



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

DISCLOSURE AND DISCOVERY IN CRIMINAL CASES

(LRC 112 – 2014)

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Law Reform Commission

FIRST PUBLISHED

December 2014

ISSN 1393-3132

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ACKNOWLEDGEMENTS

The Commission would like to thank the following people and organisations who provided valuable assistance:

John Berry, Barrister-at-Law

Dr. Kevin Booth, Principal Psychotherapist and Therapy Team Coordinator, St. Louise's Unit, Our Lady's Children's Hospital Crumlin

Rosario Boyle SC

The Hon. Mr Justice Frank Clarke, Judge of the Supreme Court

Caroline Counihan, Legal Policy Director, Rape Crisis Network Ireland

Centre for Criminal Justice, University of Limerick

Children At Risk in Ireland (CARI)

Criminal Law Committee, Law Society of Ireland

Miriam Delahunty, Barrister-at-Law

Ellen O'Malley Dunlop, Dublin Rape Crisis Centre

James Dwyer, Barrister-at-Law

Dr. Maeve Eogan, Medical Director, Sexual Assault Treatment Unit

Remy Farrell SC

Dr. Liz Heffernan, Trinity College Dublin

The Hon. Mr Justice Tony Hunt, Judge of the High Court

Eimear Lacey, Senior Social Worker, St. Clare's Unit, Temple Street Children's University Hospital

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EXECUTIVE SUMMARY

A The current position on the prosecution's duty of disclosure

1. This Report, which forms part of the Commission's *Fourth Programme of Law Reform*,¹ comes against a background of uncertainty as to the operation in practice of the prosecution's duty of disclosure in criminal cases.
2. The considerable body of case law that has developed in this area has consistently noted that the duty of disclosure forms a central part of the right of the accused to a fair trial in accordance with Article 38.1 of the Constitution.
3. The case law has emphasised that the general duty is to disclose any material that may help the defence case, help to damage the prosecution case or give a lead to other evidence.
4. Nonetheless, difficulties have emerged in a number of specific areas which demonstrate the need for reform, particularly in connection with:
 - the precise scope of the duty of disclosure;
 - the absence of a clear procedure for ensuring that disclosure is made, and made in a timely fashion;
 - the scope of the duty to disclose in summary proceedings;
 - the absence of a formal procedure for disclosure of material held by third parties, and the concomitant absence of rules for dealing with claims of privilege or confidentiality.
5. Against this background the Commission recommends that legislation be enacted to provide a clear framework to address the difficulties that have been identified, and the Report includes a *Draft Criminal Procedure (Disclosure) Bill* to give effect to this.

B The Commission's recommendations for a statutory framework

6. The proposed statutory framework should set out the general scope of the duty of disclosure, including the criteria to be employed when assessing the relevance of material of which disclosure is sought.²

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

² In addition to the central importance of the right to a fair trial under Article 38 of the Constitution, the Commission has taken into account the EU Directive on the right to information in criminal proceedings and the EU Directive on Victims' Rights.

7. This should include a process for scheduling the material similar to the process used in discovery of documents in civil cases, which would allow for a clear categorisation of material.

8. The categorising of material would have the advantage of clarifying what material cannot be disclosed because it is privileged, of a confidential nature or held by a third party.

9. Some material, such as CCTV footage and forensic material, may need to be disclosed at an early stage, including at the point where a person is detained in Garda custody.

10. The proposed framework includes the general principles concerning the duty of disclosure where a criminal prosecution is dealt with summarily in the District Court.

11. There should be a procedure for the judicial resolution of any claims of privilege made by the prosecution or by a third party. Furthermore, it is desirable that any such claim be resolved as expeditiously as possible. A pre-trial hearing along the lines proposed in the *General Scheme of a Criminal Procedure Bill* published by the Department of Justice and Equality in 2014, may be suitable for this purpose.

12. It is recommended that whenever a claim of privilege or confidentiality arises, the court charged with deciding the matter should have regard to the following matters:

- the nature of the material sought and its likely probative value;
- the extent to which access to the material appears necessary to secure the accused person's right to trial in due course of law while recognising the public interest in preserving the integrity of the judicial process; and
- any right inhering in or asserted by the person to whom the disputed material relates. Due regard should be had to the privacy rights of any such person and to any asserted harm that disclosure might cause to such person or to any natural or legal person with custody of the material.

13. Where a claim of privilege or confidentiality arises in a sexual offence case, the court should be required to have regard to the following additional factors:³

³ The Commission has had regard in this respect to the approach taken to this issue in Head 52 of the *General Scheme of a Criminal Law (Sexual Offences) Bill* published by the Department of Justice and Equality in November 2014.

- society's interest in encouraging the reporting of sexual offences;
- society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- the public interest in ensuring that adequate records are kept of counselling communications.

CHAPTER 1 THE DUTY OF DISCLOSURE

A Overview

1.01 This Report 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. It has become increasingly clear from case law, as well as from academic commentary and the observations of practising lawyers, that considerable uncertainty exists in respect of a few key aspects of disclosure to the defence. These include the timing of disclosure, the scope of the duty to disclose in summary proceedings, and the extent to which and the circumstances in which material in the possession of third parties can or should be disclosed, especially in circumstances where claims of privilege or confidentiality are made.

1.02 The absence of a procedure for third party disclosure in criminal cases has been contrasted with the availability of a similar mechanism – discovery - in civil proceedings and this has been the subject of a number of High Court and Supreme Court decisions. In approaching this topic the Commission has, of course, been cognisant of the constitutional context within which disclosure law must operate and by which it must be informed. Miscarriages of justice must be avoided at all costs. It has been noted by the Supreme Court that in at least one instance such a miscarriage of justice was connected with “grave shortcomings in disclosure”.²

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

² This was the phrase used by Hardiman J in *PG v Director of Public Prosecutions* [2007] 3 IR 39 at 42 when referring to *The People (DPP) v Wall* [2005] IECCA 140 as an example of 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.

1.03 In March 2014, the Commission published an *Issues Paper on Disclosure and Discovery in Criminal Cases*³ which sought views in relation to the following:

- the scope of the prosecution's duty of disclosure;
- the possibility of discovery in criminal cases;
- the possibility of a procedure to provide the accused access to materials in the possession of third parties;
- the interests of various parties in criminal proceedings, including claims to privilege.

In addition, in May 2014 the Commission held a public seminar on the matters set out in the Issues Paper. The seminar consisted of two panels of experts and was well attended by interested parties.⁴ The Commission received helpful responses to the questions raised in the Issues Paper. These have been taken into account in this Report which sets out the Commission's conclusions and recommendations on disclosure and discovery in criminal cases.

(1) Disclosure

1.04 Article 38.1 of the Constitution of Ireland guarantees to every person charged with a criminal offence the right to trial in due course of law. Since the enactment of the Constitution courts have given meaning and content to the expression "due course of law" in a series of significant decisions, some of which were inspired by traditional common-law principles and doctrines while others were informed by a progressive interpretation of the values and practices that a modern Constitution should foster.⁵ The constitutional imperative to furnish every accused person with a trial in due course of law requires at a minimum that all trials be conducted in accordance with basic principles of justice.⁶ In addition to requiring a procedurally fair trial, it also guarantees a right to trial with reasonable expedition as well as certain other rights the fulfilment of which are necessary for a fair trial leading to a reliable outcome. The right to trial in due course of law, as expressed in the Constitution, is a superior right. This is not to suggest that every trial must be conducted in a manner which

³ *Issues Paper on Disclosure and Discovery in Criminal Cases* (LRC IP 5-2014), available at www.lawreform.ie.

⁴ A report on the seminar held in May 2014 in available at www.lawreform.ie.

⁵ O'Malley, *The Criminal Process* (Dublin: Round Hall, 2009), at 61-144.

⁶ *Heaney v Ireland* [1994] 3 IR 593 at 605.

would be ideal from the accused person's perspective.⁷ What the Constitution requires is that the trial itself and all pre-trial proceedings should be fair to the accused. In this connection, it is well to remember that the right to a trial in due course of law is conferred by the Constitution solely and exclusively on the person being tried, and not on any other person or party. One well-established principle is that the accused's right to a fair trial "is one of the most fundamental constitutional rights afforded to persons" and that "on a hierarchy of constitutional rights it is a superior right".⁸ Because of the considerable resources at the disposal of the State to conduct investigations and gather evidence, it is essential for the purpose of a fair trial that the prosecution make available to the defence in advance of trial all relevant evidence within its possession or power of procurement. Defendants cannot, after all, draw upon state resources to conduct their own investigations. The prosecution for this purpose includes, where appropriate, the police and other investigating agencies. In *The People (DPP) v Tuite*⁹ McCarthy J stated:

"The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parole or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so."¹⁰

1.05 The *Guidelines for Prosecutors* published by the Office of the Director for Public Prosecutions also recognise that disclosure "is determined by

⁷ In *Donnelly v Ireland* [1998] 1 IR 321 at 348, the Supreme Court reiterated the principle that the right to a fair trial is a superior right, while also holding that the accused did not always require a "face-to-face" confrontation with his or her accuser. The Court held that it was permissible for the Oireachtas to provide in section 13 of the *Criminal Evidence Act 1992* that a child's evidence may be given by live television link. The Supreme Court held that the purpose of this provision, to minimise the likelihood that the child witness would be traumatised by the experience of giving evidence in court, was not in conflict with the accused's right to a fair trial. See further the discussion of competing rights at paragraph 2.20ff, below.

⁸ *D v DPP* [1994] 2 IR 465 at 474 (*per* Denham J). In this case the Supreme Court held that the applicant had not established that pre-trial publicity concerning his case constituted a real and substantial risk to his right to a fair trial under Article 38.1° and that any such risk could be addressed by suitable directions at trial.

⁹ (1983) 2 Frewen 175.

