trial is rapidly developing under both EU law<sup>6</sup> and the jurisprudence of the European Court of Human Rights. While it may be useful to compare experience in other jurisdictions it is also

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<sup>6</sup> See for example, Directive 2012/13/EU Directive on the right to information in criminal proceedings.

important to recognise the difference between Ireland and other jurisdictions such as England and Wales where there is no written constitution.

Secondly, the Issues Paper sets out the stark reality of the difference between discovery and disclosure by highlighting the intricacy of the civil discovery framework and the bare-boned nature of the disclosure regime. This is due to the unique character of the criminal process as a product of the common law tradition and the inherent power and resource imbalance that exists between defence and prosecution in the criminal justice system. Such imbalance is evident in the legal aid budget. There are cogent reasons for this disparity and whereas the words of caution in the Issues Paper relating to the question of whether discovery should be available in criminal cases are apt nonetheless some cross-fertilisation may be possible and certain elements of the discovery framework may be adapted to develop a suitable statutory procedure for disclosure. For example, experience may be drawn from well-established legal principles of necessity and proportionality to further a better understanding of the nebulous concept of "relevance" as applied in the disclosure context.

Thirdly, while there is merit in a formal procedure for disclosure, such a regime could not be based on mutuality between the prosecution and defence as is the case with discovery. Instead it may be useful to codify and/or expand on the existing rules. If a new procedure were to be grounded in primary legislation this would allow for any further changes to be debated by the Oireachtas which would enhance transparency and such a regime could also be bolstered by practice guidelines. If this were to be adopted it would be similar in this procedural respect to the approach in England and Wales.

However, England and Wales should not be followed in substance at this time through the introduction of a full-blown defence disclosure requirement. Instead if the existing duties of notification were to be added to, this should only be done in a particularised manner. This is important for cogent reasons relating to protected rights, legal culture, doctrine and practice. Some consideration might also be given to the burden of proof in the Irish criminal justice system which is founded on the constitutionally-protected presumption of innocence. The concept of disclosure may itself be subject to varying definitions and, if it were to expand, the defence might be faced with additional hurdles over and above notification. For example, the *Criminal Procedure Act 2010* introduced a requirement for the defence to seek leave of the Court when seeking to rely on expert evidence. In its *Consultation Paper on Expert Evidence*,<sup>7</sup> the Law Reform Commission proposed the introduction of a reliability test in relation to expert witnesses. Where the defence tender expert evidence, crossing the threshold of the proposed test would clearly place an additional onus on the defence. As the Court of Criminal Appeal observed in *People (DPP) v McArdle*<sup>8</sup>, in the context of previous witness statements, arrangements of this kind may raise questions about the alignment of the burden of proof.

**Dara Robinson Solicitor (Partner, Sheehan and Partners)** focused primarily on disclosure in the District Court and made the following comments:

This is an area in need of significant statutory reform, particularly given the prosecution of more complex cases in the District Court in recent times. It is unhelpful for the Superior Courts to suggest that "in the context of summary proceedings where it is intended that justice should be dispensed in a simple and speedy manner, inordinate expense must be avoided".<sup>9</sup> In *Morgan v Collins*,<sup>10</sup> for example, the accused sought disclosure in relation to

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<sup>7</sup> LRC CP 52 - 2008, available at: <http://www.lawreform.ie/fileupload/consultation%20papers/cpExpertEvidence.pdf>

<sup>8</sup> [2003] 4 IR 186.

<sup>9</sup> See *Director of Public Prosecutions v Browne* [2008] IEHC 391, cited in the *Issues Paper on Disclosure and Discovery in Criminal Cases* (LRC IP 5-2014), paragraph 1.15.

<sup>10</sup> [2010] IEHC 65.

the intoxilyser and whilst this would only have involved providing a photocopy, this was refused.

As well as a logistical and economic imbalance between prosecution and defence in the District Court, there is also a legal imbalance. For example, section 15 of the *Criminal Justice Act 2011* empowers Gardaí to obtain an order for disclosure of certain material but the defence cannot make such an application. In practice, defence practitioners find it difficult to get local traders to preserve CCTV or other materials such as bank or telephone records, whereas they will often cooperate informally with the Gardaí on such matters.

Responding to the point made by Mr. Peter Mullan (Chief Prosecution Solicitor) in relation to sanctions, Mr. Robinson said that there should also be sanctions for late disclosure by the prosecution against either the Gardaí or the DPP in order to deter the practice of drip-feeding material to the defence. There should be greater formality in the delivery of disclosure in the District Court as well as better quality disclosure.

### **C. Panel B: Issues 3 and 4 in the Issues Paper**

**The Hon. Mr. Justice Patrick J. McCarthy (Judge of the High Court)** addressed the question of whether there should be discovery in criminal cases and whether there should be a specific procedure for obtaining material from a third party. He did not consider that there are major difficulties with the present process and change is not necessary as he hoped that there had not been any miscarriages of justice because of not being able to obtain evidence. However, a stay of a prosecution may be necessary from time to time and he had made such an order once for lack of disclosure but that this was an ultimate remedy. Mr Justice McCarthy made the following observations:

Firstly, a non-statutory approach to disclosure might be best because it affords flexibility to deal with individual cases and amending definitions in statute, such as that of relevance, will not resolve the issues. If discovery existed in criminal cases it would depend on an individual acting in good faith when swearing an affidavit in relation to the material in his or her possession or in the possession of a third party. There is very little difference between that exercise and the current disclosure regime. However, the costs associated with discovery are a concern.

However, secondly, the *subpoena duces tecum* procedure had been used in the past but it is not satisfactory because the defence must have sight of the material before trial. In a recent High Court decision of Hogan J the deposition procedure was utilised.

Thirdly, in contrast to the discovery procedure in civil cases, it is not the case that disclosure in criminal proceedings necessarily incurs excessive extra costs. In the example referred to by Dara Robinson; disclosure merely involved providing three, rather than two, copies of the maintenance log for an intoxilyser: two for the prosecution and one for the defence.

From a defence perspective, it is necessary for a legal procedure to be in place which would provide the defence with the opportunity to examine the material before a trial. This is necessary in order to ensure that the defence has the opportunity to fully assess the case against them and prepare for cross-examination of the witness.

**Kate Mulkerrins (Head of Policy and Research, Office of the DPP)** spoke on behalf of the Director of Public Prosecutions (DPP) in relation to non-party disclosure and made the following comments:

The Office of the DPP has made significant efforts to date to navigate its way around the legal lacuna in relation to obtaining potentially relevant material in the possession of non-parties (also referred to as 'third parties'). As a result of ongoing discussions and negotiations, with a range of agencies, both statutory and non-governmental organisations (NGOs), the Office of the DPP is very alive to the issues and concerns of the various groups who, ultimately, are all seeking to preserve a safe space (be that therapeutic or medical) for their patients or clients, while not impeding potential prosecutions. The Office of the DPP has secured Memoranda of Understanding (MoU) with a significant number of agencies, including: the Health Service Executive; the Child and Family Agency; the Dublin Rape Crisis Centre; Cork Sexual Violence Centre; One in Four and Towards Healing. The Office of the DPP is continuing meaningful dialogue with many other groups and individuals, including national bodies representing sole practitioners or individual therapists. Under the agreements we have concluded that disclosure is made only with the informed consent of the person to whom the material relates (usually, but not always the complainant). The non-party holding the material acknowledges that ownership of the information held by them vests in the patient or client, not the authority holding it.

The Director of Public Prosecutions is well aware of the concerns of many in relation to complainants' giving informed consent to disclosure and the Memoranda of Understanding clearly articulate the consequences of consent to disclosure. The DPP fully acknowledges the private and often sensitive nature of much of this material. Where victims and witnesses do not waive their right to confidentiality and privacy under Article 8 (the right to respect for private and family life) of the European Convention on Human Rights, the agreements acknowledge that an assertion of that right to privacy over potentially relevant material can, and in many circumstances will, have an adverse impact on the viability of any proposed prosecution. Managing the process can, and does, cause upset and concern, but it causes much more upset and concern when it happens at the last minute, on the eve of trial or indeed during the trial, when a complainant or witness is uninformed and or unprepared about the process. The Memoranda of Understanding seek to assist non-parties in preparing themselves and their clients for the process in good time, ensuring the early identification of potentially relevant material, allowing the necessary time for the identification and redaction of all non-relevant private or sensitive material.