¹⁰ *Ibid* at 180-181.

concepts of constitutional justice, natural justice, fair procedures and due process of law” as well as being supplemented by statute in some circumstances.¹¹ The prosecution is statutorily required to provide the accused with a specified list of documents¹² (commonly called the book of evidence) in advance of a trial on indictment. An accused person also has a statutory right to disclosure of particular material in certain circumstances. For example, a person detained in a Garda station is entitled to a copy of the custody record relating to the period of detention and a copy of the audio-video recording of the interview¹³ and to apply for a copy of any recording of the questioning.¹⁴

1.06 In the Supreme Court decision in *McKevitt v Director of Public Prosecutions* 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.”¹⁵

The courts have also repeatedly held that the right to a trial in due course of law and to fair procedures requires the prosecution to provide an accused with access to material that is relevant to the trial.¹⁶ In *Director of Public Prosecutions v Special Criminal Court*¹⁷ the High Court held that all relevant evidence must be disclosed and this includes material that might “give a lead to other evidence”. It should also be noted that the duty to disclose is a continuing

¹¹ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors*, revised November 2010, at 9.3.

¹² Section 4B of the *Criminal Procedure Act 1967*, as inserted by section 9 of the *Criminal Justice Act 1999*, discussed below.

¹³ Regulation 24(2) of the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*.

¹⁴ Section 56 of the *Criminal Justice Act 2007*, replacing regulation 16 of the *Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997* (SI No.74 of 1997).

¹⁵ Supreme Court, 18 March 2003 (*ex tempore* judgment of Keane CJ, with which Denham, McGuinness, Murray and Hardiman JJ concurred).

¹⁶ For an overview see Dwyer “The duty of disclosure in criminal proceedings” (1993) (1) *Irish Criminal Law Journal* 66.

¹⁷ [1999] 1 IR 60 at 76.

one¹⁸ and the prosecution is also obliged to disclose material which may be discovered after the trial.¹⁹

1.07 The European Court of Human Rights (ECtHR) has described disclosure as “a fundamental aspect of the right to a fair trial”.²⁰ The Court also held that Article 6(1) of the European Convention on Human Rights (ECHR) requires the prosecution to disclose to the defence all material evidence in their possession for or against the accused. This is based on the Court’s rationale that there should be equality of arms between the prosecution and defence, which means that each party must be given a reasonable opportunity to present their case and that neither party is placed at a disadvantage.²¹ The ECtHR has also held that the equality of arms principle places an obligation on the prosecution to disclose to the defence all the material evidence in the case, whether it is of an inculpatory or exculpatory nature.²² The right to a fair trial is also enshrined in Article 47 of the *Charter of Fundamental Rights of the European Union*. In addition, the 2012 EU Directive on the right to information in criminal proceedings²³ requires that an accused be provided with access to all relevant material by prosecuting authorities.²⁴

1.08 Despite clear statements about the general duty of disclosure in cases such as *McKevitt*, discussed above, the absence of a clear procedure for disclosure has led to the development of the scope of the duty on a case-by-case basis. For example, in *The People (DPP) v Nevin*²⁵ the Court of Criminal Appeal held that material in the “possession or power of procurement” of the prosecution must be disclosed. Even though there is no formal procedure to

¹⁸ *Director of Public Prosecutions v Special Criminal Court* [1999] 1 IR 60.

¹⁹ *People (DPP) v Nevin*, unreported, Court of Criminal Appeal, 13 December 2001.

²⁰ *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1 at paragraph 60.

²¹ *Dombo Beheer BV v Netherlands* (2002) 35 EHRR 18 at paragraph 33.

²² *Jespers v Belgium* (1983) 5 EHRR CD 305.

²³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

²⁴ Article 11 of Directive 2012/13/EU requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it by 2 June 2014. At the time of writing (December 2014), the relevant legislation to implement the Directive had not been enacted but elements of the Directive may have direct effect in domestic law once the final deadline for transposition has passed.

²⁵ Court of Criminal Appeal, 13 December 2001.

compel the prosecution to procure material from a third party for the purposes of providing this material to the accused, the obligation on the prosecution to procure evidence for the purposes of disclosure is much broader than merely to disclose the material over which the prosecution has control.²⁶ Indeed the scope of “power of procurement” in this context has not been defined in any detail but it has been 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.²⁷ It is notable that the phrase “power of procurement” reflects the language used in both the *Rules of the Superior Courts 1986*²⁸ and the *Circuit Court Rules 2001*²⁹ to describe the civil process of discovery. By way of comparison with disclosure in criminal cases, the process of discovery in civil proceedings serves a similar function whereby one party provides relevant evidence to another in advance of trial; but, by contrast, discovery in civil cases is based on a clear statutory foundation.

1.09 Disclosure also exists in certain civil proceedings but it has a different meaning from the process of disclosure in criminal cases and is grounded upon different principles. In brief, it refers to 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*,³⁰ which apply to High Court personal injuries actions only, require the parties to disclose to each other any report or statement from any expert whom they intend to call to give evidence in relation to an issue in the case. However, the most common means of obtaining access to material in civil proceedings is through the discovery procedure.

(2) Discovery

1.10 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.³¹ Order 31, rule 12 of the *Rules of the Superior Courts 1986*, as

²⁶ *The People (DPP) v Sweeney* [2001] 4 IR 102.

²⁷ Coonan and O’Toole *Criminal Procedure in the District Court* (Round Hall Press 2011) at 238.

²⁸ Order 31, rule 12 of the 1986 Rules, as inserted by the *Rules of the Superior Courts (Discovery) 2009* (SI No. 93/2009).

²⁹ Order 32, rule 1 of the 2001 Rules.

³⁰ SI No. 391/1998. The 1998 Rules were made under section 45 of the *Courts and Court Officers Act 1995*.

³¹ See generally Delany and McGrath *Civil Procedure in the Superior Courts* 3rd ed (Round Hall, 2012), Chapter 10.

amended,³² 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.³³ 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 or power of 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. 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.

1.11 In its Issues Paper the Commission considered the arguments for and against introducing a discovery procedure in criminal cases. On the one hand, the advantage of having a process akin to discovery in criminal proceedings would be the introduction of a fixed formal procedure for seeking access to relevant material. 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. Matthews and Malik have commented:³⁴

“The perceived advantage of disclosure process includes fairness to both sides, playing “with all the cards face up on the table”, clarifying

³² 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.

³³ See Delany and McGrath *Civil Procedure in the Superior Courts* 3rd ed (Round Hall Press 2012), at paragraphs 10-22.

³⁴ Matthews and Malik *Disclosure* (4th ed Sweet and Maxwell 2012).

the issue between the parties, reducing surprise at the trial and encouraging settlement. Any system of disclosure should have as a broad rationale the just and efficient disposal of litigation”.

1.12 On the other hand, 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.³⁵ For example, in *Irish Nationwide Building Society v Charlton*³⁶ it was stated that “there is a danger that this valuable legal procedure may be invoked unnecessarily or applied oppressively [and] it will always involve delay and expense”. As well as delays there can be significant cost to 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 discovery should not... be underestimated” particularly since it may “play an important role in keeping witnesses honest”.³⁷

(3) Principles underpinning difference between criminal and civil proceedings

1.13 The courts have also pointed to important differences between the operation of discovery in civil and criminal proceedings. In *The People (DPP) v Sweeney*³⁸ 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*³⁹ 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, and this was at variance with the concept of mutuality in third party discovery in civil proceedings.⁴⁰ In *DH v Groarke*⁴¹ Keane CJ noted that, in *Sweeney*, Geoghegan J had drawn a distinction between the prosecution’s duty to disclose and “the inappropriate

³⁵ Delany and McGrath *Civil Procedure in the Superior Courts* (3rd ed Round Hall Press 2012), at paragraph 10-08.

³⁶ Supreme Court, 5 March 1997.

³⁷ See Clarke J’s Foreword to Commercial Litigation Association of Ireland *Good Practice Discovery Guide* (March 2014), available at www.clai.ie.

³⁸ [2001] 4 IR 102.

³⁹ [1996] 1 ILRM 317.

⁴⁰ *Ibid* at 319.

⁴¹ [2002] 3 IR 522.

use of the civil machinery of discovery”.⁴² In the context of sexual offence cases it has been suggested that applications for third party discovery may amount to a “fishing expedition” with a view to obtaining information about the victim that could then be used by the defence in cross-examination.⁴³

1.14 Having set out these considerations in the Issues Paper, the Commission asked whether discovery should be available in criminal cases and, if so, 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 specifically for criminal proceedings. In *Allied Irish Banks plc v Ernst & Whinney*,⁴⁴ the Supreme Court noted that discovery in civil cases is 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 to defence of the claim. This point was considered by the Supreme Court in *Sweeney*⁴⁵ where it held that, because discovery in civil proceedings is based on its mutual availability to the parties, it cannot be applied by analogy to criminal proceedings because no such mutuality exists between the prosecution and the accused. The majority of consultees and contributors at the seminar agreed that the mutuality on which discovery in civil proceedings was based was not appropriate for criminal proceedings where the burden of proof is on the prosecution to prove the guilt of an accused beyond all reasonable doubt.

1.15 Given the lack of mutuality in criminal proceedings there is no general obligation on the accused to provide details of the defence to the prosecution in advance of trial. In contrast, in England and Wales the *Criminal Procedure and Investigations Act 1996* requires the defence in a criminal case to provide statements in advance of the trial to the prosecution.⁴⁶ Irish law provides for some limited circumstances in which the accused is required to give advance notice to the prosecution of defence evidence. For example, if the accused proposes to call an alibi in defence, the prosecution must be notified and the name of the person who is to provide the alibi must be provided to the

⁴² *Ibid* at 530.

⁴³ 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.

⁴⁴ [1993] 1 IR 375 at 390.

⁴⁵ [2001] 4 IR 102. See also *The People (DPP) v Flynn* [1996] 1 ILRM 317.