The most important concern of many complainants agreeing to disclosure relates to the practical aspects of where the information goes, who sees it, do they retain copies, etc. In this regard the Office of the DPP has sought to strengthen safeguards for all witnesses or complainant, requiring, prior to disclosure that the accused or his or her legal representative agree to the following:

- (i) The material will be retained in the custody of the legal representatives (Solicitor & Counsel) at all times;
- (ii) The material be copied and used as necessary by the solicitor and/or Counsel [only] for the purposes of the trial;
- (iii) The material be accessed or used by any accused or witness only under the supervision of the said solicitor and/or counsel;
- (iv) No accused or witness will be permitted to take copies of this material into their sole custody outside the supervision of the said solicitor and/or counsel unless directed by Order of the Court and on prior notice to the Office of DPP
- (v) At the conclusion of all criminal proceedings, (including any appeal) the disclosed material (including all copies) will be returned to the Office of the DPP for secure archive storage.

These Memoranda of Understanding are working well, alleviating some of the common difficulties which had in the past arisen in relation to disclosure of what is often very sensitive material held by therapists, social workers or counsellors.

In a newspaper article, Commissioner O'Malley questioned whether disclosure of intimate private material has the potential to undermine the hard-won statutory protections to exclude the introduction of irrelevant evidence relating to a complainant's sexual history.<sup>11</sup> Uniquely, separate legal representation is afforded to a complainant seeking to resist such an application<sup>12</sup> through the State-funded legal aid scheme<sup>13</sup>. By contrast, in Canada, a complainant is afforded representation in disclosure hearings, but not in a *voir dire* on the issue of adducing previous sexual history. No such representation is available to complainants in relation to disclosure in Ireland, Scotland or England and Wales. The former Director of Public Prosecutions of England and Wales, Keir Starmer QC, has acknowledged that there are no plans to introduce such measures in England and Wales on the basis of cost.

The position of children is different as they do not make the decision to report; that decision is made for them, and by virtue of age, children are entitled to the greatest level of protection. The best interests of the child is of central importance in child sexual abuse cases and therefore the DPP accepts that there are instances where experts advise against disclosure. Thus, a statutory regime would not necessarily assist in such cases.

On the whole, the Director of Public Prosecutions would see merit in a new statutory procedure filling the current lacuna in relation to obtaining relevant material in the possession of non-parties. However, the Director would caution against a procedure giving rise to an entirely new *locus standi* for such non-parties to be heard in the context of what is a bi-partite criminal process. Whilst it would be very important that views are invited from such non-parties, in relation to such matters as whether the material is considered sensitive or privileged such views ought to be channelled through the prosecutor. Granting wider participation rights within the process has the potential to be very problematic and potentially very costly.

**Rebecca Smith BL** prefaced her comments by stating that she had sought the views of her colleagues and that it is important to bear in mind that most criminal defence practitioners are not interested in delaying criminal proceedings contrary to what is thought and it is not the case that they will always use disclosure as a delaying tactic. She made the following comments:

Firstly, Garda investigations are integral to the functioning of the disclosure regime, which is particularly important given the duty of the Gardaí to seek out and preserve evidence. Even though solicitors are now permitted to sit in on interviews in Garda stations the obligations of investigative agencies must be clearly provided for in a disclosure regime. The question of preserving evidence needs to be addressed early in the investigative process because by the time a defence solicitor becomes involved, even in a Garda station, it may be some time after the event and it would be impossible in practical terms to seek out evidence at that stage.

Secondly, the majority of criminal law practitioners do not seem to think it is preferable to have civil discovery in criminal cases due to the cost and complexity associated with that procedural mechanism in civil cases. Instead, there is a need to introduce a legislative procedure to deal with disclosure/discovery which is both clear and concise. The Canadian model could be considered to be a bit complex as there is a long and specific list of criteria which a judge must take into consideration in order to reach a decision as to whether a

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<sup>11</sup> Section 3 of the *Criminal Law (Rape) Act 1981* (as amended).

<sup>12</sup> Section 4A of the *Criminal Law(Rape) Act 1981*, inserted by section 34 of the *Sex Offenders Act 2001*.

<sup>13</sup> Section 26(3)(b) of the *Civil Legal Aid Act 1995*.

disclosure order may be granted. If the Canadian model is adopted in Ireland it might unduly constrain judicial discretion and render it impossible to take the particular facts of each case into consideration.

Thirdly, third party disclosure should begin with a voluntary disclosure/discovery letter and if this is refused there should be a procedure available to the defence to apply for disclosure, be that a simple application to the Court by way of Notice of Motion or otherwise. But it should not be a complicated system.

Lastly, there seems to be a lot of emphasis on the Canadian model but it is necessary to take a step back from this and develop a new system which is specifically designed for the Irish criminal justice system.

**Caroline Counihan (Legal Director, Rape Crisis Network Ireland (RCNI) )** explained that her comments were informed by the experience of working with complainants of sexual assault and reflected the views of the Rape Crisis Network as set out in RCNI's submission on the Issues Paper. She made the following comments:

Firstly, there should be a special statutory procedure to deal with requests for access to a complainant's counselling records. A judge must be the decision-maker in such a process as he or she must balance the competing right of the accused to a fair trial and the rights of the complainant. There cannot be an absolute privilege for counselling records due to the primacy of the right to a fair trial but the bar should be set as high as possible. Complainants and third parties holding such records should have rights of audience and separate legal representation where access to confidential documents is at issue, particularly with respect to child and vulnerable adult complainants.

Secondly, in relation to the competing rights at play, the EU Directive on Victims<sup>14</sup> is of vital importance, particularly Articles 18 and 21, which compel Member States to safeguard the victim from secondary and repeat victimisation including the risk of psychological harm, and protect the victim's privacy, respectively. In balancing the rights of an accused and a complainant, a judge should take into consideration the public interest in reporting sexual offence cases and ensuring that sexual violence victims continue to access specialist support.

Thirdly, whilst the Canadian model seems to involve a good approach, a simplified version may be needed. In Canada the focus is on the nature of the documents rather than the person who holds the documents and that is an approach that should be adopted in Ireland. Counselling notes may be classified as "double hearsay" due to the way in which they are written since they do not constitute a factual report: they are subjective in nature, are created primarily as provisional, fragmentary notes about the complainant's state of mind, and the maker of the notes is hardly ever called as a witness in the case. Therefore, if the notes are to be admitted into evidence they should be given limited weight and perhaps a judicial warning should be given to the jury in relation to the limitations of relying on inferences drawn from their contents.

**Dr. Maeve Eogan (Medical Director, Sexual Assault Treatment Unit (SATU) )** explained the types of documents held by the Sexual Assault Treatment Unit, SATU's requirements in relation to consent and the experience in the UK. She also pointed out that SATU does not deal with children under the age of 14. She made the following comments:

Firstly, SATU holds medical records which include relevant past and current medical history and brief details of the incident which guide care provision and forensic examination. These

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<sup>14</sup> Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

records also include details of the forensic examination carried out and body maps. In general the adult SATU services do not store photographic evidence. While patients may be referred to the Rape Crisis Network, no counselling records are kept on file in SATU.

Secondly, when a patient presents at SATU he or she signs a consent form to the effect that the findings of a medical examination may be shared with the Gardaí and may be used in evidence in court.

Thirdly, in the UK records are divided into two sections; a medical section (yellow form) and a forensic section (green form). Both forms are sent to the Crown Prosecution Service (CPS): the forensic section (green) is disclosed as a matter of course and the CPS decide whether the material in the medical section is: (a) relevant and (b) privileged.

#### **D. Contributions from the Audience**

**Gareth Noble Solicitor (Partner, KOD Lyons Solicitors)** commented on the role of the Gardaí in investigations and the operation of disclosure in both the District Court and the Children's Court. The EU Directive on the right to information in criminal proceedings<sup>15</sup> has the potential to have an impact on disclosure. However, given that the practice of solicitors attending interviews in Garda stations was recently introduced without any protocols, this is indicative of a lack of regulation in certain procedural matters in the criminal justice system. In the Children's Court there is also inconsistency in approach. It is commonplace that many Gardaí are unaware of the obligations placed upon them to seek out, retain and furnish all material evidence having a bearing on the guilt or otherwise of the accused. Unfortunately, many Gardaí only furnish information that assists their own case. Given the issues with disclosure in summary proceedings and the fact that all prosecutions are taken in the name of the DPP, it was questioned whether the Director of Public Prosecutions might take an overarching role to ensure that disclosure obligations are strictly adhered to.