⁴⁶ Sections 6 to 6E of the UK *Criminal Procedure and Investigations Act 1996*.

prosecution in advance of trial.⁴⁷ The accused must also notify the prosecution of the name of any expert witness he or she proposes to call.⁴⁸ Section 1A of the *Bail Act 1997* requires a person charged with a “serious offence”⁴⁹ to furnish the prosecutor with a written statement containing certain specified information relating to the applicant.

1.16 It might be argued that since Irish law already has some statutory provisions requiring advance notice from the accused further exceptions should be made. Previous analysis of the matter strongly leans against any further exceptions. In 2003 the *Report of the Working Group on the Jurisdiction of the Courts* 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.”⁵⁰ This view was echoed in the 2007 *Final Report of the Balance in the Criminal Law Review Group*.⁵¹ In *Markey v Minister for Justice and Law Reform* 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”.⁵² There was general consensus from consultees that defence disclosure should not be introduced and that further notification requirements should only be introduced in specified circumstances. The majority of consultees felt that a requirement for disclosure by the defence would infringe the right to a fair trial.

1.17 It was suggested, however, that in some circumstances advance notice of defence statements might assist in ensuring that trials were fairer. In this respect, 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

⁴⁷ Section 20 of the *Criminal Justice Act 1984*.

⁴⁸ Section 34 of the *Criminal Procedure Act 2010*.

⁴⁹ S. 1 of the *Bail Act 1997* provides that a “serious offence” means “an offence specified in the *Schedule* for which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of 5 years or by a more severe penalty”.

⁵⁰ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (the Fennelly Group Report) (Courts Service, 2003), at paragraph 772.

⁵¹ Available at www.justice.ie.

⁵² [2012] 1 IR 62.

Act.⁵³ It has been suggested that the 2011 Act therefore undermines the argument against the availability of discovery in criminal cases.⁵⁴ In its Issues Paper, the Commission posed the questions whether the list of offences to which section 15 of the *Criminal Justice Act 2011* applies should be extended and also whether there should be a specific procedure for disclosure by the accused. The majority of consultees did not agree that either of these measures would be a suitable means of reforming the disclosure system. The Commission agrees and therefore makes no recommendations concerning the introduction of disclosure by the accused in this Report.

(4) The need for statutory reform: a procedure for disclosure

1.18 The absence of a specific procedure for prosecution disclosure has been criticised by many commentators⁵⁵ as well as by the judiciary.⁵⁶ In its Issues Paper the Commission asked whether there should be a fixed procedure for seeking disclosure in criminal cases and whether this should be on a statutory or non-statutory footing. There was general agreement amongst consultees that disclosure in criminal proceedings should be provided for in legislation because this would clarify the nature and scope of the prosecution duty. Some consultees expressed concern about the inconsistent approaches taken by agencies to their obligation to disclose and that this results in differing standards of disclosure amongst agencies. Opinion varied as to the most suitable reform mechanism. Some suggested revised rules of court, others primary legislation and others the preparation of appropriate bench books. It was suggested that reform in criminal proceedings might be achieved by cross-fertilisation of civil and criminal procedural law. In that regard it was proposed that, the schedule attached to the affidavit of discovery in civil proceedings might be utilised in a criminal disclosure procedure. In such a schedule one

⁵³ These offences include what are commonly referred to as “white collar” offences. These include 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.

⁵⁴ Mulcahy “The Criminal Justice Act 2011, Criminal Discovery, and *égalité des armes*” (2012) (1) *Bar Review* 21, at 24.

⁵⁵ See Abrahamson, Dwyer and Fitzpatrick *Discovery and Disclosure* 2nd ed (Round Hall, 2013); Heffernan and Ni Raifeartaigh *Evidence in Criminal Trials* (Bloomsbury Professional Ireland, 2014); Coonan and O’Toole *Criminal Procedure in the District Court* (Round Hall, 2011).

⁵⁶ For example, Hardiman J in *PG v Director of Public Prosecutions* [2007] 3 IR 39, at 42; and in *JB v Director of Public Prosecutions* [2006] IESC 66.

party might be required to list all the material currently and previously in its possession or power of procurement as well as the material over which privilege was claimed. It would then be for the court to rule on the claim of privilege.

1.19 During the consultation process the Commission received information that a scheduling procedure, analogous to civil discovery, has already developed by some prosecuting authorities in Ireland. The practice of scheduling also exists in criminal procedure in England and Wales. The *Criminal Procedure and Investigations Act 1996* recognises a distinction between ‘sensitive’ and ‘non-sensitive’ unused material which is documented by investigators in schedules; Schedule MG6C contains a list of ‘non-sensitive’ unused material and schedule MG6D sets out the ‘sensitive’ unused material. This model was also recommended during the consultation process as a visible mechanism for case audit and subsequent review, and this is the practice used by the police forces of England and Wales. In its 2014 *Report on Crime Investigation*, the Garda Inspectorate noted that in Ireland, unlike other comparable jurisdictions, the Garda Síochána “are generally untrained in disclosure issues, particularly in presenting evidence that is disclosable or non-disclosable and in preparing disclosure schedules for court.” As a result the Inspectorate recommended the need for disclosure training for An Garda Síochána.⁵⁷

B The process of disclosure, including timing

(1) The point at which the obligation to disclose first arises

1.20 The duty of disclosure 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.⁵⁸ 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”.⁵⁹ It has been observed that the defence’s right to disclosure of evidence “would have little meaning unless the prosecution

⁵⁷ See Garda Inspectorate, *Report on Crime Investigation* (2014), recommendations 6.6, 9.11, 9.12, available at www.gsinsp.ie.

⁵⁸ See *Braddish v Director of Public Prosecutions* [2001] 3 IR 127 and *Savage v Director of Public Prosecutions* [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.

⁵⁹ Glynn, “The Extent of the Duty of An Garda Síochána to Preserve Evidence” (2011) 29 ILT 109.

were obliged to preserve that evidence”.⁶⁰ Investigators must comply with this obligation from the very beginning of an investigation when large amounts of material may be gathered from a range of sources, including both public bodies and private individuals or organisations. Moreover, in May 2014, the Supreme Court indicated that it was likely to decide at a future date that the Constitution requires that a person in Garda custody is entitled to have a solicitor present while he or she is being questioned.⁶¹ The disclosure of material gathered prior to questioning in the Garda station to the detained person might affect the legal advice given by a solicitor to the detained person. In *Braddish v Director of Public Prosecutions*⁶² the Supreme Court recognised the “unique investigative role” of An Garda Síochána and held that the Garda Síochána have:

“a duty to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not, and regardless of whether it assists the case the prosecution is advancing or not.”⁶³

1.21 The 2012 EU Directive on the right to information in criminal proceedings⁶⁴ requires Member States to provide the suspect or the accused with a written notification of rights and entitlements as well as any relevant information regarding the accusation from the point at which he or she is arrested by the investigating authorities.⁶⁵ Moreover, access to

⁶⁰ O'Malley *The Criminal Process* (Round Hall Press 2009) at 713.

⁶¹ *The People (DPP) v Gormley* [2014] IESC 17. Following this, on 7 May 2014 the Director of Public Prosecutions issued a directive to the Garda Síochána to the effect that, from that date, a person detained in Garda custody is entitled to have a solicitor present during questioning: see Robinson “Key Changes to Criminal Law Get the Silent Treatment” *The Irish Times* 19 May 2014. The Legal Aid Board’s *Garda Station Legal Advice Revised Scheme*, available at www.legalaidboard.ie, which came into effect in August 2014, takes account of the DPP’s directive of 7 May 2014.

⁶² [2001] 3 IR 127, at 133.

⁶³ *Ibid* at 133.

⁶⁴ See paragraph 1.07, above.

⁶⁵ Article 7(1) of the 2012 Directive provides: “Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with

materials must be granted in “due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court”.⁶⁶ Article 7(2) of the 2012 EU Directive also provides:

“Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.”

Recital 31 of the 2012 Directive states that such material may include “documents, and where appropriate photographs and audio and video recordings” contained in a case file.

1.22 This mirrors the Supreme Court’s understanding of disclosure which was set out in *McKevitt v Director of Public Prosecutions*⁶⁷ 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.”

1.23 There is, however, limited statutory guidance in Irish law as to the material which must be disclosed by the prosecution. Section 4B of the *Criminal Procedure Act 1967* provides the most extensive list of documents (commonly known as the book of evidence) which the prosecution must provide to the accused 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;

national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers”.

⁶⁶ Article 7(3) of the 2012 Directive.

⁶⁷ Supreme Court, 18 March 2003 (*ex tempore* judgment of Keane CJ, with which Denham, McGuinness, Murray and Hardiman JJ concurred).

(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).⁶⁸

In addition, section 4C of the 1967 Act⁶⁹ allows the prosecution to provide additional evidence to the defence at any time after the book of evidence is served. As a book of evidence is served only in a trial on indictment, this requirement does not address the duty of disclosure in other cases. In addition, as the book of evidence is served at a relatively advanced stage in the criminal justice process, it is arguable that it would not be sufficient to comply with the duty of disclosure or the requirements of the 2012 EU Directive for the provision of information as soon as practicable.

1.24 There is no equivalent statutory provision or procedure for disclosure in the case of summary proceedings. In this respect it is notable that the 2012 EU Directive applies in all “courts having jurisdiction in criminal matters”.⁷⁰ Article 6(1) of the 2012 EU Directive requires Member States to ensure that information is provided swiftly to the suspect or the accused and this information should set out details of the alleged criminal offence in “such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.”

1.25 The *District Court Rules 1997* include some reference to the type of information which must be supplied to the accused. For example, a summons must be written in “ordinary language” and it must set out the particulars of the alleged offence, including “the name of the person against whom the complaint has been made or who is alleged to have committed the offence and the address (if known) at which he or she ordinarily resides”.⁷¹ When an accused is prosecuted by way of a charge sheet, a copy of the particulars of the offence must be provided to the person against whom the offence is alleged as soon as possible. In addition, where another document is requested and is deemed to

⁶⁸ Section 4B of the *Criminal Procedure Act 1967*, as inserted by section 9 of the *Criminal Justice Act 1999*.

⁶⁹ As inserted by section 9 of the *Criminal Justice Act 1999*.

⁷⁰ Article 2(2) of the 2012 Directive.

⁷¹ Order 15, rule 3 of the *District Court Rules 1997*.

be “reasonably required” by a judge, a copy of such document must be provided.⁷²

1.26 However, there is no prescribed application which may be made in Court to seek disclosure. In practice the defence often requests a so-called ‘Gary Doyle letter’ or ‘Gary Doyle order’ seeking disclosure which may be granted at the judge’s discretion on the basis of that particular judge’s interpretation of *Gary Doyle*, which will be discussed in more detail below.⁷³ The prosecution then provides the defence with a *précis* of the evidence, which is supposed to be a summary of the evidence that is to be presented to the Court by the prosecuting Garda. This has developed since the *Gary Doyle* case but the form and quality of the disclosure in the *précis* vary considerably given the informal nature of this practice.⁷⁴ A list of witnesses and a copy of witness statements is not furnished to the defence as a matter of course.

1.27 It would appear that neither the *District Court Rules 1997* nor the *précis* practice are extensive enough to cover the broad obligations for access to materials set out in the 2012 EU Directive. For example, the EU Commission’s Explanatory Memorandum for the 2012 Directive states that the defence should have the opportunity to access a case-file on an ongoing basis and that the accused should be provided with an index of the documents in the case-file in order to identify the documents to which it would be most useful to have access.⁷⁵

1.28 In England and Wales disclosure is regulated by the *Criminal Procedure and Investigations Act 1996* which also applies to Northern Ireland. The 1996 Act was amended significantly in 2003 and is supplemented by the *Criminal Procedure Rules*.⁷⁶ The Guidelines published by the Attorney General for England and Wales provide that “the prosecutor should... provide to the

⁷² Order 35, rule 3 of the *District Court Rules 1997*.

⁷³ *Director of Public Prosecutions v Doyle (Gary)* [1994] 2 IR 286.

⁷⁴ For a general overview of the operation of disclosure in summary prosecutions see Coonan and O’Toole *Criminal Procedure in the District Court* (Round Hall, 2011) at 233-253; Dunne *Judicial Review of Criminal Proceedings* (Round Hall 2011) at 625; Heffernan and Ní Raifeartaigh *Evidence in Criminal Trials* (2014) at paragraph. 11.20; Dwyer *et al Discovery and Disclosure* (2nd ed. Round Hall Press 2013) at 354.

⁷⁵ European Commission, Proposal for a Directive of the European Council and Parliament of 22 May 2012 on the right to information in criminal proceedings, COM(2010) 392 final, at paragraph 32.

⁷⁶ *Criminal Procedure Rules 2013* (SI 2013/1554).

defence all evidence upon which the Crown proposes to rely in a summary trial".⁷⁷ In general terms, however, as is the case in Irish law, there is a lesser duty to disclose where the offence is being tried summarily in the Magistrates Court as opposed to on indictment in the Crown Court. The accused is, however, entitled to a copy of statements in advance of entering a plea to the charge for offences triable either way.⁷⁸ In addition, the UK has implemented the 2012 EU Directive through changes to PACE Codes C and H made under the *Police and Criminal Evidence Act 1984*. When implementing these changes the UK Government noted that this builds on existing good practice within the PACE framework.⁷⁹

(2) Process of Disclosure

1.29 The 2012 EU Directive on the right to information in criminal proceedings provides that access to the materials of the case must be granted at the earliest opportunity. Disclosure is often made at a late stage in the trial and in some cases this may delay the trial. In recent years many cases have come before the courts seeking a prohibition of trial on the basis that crucial evidence, such as CCTV footage, was missing. This has occurred even though the courts have on many occasions reiterated that the *Braddish* principles set out a clear duty on investigating authorities to seek out and preserve evidence.⁸⁰

1.30 During the consultation process, it was indicated that the delay in disclosure or insufficient disclosure at the outset may be due to the absence of a formal structured disclosure regime. If such a framework existed, it might include a scheduling process whereby the investigator would categorise material under a number of headings, including relevance. The determination of relevance of material is one of the key steps in the disclosure process. In *Director of Public Prosecutions v Special Criminal Court*⁸¹ the High Court held that relevant evidence includes material that "might help the defence case, help

⁷⁷ Attorney General for England and Wales, *Guidelines on Disclosure* paragraph 57.

⁷⁸ *Magistrates' Courts (Advance Information) Rules 1985*.

⁷⁹ Home Office, *Police and Criminal Evidence Act 1984 ('PACE') Codes of Practice Consultations: a response to the Home Office consultation on PACE Codes C and H* (2014), available at www.gov.uk.

⁸⁰ For example, *Dunne v Director of Public Prosecutions* [2002] 2 IR 305. See also, Daly "Criminal Evidence" in *Annual Review of Irish Law 2010* (Thomson Round Hall 2011), at 281.

⁸¹ [1999] 1 IR 60 at 76.

to damage the prosecution case or give a lead to other evidence”.⁸² Therefore, while the defence will be entitled to have access to all the relevant evidence in a particular case, it is important to note the limits to disclosure. For example, in a drink-driving case where the defence sought access to material related to the operation of intoximeters it was refused on the basis that sufficient safeguards had been built into the *Road Traffic Act 1994* (as amended) to ensure the effective functioning of the machines.⁸³

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* also clearly state that where there are no obstacles, disclosure should be favoured when balancing different considerations.⁸⁴ The *Guidelines* also state that some material may be excluded on the basis of public interest concerns. 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;

⁸² *Ibid* at 76.

⁸³ *Dowling v Brennan* [2010] IEHC 522.

⁸⁴ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors*, revised November 2010, at paragraph 9.22.

(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".⁸⁵

1.31 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;

(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;

⁸⁵ *Ibid* at paragraph 9.24.

- (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);⁸⁶
- (p) any other relevant document.⁸⁷

1.32 In its Issues Paper, the Commission asked whether the *Guidelines* were considered to be sufficient and whether they should be placed on a statutory footing. Opinion was divided in relation to the effectiveness of the DPP's *Guidelines for Prosecutors*. Some suggested the definitions of legal professional privilege and relevant material as set out in the *Guidelines* should be reviewed. Others suggested the definition of relevance set out in the Disclosure Codes of Practice accompanying the English *Criminal Procedure and Investigations Act 1996* should be adopted.⁸⁸ One consultee submitted that the *Guidelines* should refer to the rights of victims, particularly those set out in the EU Directive on Victims' Rights.⁸⁹ Another suggested that timing, particularly

⁸⁶ Paragraphs 8.6-8.8 of the *Guidelines for Prosecutors* relate to the role of the prosecutor in court and obligations to call witnesses.

⁸⁷ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors*, revised November 2010, at paragraph 9.11.

⁸⁸ This definition reads: "if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case".

⁸⁹ Directive 2012/29/EU. The Directive requires Member States to implement it by 16 November 2015.

the time in which disclosure is to be delivered and the time in which statements are to be taken, should be included in the DPP's *Guidelines*. Most consultees considered it necessary to place the *Guidelines* on a statutory footing. The DPP submitted that it would not be desirable to place the *Guidelines* on a statutory footing, especially because their current status has the advantage that they may be readily revised to provide, for example, suitable disclosure arrangements for digital media; and noted that the approach in England and Wales provides a useful example of how statutory provisions may be supplemented by guidelines.⁹⁰

1.33 After the determination of relevance has been made and either before or after the schedule of material has been provided to the defence, a situation may arise where the defence seeks to access material which was either not used by the prosecution or was deemed not to be relevant. Since there is currently no formal procedure for disclosure the stage at which the issue arises during the trial process is not precisely defined. A failure to disclose is often the subject matter of judicial review, when an application is brought seeking an order of prohibition.⁹¹ In contrast in England and Wales disclosure is dealt with during pre-trial case management hearings since the overhaul of the disclosure regime in 2003.⁹²

1.34 The introduction of preliminary hearings in all trials on indictment was recommended by the *Working Group on the Jurisdiction of the Courts* "to identify and determine whether the prosecution has made full disclosure in conformity with its current obligations".⁹³ In its *Report on Prosecution Appeals and Pre-trial Hearings*, the Commission recommended the introduction of a pre-trial questionnaire to ensure that legal teams have an opportunity to assess whether the case is ready for trial as well as draw up witness lists. It was suggested that these changes "could enhance the reliability of trial verdicts" and may even perhaps lead to a reduction in "the number of quashed convictions

⁹⁰ As noted above, in England and Wales the Attorney General publishes *Guidelines on Disclosure* to supplement the statutory disclosure regime in the *Criminal Procedure and Investigations Act 1996*. At the time of writing (December 2014), these were revised in December 2013, available at www.gov.uk.

⁹¹ O'Higgins, "Recent Developments in the law of prohibition Part 2" (2009) *Bar Review* 54.

⁹² For commentary on the operation of this see (2010) 14 *International Journal of Evidence and Proof* 89-128.

⁹³ Working Group on the Jurisdiction of the Courts, *Report on the Jurisdiction of the Courts* (Dublin: Courts Service, May 2003), at 23.

and retrials”.⁹⁴ In 2012 the *Report of the Working Group on Efficiency Measures in the Criminal Justice System* recommended the introduction of a pre-trial procedure for criminal cases in the Circuit Court.⁹⁵ As a result in 2012 practice directions were developed in relation to pre-trial hearings and case management which led to the introduction of a pilot pre-trial procedure.⁹⁶ In its 2014 *Report on Crime Investigation*, the Garda Inspectorate welcomed this pilot scheme and recommended that it be extended to the District Court.⁹⁷ In 2014 the Department of Justice and Equality published the *General Scheme of a Criminal Procedure Bill*, Head 2 of which provides for extensive pre-trial preliminary hearings.⁹⁸ The Commission considers that the proposals in the General Scheme may prove very useful in the context of a statutory disclosure process, especially as a means of providing a judicially-controlled mechanism for difficult cases where disclosure is contested.