**Michael O'Neill (Head of Legal Affairs, GSOC)** spoke about the experience of investigators and the difficulty in investigating parallel matters at one time. He followed up on the issue raised by Remy Farrell SC in relation to the need for the DPP to become more involved in disclosure, including in decisions on relevance. Based on his experience with the Garda Síochána Ombudsman Commission (GSOC) he proposed a system (for all trials, summary and indictment) of listing all materials in disclosure schedules and suggested the following categories:

1. Materials assembled during an investigation which are to be handed over
2. Materials subject to privilege
3. Sensitive materials
4. Materials deemed to be irrelevant
5. Materials which were available at one point, but are no longer available, such as CCTV.

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<sup>15</sup> Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings.

**Ellen O'Malley-Dunlop (CEO Dublin Rape Crisis Centre)** explained that her organisation previously had a policy of not handing over notes until subpoenaed and that this was putting extra stress and created more upset for the complainant. However, DRCC has signed a Memorandum of Understanding with the Office of the DPP and this has had a very positive impact because clients are now clear about the process agreed in the Memorandum of Understanding which includes reading their notes with their therapist beforehand so that they are enabled to give informed consent to having their notes handed over. Clients of the centre will be told, before engaging in therapy, that there are three exceptions to privilege in the counselling/therapy setting: (a) material required for court; (b) information that indicated self-harm or harming another; and (c) child risk situation. Legislative reform in this area would be welcome. Moreover, the system is already in place for separate legal representation in relation to requests to cross-examine the complainant about their previous sexual history and this should be extended to disclosure requests for counselling records, which could form part of the pre-trial process.

**Tony McGillicuddy BL** made three points in relation to the disclosure regime in Ireland:

Firstly, under section 3 of the *Offences against the State (Amendment) Act 1972*, it is not necessary for the Garda Chief Superintendent to disclose any materials upon which he or she has founded a belief that the accused is a member of an illegal organisation. There must be some better mechanism for disclosure of the material on which the opinion is based than that which applies at present. The present procedure would involve the court assessing the material to see if it should be disclosed, which no defence team could be happy with. Secondly, 70% of all criminal cases are disposed of in the District Court and often these are quite serious offences, including drugs cases of value up to €8,000, assault causing harm and sexual assault cases. Statutory reform of the disclosure process in summary proceedings is necessary. Thirdly, in *The People (DPP) v McKeivitt*<sup>16</sup> an issue arose in relation to obtaining disclosure from foreign agencies. That case highlighted the potential difficulty with obtaining disclosure from third parties which are based abroad.

**Dr. Imelda Ryan (Director of St Louise's Unit at the Children's Hospital Crumlin)** stated she has been working with child victims of sexual abuse for a number of years and emphasised that there must be mutual respect between the competing rights of the child and the accused. The unique position of children in the criminal justice system must be taken into consideration and it must be acknowledged that child participation in that system can have a negative impact on the child. This negative impact can then be compounded by the disclosure of material produced as a result of a therapy session as it may be available to the defence as part of a strategy to undermine the child complainant. Due to this experience, St. Louise's Unit has not signed an official Memorandum of Understanding with the Office of the DPP but the working relationship is becoming better.

**Dr. Chris Taylor (Senior Lecturer Bradford University Law School)** explained that he has over 15 years experience of the disclosure regime in the UK and stated that, despite this system, miscarriages of justice continue to take place. He agreed with Michael O'Neil (GSOC) that a system of scheduling is to be commended, particularly the distinction between sensitive and non-sensitive material and this may even lead to continuity through investigations. The continuing problems with the disclosure regime in the UK are almost exclusively the product of operational decision making in relation to the retention and recording of material during the initial investigation. There are two key factors which contribute to this problem.

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<sup>16</sup> *McKeivitt v Director of Public Prosecutions*, Supreme Court, 18 March 2003.

Firstly, the ideological resistance of many investigators to providing effective disclosure to the defence, often characterised by officers as 'doing the defence's job for them'. Secondly, the 'gatekeeper' role of the investigator in relation to material gathered during the investigation, which enables the investigator to ignore or conceal potentially valuable material and, effectively, exclude such material from the disclosure process. It is important to recognise that these factors are inherent in the investigative role irrespective of jurisdiction and, for this reason, it would be naïve to assume that Gardaí are likely to act any differently to their UK counterparts in this regard. Against this background, he would view the fact that disclosure failings are not more routinely reported, not as an indication of a system working well, but rather as an indication of a regime which is all too easily subverted. As a consequence, he would urge the introduction of both a statutory disclosure regime and standardised scheduling of material as a matter of some urgency.