(3) Process of disclosure in summary proceedings and in trial on indictment

1.35 As a court of summary jurisdiction, it has been stated that trials in the District Court may be “undertaken with some degree of expedition and informality [but] without departing from the principles of justice”.⁹⁹ In *The State (Healy) v Donoghue*, O’Higgins CJ held that Article 38 of the Constitution “makes it mandatory that every criminal trial shall be conducted in accordance with the concept of justice... [and] that the person accused will be afforded every opportunity to defend himself”.¹⁰⁰

⁹⁴ Law Reform Commission, *Report on Prosecution Appeals and Pretrial Hearings* (LRC 81–2006), at 78-79.

⁹⁵ Department of Justice and Equality, *Report of the Working Group on Efficiency Measures in the Criminal Justice System - Circuit and District Courts* (November 2012), available at www.justice.ie, at 6.

⁹⁶ CC12 - Pre-trial procedure - Dublin Circuit, 17 December 2012, available at: www.courts.ie.

⁹⁷ Garda Síochána Inspectorate, *Report on Crime Investigation* (October 2014); available at www.gsinsp.ie.

⁹⁸ Department of Justice and Equality, *General Scheme of a Criminal Procedure Bill*, 1/04/2014, available at www.justice.ie.

⁹⁹ *Clune v Director of Public Prosecutions* [1981] ILRM 17.

¹⁰⁰ [1976] 1 IR 325 at 349.

1.36 The leading authority on disclosure in summary proceedings is *Director of Public Prosecutions v Gary Doyle*,¹⁰¹ in which 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*¹⁰² and was prosecuted summarily. He had made an inculpatory statement while being interviewed by a member of An Garda Síochána in relation to a number of burglaries. While the prosecution provided him with his own statement it refused to provide him with copies of statements made by four other persons. 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 whether this was required, a judge of the District Court should consider the following four factors:

- “(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;
- (d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused.”¹⁰³

1.37 *Whelan v Kirby* related to the prosecution of a summary only offence for drunken driving where it was held that *Gary Doyle* applied by analogy since it was “based on the exact same constitutional principle”.¹⁰⁴ Therefore, the four factors apply to both indictable and summary offences prosecuted in the District Court. The Director of Public Prosecutions’ *Guidelines for Prosecutors* acknowledge that the principles set out in *Gary Doyle* “are applicable to all offences being tried summarily”. The constitutional requirement of fair procedures therefore applies equally to summary prosecutions and prosecutions on indictment.

¹⁰¹ [1994] 2 IR 286.

¹⁰² Since replaced by the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

¹⁰³ [1994] 2 IR 286 at 302.

¹⁰⁴ [2005] 2 IR 30.

1.38 Some commentators¹⁰⁵ have drawn attention to problems with the disclosure regime in summary proceedings and in particular that the circumstances in which disclosure orders are granted and that the content of such orders vary greatly.¹⁰⁶ While the most serious criminal matters are dealt with on indictment in the Central Criminal Court and in the Circuit Criminal Court, the vast majority of criminal matters are dealt with summarily in the District Court. Therefore, in its Issues Paper the Commission asked whether the disclosure regime for indictable offences tried summarily was adequate. In particular the Commission sought views on whether the factors set out in *Gary Doyle* should be placed on a statutory footing and whether it was necessary to supplement those factors. The responses to these questions and the contributions to the seminar indicated dissatisfaction with the current disclosure regime in summary proceedings and virtual unanimity in relation to the need for reform of the process. The submissions received confirmed inconsistency of approach and a lack of procedural clarity in the District Court.

(4) The Gary Doyle factors

1.39 The Supreme Court held in *Gary Doyle*¹⁰⁷ that in the absence of legislation the test for a judge of the District Court to apply in each case is “whether it is necessary in the interests of justice on the facts of the particular case that the accused should be furnished pre-trial with the statements on which the prosecution case will proceed”.¹⁰⁸ Legislation would put on a statutory basis the factors to be considered by a judge of the District Court and clarify an important matter of criminal procedure.

(a) Seriousness of the charge

1.40 In response to the Issues Paper some practitioners said that the number of serious cases dealt with summarily had increased significantly in recent years, citing robberies and sexual assault as examples. Summary jurisdiction has expanded as a result of a number of legal developments, including the increase in indictable offences triable summarily (also known as ‘hybrid offences’) and summary disposal following a guilty plea.¹⁰⁹ In 2013

¹⁰⁵ For example, Dwyer *et al Disclosure and Discovery* (2nd ed. Round Hall Press 2013).

¹⁰⁶ *Ibid* at 354.

¹⁰⁷ [1994] 2 IR 286.

¹⁰⁸ *Ibid* at 301.

¹⁰⁹ O’Malley *Sentencing Law and Practice* (2nd ed. Round Hall, 2006) at 545 -551.

284,949 orders were made in respect of summary offences and 63,049 orders were made in respect of indictable offences dealt with summarily.¹¹⁰

1.41 Offences of varying levels of seriousness are now tried in the District Court. An indictable offence triable summarily, e.g. assault causing harm, is more serious than an offence only triable summarily, e.g. assault. Some such indictable offences triable summarily may require the prosecution to have substantial evidence, such as witness statements or CCTV footage, to prove the case. Irrespective of whether such witness statements form part of the prosecution case, the duty of disclosure requires the statements to be provided to the defence. However, the *précis* of the evidence does not adhere to a prescribed format and therefore in practice a list of witnesses or a summary of a witness statement may be provided. In response to the Issues Paper, a consultee expressed dissatisfaction with this stating that a *précis* of the evidence of a number of witnesses is not sufficient to provide proper notice or evidence of the means to cross examine.

1.42 Some consultees consider that the current disclosure regime in the District Court works effectively. It is clear from the majority of submissions to the Issues Paper however that practitioners are dissatisfied with the discharge of the duty to disclose in summary proceedings, particularly in serious cases. It is arguable that the reason practitioners are more dissatisfied with disclosure in summary proceedings than in a trial on indictment is due to the absence of a formal procedure in summary proceedings. It may not be necessary to have a procedure equivalent to the Book of Evidence in summary proceedings but it is possible to envisage a regime which would provide clarity. For example, a two-tiered approach could be introduced which would require more rigorous disclosure in the case of more serious offences, e.g. the prosecution might be required to hand over the case file for inspection in line with the 2012 EU Directive on the right to information in criminal cases. If this were to be introduced alongside a more rigorous process at the investigation stage, it should not impose a disproportionate additional burden on the prosecution.

(b) Importance of the statements or documents

1.43 The right to a fair trial requires important documents to be provided to the defence in advance of trial so that there is an opportunity to prepare an adequate defence. The duty of disclosure requires the prosecution to provide the defence with access to materials which may either support the defence case or undermine the prosecution case. This factor is therefore connected to the general test of relevance which is applied by the prosecution when examining the material to be disclosed.

¹¹⁰ Courts Service, *Annual Report 2013 (2014)*, available at www.courts.ie.

1.44 The importance or relevance of documents has arisen in connection with disclosure of documents related to the functioning of devices measuring speed or intoxication in road traffic offences. In two 2010 decisions of the High Court the information sought was refused on the basis that sufficient safeguards had been built into the *Road Traffic Act 1994* (as amended) to ensure the effective functioning of the intoximeters¹¹¹ and also because such material did not constitute evidence but would require “an inquiry to take place to elicit if evidence exists”.¹¹² Similar cases in relation to intoximeters have also arisen in England and Wales.¹¹³

1.45 The importance of material has also been connected to the possession of materials. This has been the subject of much debate in relation to the request for access to counselling records in a sexual offence case, where it has been suggested the defence is carrying out a “fishing expedition”. This can occur in other types of cases. For example, in *Director of Public Prosecutions v O'Malley*¹¹⁴ the accused sought to obtain information in relation to how the breath specimen taken from him was treated by the Medical Bureau of Road Safety (MBRS). At trial the accused argued that the documentation sought was required to establish the “forensic integrity” of the machine with a view to arguing that the machine was unreliable. The MBRS argued that the software code was not relevant to the determination of the case because the machine in question had been used 35 times throughout the State during a four year period. The High Court held that the Medical Bureau of Road Safety (MBRS), as a State entity, was part of the prosecution and therefore was obliged to disclose.¹¹⁵ This illustrates that third party disclosure is also of relevance in summary proceedings.

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

1.46 It has been set out above that the only requirement in summary proceedings is for the accused to be provided with a brief description of the charge either in the summons or the charge sheet. At the seminar, practitioners stated that often disclosure only becomes available on the date of a trial or it is delayed beyond that date. However, it was also stated at the seminar that the

¹¹¹ *Dowling v Brennan* [2010] IEHC 522.

¹¹² *Thompkins v Director of Public Prosecutions* [2010] IEHC 58.

¹¹³ For example, *Director of Public Prosecutions v Wood*; *Director of Public Prosecutions v McGillicuddy* [2006] EWHC 2986.

¹¹⁴ [2008] IEHC 117.

¹¹⁵ *Ibid* at paragraph 19.

pilot scheme introduced in the Circuit Criminal Court in 2012¹¹⁶ has alleviated delays and that all parties are now more prepared for trial once the trial date is fixed, thereby reducing the possibility that a prosecution will be stayed. It is suggested that this positive experience could be built upon to form the basis for the introduction of a pre-trial procedure in summary proceedings.¹¹⁷

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

1.47 The prosecution is obliged only to disclose material that is: (a) relevant and (b) in its possession or power of procurement. In the case of summary prosecutions, less formal procedures exist for policy reasons which have been characterised as follows: “justice should be dispensed in a simple and speedy manner, inordinate expense must be avoided”.¹¹⁸

1.48 As well as the right to a fair trial being at the centre of the criminal justice system, other rights and interests are at play. In *Rowe and Davis v United Kingdom*,¹¹⁹ the ECtHR recognised that “the entitlement to disclosure of relevant evidence is not an absolute right”.¹²⁰ The Court 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.¹²¹ Commenting on the position of victims of crime in *Doorson v The Netherlands*,¹²² the ECtHR held that the principles of fair trial rights of the accused are weighed against those of witnesses or victims in criminal proceedings. This is also in line with the 2012 EU Directive on Victims’ Rights¹²³ which provides for a number of rights, including protection rights such as protection against re-victimisation as well as the right to privacy.

¹¹⁶ CC12: Pre-trial Procedure, Dublin Circuit, 17 December 2012.

¹¹⁷ As noted above this has been recommended in the Garda Síochána Inspectorate’s *Report on Crime Investigation* (October 2014).

¹¹⁸ *Director of Public Prosecutions v Browne* [2008] IEHC 391.

¹¹⁹ (2000) 30 EHRR 1.

¹²⁰ *Ibid* at paragraph 61.

¹²¹ *Ibid*.

¹²² (1996) 22 EHRR 330 at paragraph 70.

¹²³ Directive 2012/29/EU of the European Parliament and of the Council 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. The Directive requires that it must be implemented by Member States by 16 November 2015.

These considerations were discussed in the context of summary proceedings in *Director of Public Prosecutions v Browne* where McMahon J favoured common sense and proportionality as guiding principles “in the weighing exercise which the District Court judge must undertake in exercising his discretion”.¹²⁴ Proportionality is often used as a test in weighing up different constitutional rights and therefore may seem an appropriate solution in this context. However, caution has also been expressed about the inappropriate use of proportionality tests in relation to the right to a trial in due course of the law.¹²⁵

C Recommendations

1.49 In light of the analysis of case law and commentary set out above as well as the responses received during the Commission’s consultation process, **the Commission recommends, that a statutory framework should be enacted setting out the scope of the prosecution duty of disclosure and its application in trials on indictment and summary prosecutions.**

1.50 **The statutory framework should reflect the centrality of the right of the accused under Article 38.1 of the Constitution to a trial in due course of law and should include elements consistent with the 2012 EU Directive on the right to information in criminal proceedings.**

1.51 **The statutory statement of the duty of disclosure should be consistent with existing case law and should provide that the prosecution must, in order to ensure a trial in due course of law and to facilitate the preparation of the defence, disclose to the accused or his or her solicitor any prosecution material which:**

(a) is in the possession or power of procurement of the prosecution,

(b) is relevant to the case,

(c) has not previously been disclosed by the prosecutor to the accused or his or her solicitor, and

(d) can help the case for the defence, damage the case for the prosecution or give a lead to other evidence. Disclosure should be provided as early as possible and in sufficient time as to allow the effective exercise of the rights of the defence.

¹²⁴ [2008] IEHC 391.

¹²⁵ Hogan and Whyte (eds), *Kelly: The Irish Constitution* 4th ed (LexisNexis, 2003) at paragraph 6.5.18; see also paragraphs 6.5.14-6.5.19.

- 1.52 The statutory test of relevance should be supplemented by a list of factors set out in guidelines; and the Director of Public Prosecutions' *Guidelines for Prosecutors* constitute a suitable vehicle for this purpose.
- 1.53 The statutory framework should provide for a scheduling system. The schedules would comprise:
- (a) prosecution material that the prosecutor agrees to be disclosed;
 - (b) prosecution material that the prosecutor considers should not be disclosed on the ground that it:
 - (i) is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public interest privilege and legal professional privilege,
 - or
 - (ii) should not for other stated reasons, including that it is not relevant, be disclosed to the accused;
- and
- (c) prosecution material of which the prosecutor is aware but which is not, at the time of completing the prescribed form, in the possession or power of procurement of the prosecutor.
- 1.54 Objective material, such as CCTV footage and forensic evidence, should be disclosed at an early stage, including at the point where a person is detained in Garda custody. Further disclosure of scheduled materials will occur after this.
- 1.55 In relation to summary prosecutions the legislative framework should provide that the duty of disclosure applies and that it should occur as soon as practicable and in any event alongside the summons or charge sheet. There should also be a proportionality test which sets down factors to be considered with respect to disclosure in summary proceedings, as set out in *Director of Public Prosecutions v Doyle (Gary)*.¹²⁶
- 1.56 In relation to prosecutions on indictment, disclosure should occur as soon as is practicable and in any event not later than either the date on which the accused is put on his or her election or the date on which the documents specified in section 4B(1)(b) of the *Criminal Procedure Act 1967* (the "book of evidence") are served on the accused or the accused's solicitor.

¹²⁶ [1994] 2 IR 286.

1.57 **Provision should also be made for pre-trial preliminary hearings in which disputed questions concerning disclosure may be determined by the court on the application of the accused, the prosecution or any third party who may be affected by disclosure, including a potential third party witness. The Commission discusses this in more detail in Chapter 2.**

CHAPTER 2 PRIVILEGE, CONFIDENTIALITY AND THIRD PARTIES

A Limitations on the duty of disclosure

2.01 In *The People (DPP) v Nevin*¹ it was held that the constitutional duty of disclosure was subject to some limitations. The European Court of Human Rights (ECtHR) also recognised in *Rowe and Davis v United Kingdom*² that “the entitlement to disclosure of relevant evidence is not an absolute right”.³ Moreover, the ECtHR 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.⁴ There may be circumstances where the prosecution refuses to provide the accused with access to relevant material and this gives rise to disputes. In these circumstances the prosecution may claim that the material is subject to privilege and if upheld the scope of the duty to disclose may be curtailed.⁵

(1) *Privilege and confidentiality*

2.02 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.⁶ Privilege is most commonly claimed on the grounds of public interest in criminal proceedings.⁷ In *Murphy v Dublin Corporation*,⁸ it was held

¹ Court of Criminal Appeal, 13 December 2001. In that case it was held that public interest privilege arises in the context of certain communications between the investigating authorities and the Director of Public Prosecutions.

² (2000) 30 EHRR 1.

³ *Ibid* at paragraph 61.

⁴ *Ibid*.

⁵ Charleton and Reidy “Disclosure in criminal cases: Tripping up the prosecution in a legal vacuum - Part 2” (2010) 3 ICLJ 70.

⁶ See Fennell *The Law of Evidence in Ireland* 3rd ed (Bloomsbury 2009).

⁷ O’Malley *The Criminal Process* (Round Hall 2009), at 699.

that the judiciary may not “permit any other body or power to decide for it whether or not a document will be disclosed or produced”.⁹ However, the prosecution does not enjoy the same degree of decision-making power as the court in relation to ascertaining whether material is subject to privilege or not. In addition, the ECtHR held that where the prosecution seeks to determine the importance of information to be withheld from the defence, this amounts to a breach of the right to a fair trial as protected by Article 6(1) of the European Convention on Human Rights (ECHR).¹⁰

(a) Public interest privilege and informer privilege

2.03 Public interest privilege is the most commonly claimed form of privilege in criminal proceedings.¹¹ In *Breathnach v Ireland (No.3)* Keane J set out some of the considerations which may arise in criminal cases:

“[D]ifferent considerations would appear to apply to communications between the Gardaí and the Director of Public Prosecutions, where the public interest in the prevention and prosecution of crime would be given due weight. It would be clearly unacceptable if in every case where a person was acquitted of a criminal charge, he could, by instituting proceedings for wrongful arrest or malicious prosecution, embark on a fishing expedition through all the files of the Gardaí relating to the case.”¹²

Keane J went on to state that the constitutional principles must be carefully considered in each case in order to weigh up the public interest against the rights of the accused.

2.04 Informer privilege is a well-established exception to the general obligation of the prosecution to disclose all relevant material to the defence.¹³ Cases involving informer privilege often relate to offences against the State. It has been suggested that while the underpinning principles are similar to public interest privilege, informer privilege should be viewed separately because the courts do not have to weigh up conflicting public interests.¹⁴ For example, in

⁸ [1972] IR 215.

⁹ *Ibid* at 234.

¹⁰ *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1.

¹¹ See O'Malley *The Criminal Process* (Round Hall 2009), at 699.

¹² [1993] 2 IR 458, at 472.

¹³ *Attorney General v Briant* (1846) 15 M & W 169.

¹⁴ McGrath *Evidence* (Round Hall Press 2005), at paragraph 10.181.

Donohoe v Ireland,¹⁵ the applicant had been charged with the offence of membership of an unlawful organisation, the IRA, contrary to section 2 of the *Offences Against the State Act 1939* and was prosecuted for that offence in the Special Criminal Court. The ECtHR held that the non-disclosure of material as a result of informer privilege does not amount to a violation of the right to a fair trial as enshrined in Article 6 ECHR. In particular the ECtHR found the State's justification, which related to the "effective protection of person and state security as well as effective prosecution of serious and complex crime," to be "compelling and substantiated".¹⁶ Informer privilege is however subject to the "innocence at stake" exception.¹⁷

2.05 Many of the cases which involve a conflict between the right to a fair trial and other personal rights, such as the right to privacy, often involve sexual offence cases where the defence is seeking access to counselling or other medical records of the complainant. Such cases require due consideration to be given to the right of the complainant to privacy.¹⁸ Privacy is protected as an unenumerated right under Article 40.3° of the Constitution. The right to privacy is also enshrined in Article 8 ECHR.

(b) Duty of confidentiality

2.06 Disclosure disputes often arise in relation to the confidentiality of certain material. However, even if certain material is considered to be confidential it may not be afforded privilege. For example, in *Nic Gibb v Minister for Justice*,¹⁹ the plaintiff's partner was fatally injured by Gardaí during a failed robbery attempt. O'Malley J held that while Garda documents, such as a report, duty roster and operational plan, were confidential, they were not privileged and could be admitted into evidence subject to redactions. In *McLaughlin v Aviva Insurance*²⁰ Denham CJ held that privilege only attaches to documents that are "... created, sought, or obtained for, and relevant to, a criminal prosecution by a prosecutor".²¹ That case involved an insurance dispute, where the defendant

¹⁵ European Court of Human Rights, Application no. 19165/08, 13 December 2013.

¹⁶ *Ibid* at paragraph 82.

¹⁷ *Director of Public Prosecutions v Special Criminal Court* [1999] IR 60.

¹⁸ In *Doorson v The Netherlands* (1996) 22 EHRR 330 at 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.

¹⁹ [2013] IEHC 238.

²⁰ [2012] 1 ILRM 487.

²¹ *Ibid* at 493.

claimed the plaintiff had started a fire in his bar and the issue of privilege arose in relation to video surveillance footage, which, at the time of the case, was in the hands of the Gardaí.

2.07 A similar confidentiality issue arose in *Traynor v Delahunt*²² where the applicant brought judicial review proceedings against a decision of the respondent trial judge to refuse to make an order for disclosure in respect of documents relating to a complaint the applicant had made to the Garda Síochána Complaints Board. This complaint related to the conduct of a Garda when attending a public order incident, where the applicant alleged she was assaulted by the Garda when she tried to intervene in an altercation involving her daughter. 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 it was not an adequate excuse for the Director of Public Prosecutions to say that the prosecutor did not propose to rely on certain material in its prosecution, in lieu of disclosure of such material.²³ Of particular relevance to McMahon J's order that the applicant be furnished with all documents received by the Director of Public Prosecutions from the Garda Síochána Complaints Board was that the Director of Public Prosecutions already had sight of the documents and reports relating to the incident.²⁴ Nevertheless, 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.²⁵

(2) *Materials in the possession or power of procurement of the prosecution and third parties*

2.08 Another limitation is that there is no mechanism to order disclosure of material which is in the possession or power of procurement of the prosecution. It has been argued that the role of the prosecutor must be constrained in this manner in order to allow the prosecution to function effectively.²⁶ In *The People (DPP) v Nevin*²⁷ the Court of Criminal Appeal held that material in the

²² [2008] IR 605.

²³ *Ibid* at 611.

²⁴ *Ibid* at 613.

²⁵ *Ibid* at 272.

²⁶ Plater and Line, "Has the 'Silver Thread' of the Criminal Law Lost its Lustre? The Modern Prosecutor as a Minister of Justice", (2012) 31 *University of Tasmania Law Review* 55.

²⁷ Court of Criminal Appeal, 13 December 2001.

possession or power of 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.²⁸ The extension of “possession” to include “power of procurement” reflects the language relating to discovery used in both the *Rules of the Superior Courts 1986*²⁹ and the *Circuit Court Rules 2001*.³⁰ Similarly, the 2012 EU Directive on the right to information in criminal proceedings³¹ requires the national competent authorities to provide suspects and accused persons with the material that is in their possession. However, as already discussed in Chapter 1, there is currently no procedure to compel the prosecution to procure material from a third party for the purposes of providing this material to the accused.³² Therefore, possession of material can be said to limit the scope of the duty of disclosure somewhat. The Director of Public Prosecutions has agreed a series of Memoranda of Understanding with third parties, including a state agency, to streamline the process of disclosure.³³ Nevertheless, the High Court has grappled with the question of who may be defined as a third party or as a party to the proceedings: in *Director of Public Prosecutions v O’Malley*³⁴ it was held that the Medical Bureau of Road Safety (MBRS), as a State entity, was part of the prosecution and was therefore obliged to disclose the information.³⁵

2.09 In its Issues Paper the Commission sought views on whether a formal process analogous to third party discovery in civil proceedings should be available in criminal cases and whether this should be a statutory procedure. The majority of consultees and contributors at the seminar agreed that a

²⁸ Coonan and O’Toole *Criminal Procedure in the District Court* (Round Hall Press 2011) at 238.

²⁹ Order 31, rule 12 of the 1986 Rules, as inserted by the *Rules of the Superior Courts (Discovery) 2009* (SI No. 93/ 2009).

³⁰ Order 32, rule 1 of the 2001 Rules.

³¹ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

³² *The People (DPP) v Sweeney* [2001] 4 IR 102.

³³ Law Reform Commission, *Report of Seminar on Disclosure and Discovery in Criminal Cases* (published on 14 July 2014), pp.7-8, available at www.lawreform.ie.

³⁴ [2008] IEHC 117.

³⁵ *Ibid* at paragraph 19.

statutory procedure should be enacted to deal with applications by an accused for access to relevant material in the possession of a third party. However, opinion was divided as to whether this should be a procedure analogous to non-party discovery or whether a specific statutory procedure should be developed.

B Procedural reform

2.10 In *Health Service Executive v White*³⁶ Edwards J concluded 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. He stated that this was a matter for legislative reform.³⁷ In that judgment, Edwards J was referring to the lack of a mechanism for access to materials held by a third party. In its Issues Paper, the Commission stated its support for legislative reform in this area and briefly set out how this has been dealt with in other jurisdictions such as Canada and Australia to assist in ascertaining which model would be most suited to the Irish criminal justice system. The majority of consultees agreed that legislative reform was necessary but opinions diverged with respect to the manner in which such reforms should be implemented.

(1) A general test for third party disclosure

2.11 While it may be the case that an effective disclosure system must take account of “the rights of third parties, the tensions within the prosecutorial role and the adversarial criminal justice system”, it must also be capable of operating “effectively, efficiently and fairly, notably to the accused”.³⁸ These elements all need to be catered for in devising any reforms to the current law. Nevertheless, the majority of consultees were in agreement that disclosure must be dealt with at the earliest possible opportunity and, if a dispute arises, that this should be dealt with pre-trial and adjudicated by a judge, particularly where the dispute involves sensitive material and/or a third party. Therefore, it is clear that an application procedure is desirable where access to certain material has been refused. It has already been noted that disclosure is regularly limited

³⁶ [2009] IEHC 242. That case 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.

³⁷ *Ibid.*

³⁸ Plater and De Vreez “Is the ‘golden rule’ or full prosecution disclosure a modern ‘mission impossible’?” (2012) 14 *Flinders Law Journal* 133, at 188.

by well-established grounds of privilege, such as legal professional privilege. However, it has also been recognised that there are circumstances in which the prosecution will no longer have access to certain material, particularly if it is missing or is in the hands of a third party. In such circumstances a court may be obliged to take the views of the third party into consideration, particularly where there is objection to disclosure.

2.12 The issue of access to third party material (including other material as well as therapeutic records) has arisen in a number of jurisdictions. In England and Wales third party disclosure is not dealt with under the general framework for disclosure in the *Criminal Procedure and Investigations Act 1996*. Instead the 1996 Act amended existing legislation to allow for third party disclosure to be obtained by subpoena under section 2 of the *Criminal Procedure (Attendance of Witnesses) Act 1965* or section 97 of the *Magistrates' Courts Act 1980*. The 1965 and 1980 Acts involve a two-part test. The first stage requires the applicant to provide a supporting affidavit specifying the evidence sought, the grounds in law allowing the third party to produce it and the basis for believing that it is likely to be material evidence. The third party is then given the opportunity to reply before the judge issues a summons. During the second stage the judge will examine the disputed records and balance any public interests at issue. It should be noted that the defence may only apply for access to material evidence, that is, evidence which is immediately admissible. Many commentators have highlighted problems with this procedure with some even describing them as "intractable".³⁹

2.13 In Canada, the test relating to disclosure of third party materials was set down by the Supreme Court of Canada in *R v O'Connor*.⁴⁰ The case concerned a situation where the prosecution failed to disclose and produce the complainant's medical, counselling and school records and the accused sought a stay of proceedings. The Court concluded that privacy must be "balanced against legitimate societal needs"⁴¹ 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 defence to establish the 'likely relevance' of the documents sought by way of an application to the Court grounded on affidavit. In *O'Connor* the Court held that in order to satisfy the test

³⁹ Hoyano, "Sexual offences: allegations of historic sexual abuse - credibility of complainants at issue" (2011) *Criminal Law Review* 502, at 503. For a comparative analysis of the law relating to third party disclosure in sex offence cases, see O'Malley, *Sexual Offences* 2nd ed (Dublin, 2013), ch. 16.

⁴⁰ [1995] 4 SCR 411.

⁴¹ *Ibid* at paragraph 117.

of 'likely relevance' the defence must demonstrate "that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify".⁴²

2.14 Once the defence has been deemed to have satisfied the likely relevance test, the Record Holder, not necessarily the person to whom the record relates, reviews the records in relation to privilege and proposes any redactions where appropriate. The Record Holder then provides the Court and counsel for the defence with a vetted copy (including any redactions) and an unvetted copy of the records. The second limb of the test is then activated, and a judge, having inspected the documents, determines whether or not they are to be produced and provided to the defence. In deciding the matter it was stated 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...⁴³

Reflecting on the difficulty in devising such a test which preserves the right of the accused to a fair trial on the one hand and respects the right of the complainant to privacy on the other, MacLachlin J observed that the key to striking the appropriate balance lies in recognising that section 7 of the Canadian *Constitution Act 1982* "guarantees not the fairest of all possible trials,

⁴² [1995] 4 SCR 411, paragraph 22. This test was endorsed by the Supreme Court of Canada in *R v McNeil* (2009) 301 DLR (4th) 1.

⁴³ *Ibid* at paragraph 156.

but rather a trial which is fundamentally fair”.⁴⁴ One commentator has observed that this case is “instructive on how Canadian courts have balanced the accused’s right to a fair trial with the third party’s right to privacy”.⁴⁵ In *R v Pickton* the Supreme Court of British Columbia recognised that there is a “somewhat generous scope afforded the defendant” given that there is no way of knowing what information is contained within the records. Nevertheless, it was held that “a reasonable degree of latitude will be afforded” where the issues of credibility and character of a witness are in question.⁴⁶

(2) Disclosure of counselling records in sexual offence cases

(a) Issues

2.15 There is significant debate around the probative value of therapeutic notes and many commentators have argued that this is due more to the particular nature of such records rather than concerns about who holds the material.⁴⁷ For example, the Rape Crisis Network Ireland has described counselling notes as follows:

“Counselling notes are neither objective, accurate and complete accounts of what is said in counselling, nor sworn statements. They are individual, subjective and fragmented musings by the counsellor or therapist on the client’s emotional state. They may be updated as the therapist develops understanding of the client’s emotional landscape.”⁴⁸

Another commentator, with both a legal and psychotherapy background, suggested that therapeutic records would be unreliable as a matter of evidence because “it is only an abstract expression of the patient’s feelings and

⁴⁴ *Ibid* at paragraph 193.

⁴⁵ Cassim “Seeking access to the confidential records of a third party: the accused’s right to a fair trial v the third party’s right to privacy” (2009) 42 *Comparative and International Law Journal of Southern Africa* 128, at 142.

⁴⁶ (2006) BCSC 2112.

⁴⁷ See Leahy “The Defendant’s Right or a Bridge too Far? Regulating Defence Access to Complainants’ Counselling Records in Trials for Sexual Offences” (2012) *Irish Criminal Law Journal* (Pts 1 & 2); Gotell “When privacy is not enough: sexual assault complainants, sexual history evidence and the disclosure of personal records” (2006) *Alberta Law Review* 743.

⁴⁸ Counihan, “Rape Crisis Network Ireland Perspectives on Sexual Violence and the Criminal Justice System” (2013) 4 *ICLJ* 115, at 121.

emotions”.⁴⁹ This view was echoed at the seminar as well as by many of the consultees during the consultation process.

2.16 Commentators and respondents to the Issues Paper have also suggested that the disclosure of therapeutic records may have a chilling effect on the reporting of sexual offences. Commentators have also voiced concerns that the possibility of an accused having access to therapeutic records may discourage victims from seeking support and could even lead to changes in the delivery of such support.⁵⁰ This issue was also raised by the European Court of Human Rights in *Z v Finland*,⁵¹ a case relating to the disclosure of a HIV patient’s medical details in the course of criminal proceedings.

2.17 In addition, there has been criticism of the recent increase in requests for access to counselling records in sexual offence cases, particularly cases involving children.⁵² This is because disclosure of counselling records may impact on the recovery of a complainant, particularly children or other vulnerable persons, or that such disclosure may lead to irreparable trauma.⁵³ In 2010 the Special Rapporteur on Child Protection highlighted the need for “legislation governing the issue of disclosure” as a matter of urgency and noted that such legislation must balance the complainant’s privacy with the accused’s right to a fair trial.⁵⁴ In 2013, Senator Jillian van Turnhout proposed an amendment to the *Courts and Civil Law (Miscellaneous Provisions) Bill 2013* which would deem inadmissible sexual assault communications made by a person under 17. Senator van Turnhout’s proposal would empower a court to take the following three factors into account in determining an application for an order admitting therapeutic records into evidence:

“(a) the evidence must have substantial probative value;

⁴⁹ O’ Leary “A Privilege for Psychotherapy? - Part 2” (2007) 2 *Bar Review* 76.

⁵⁰ See Leahy “The Defendant’s Right or a Bridge too Far? Regulating Defence Access to Complainants’ Counselling Records in Trials for Sexual Offences” (2012) ICLJ (Pts 1 & 2).

⁵¹ (1997) 45 BMLR 107.

⁵² See Counihan “Rape Crisis Network Ireland perspectives on sexual violence and the criminal justice system” (2013) 23(4) *Irish Criminal Law Journal* 115. See also Shannon “Progress has been made in child protection but challenges remain”, *The Irish Times*, 7 January 2014.

⁵³ The term “relevant person” was used in the Commission’s *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013).

⁵⁴ *Fourth Report of the Special Rapporteur on Child Protection*, December 2010, at 16.

(b) there must be no other evidence which could prove the disputed facts;

(c) the public interest in disclosure outweighs the potential harm to the complainant.”⁵⁵

2.18 During the consultation process a number of consultees who were professionals working with children called for special consideration to be given to the position of children within the disclosure regime. In particular, consultees expressed concerns about the need to take into consideration the stages of child development as well as the impact of court proceedings on the child’s healing process. While many consultees felt absolute privilege would be the most appropriate solution for counselling records pertaining to children, based on the best interests of the child principle, it was also recognised that in order to achieve a balance with the right to a fair trial it might be necessary to introduce a system of qualified privilege. In that regard consultees were clear that the decision to disclose should rest with a judge and any statutory framework should provide the opportunity to attach conditions to disclosure which would take into account the impact this might have on a child. At the seminar the vulnerable position of children was noted and it was accepted that there might be instances where professionals dealing with children would advise against disclosure.

(b) *Balancing the right of the accused to a fair trial with the right of a victim to privacy*

2.19 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.⁵⁶ For example, in *DPP (Walsh) v Cash*, it was stated that:

“When a crime is committed, it is the legal rights of the entire people of Ireland that are being attacked: hence, crimes are prosecuted in the name of the people under Article 30.3°... Such acknowledgement as there has been in Irish law that the victim also has a right, because of the commission of a crime against her or him, to ensure that the prosecution is conducted fairly has been very limited.”⁵⁷

⁵⁵ Courts and Civil Law (Miscellaneous Provisions) Bill 2013 (Bill No. 30/2013): Report and Final Stages (Continued) 2 July 2013, available at www.oireachtas.ie

⁵⁶ This has been described as the ‘triangulation of interests’ by 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.

⁵⁷ [2007] IEHC 108 at paragraph 43.

2.20 However, in that case it was also recognised that a balance must be struck between competing rights. In sexual offence cases this balancing exercise often arises where the accused seeks access to counselling records in furtherance of the right to a fair trial. On the other hand the complainant may assert that the records are protected by the individual's constitutional right to privacy, as protected by Article 40.3.1° of the Constitution. The EU Directive on Victims' Rights provides that the victim has a right to protection and to be safeguarded against re-victimisation. The Directive also includes two specific rights which are of particular importance in the consideration of whether a complaint's therapeutic records should be disclosed in a particular criminal case. 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. Nevertheless, there is case law to suggest that based on the hierarchy of constitutional rights the right to a fair trial holds a prime position within criminal proceedings. For example, in *D v Director of Public Prosecutions* 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".⁵⁸ It is arguable that this reasoning also applies where there are competing individual rights at stake, that is that the accused's right to a fair trial takes precedence over all other personal rights, such as a victim's right to privacy.

2.21 Therefore, in seeking to find a balance between these competing rights, it is necessary to adopt a suitable legal framework. Drawing on the existing concept of privilege, which has been outlined above, this issue may be resolved by introducing either a system of absolute or qualified privilege. Fennell has stated that privilege requires an examination of:

"the damage that would be done to the relationship involved, and the public good, against that of the good that would be done in terms of the administration of justice, should the information be revealed."⁵⁹

Bearing in mind that most grounds of privilege claimed in criminal proceedings are based on public interest, it has been argued by way of analogy that there should be a form of privilege to protect communications or material between a patient and a psychiatrist.⁶⁰ Such privilege is available in many states within the United States, taking the form of privilege afforded to counsellors as well as privilege afforded to the victim counsellor relationship. As with other forms of

⁵⁸ [1994] 2 IR 465.

⁵⁹ Fennell *The Law of Evidence in Ireland* (3rd Ed. Bloomsbury 2009), at 319.

⁶⁰ For discussion on this point see O' Leary "A Privilege for Psychotherapy? - Part 2" (2007) 2 *Bar Review* 76.

privilege, the court would have to balance the rights of the accused with the rights of the complainant.

2.22 However, given the primacy afforded to the right to a fair trial in Irish law it would seem unlikely that the form of absolute privilege afforded to therapeutic records in some other jurisdictions⁶¹ would be a constitutional possibility in Ireland. Nevertheless, many jurisdictions have opted for a qualified privilege system. For example, a number of Australian states have classified therapeutic, counselling or medical records in sexual offence cases as “protected confidences”.⁶² In particular, in New South Wales the *Criminal Procedure Act 1986*, as amended by the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999*, provides 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 complainant. 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”. During the consultation process, this model was suggested as suitable but consultees noted that there had been some problems with it in practice. For example, it has been argued that this broad mechanism has been interpreted narrowly in the New South Wales courts and would therefore require a complainant of sexual assault to be diagnosed with a recognised psychiatric illness before privilege would attach to counselling documents.⁶³

2.23 In Canada, the disclosure regime set out in *O’Connor* was subject to much criticism with some commentators arguing that the two-part test developed by the Supreme Court “rested on a presumption of the *de facto*

⁶¹ For example, the Australian state of Tasmania: *Evidence Act 2001* (Tas) sections 127A-127B.

⁶² For example, *Evidence Act 1906* (Western Australia) sections 19A-19M; *Evidence Act 1929* (Southern Australia) sections 67D-67F; *Evidence Act 1939* (Northern Territory), *Evidence (Miscellaneous Provisions) Act 1991* (Australian Central Territory) sections 54-67.

⁶³ 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.

relevance of third party records”.⁶⁴ Soon after judgment was handed down in *O’Connor*, the Canadian federal Parliament introduced *Bill C-46*, which amended the *Canadian Criminal Code* in order to regulate access to therapeutic records and inserted what is now section 278 of the *Code*. *Bill C-46* was indicative of the legislature’s dissatisfaction with the *O’Connor* regime as the Bill sought to curb judicial discretion in granting the defence access to therapeutic records in favour of upholding the complainant’s right to privacy. It has also been suggested that the legislation was the result of a large-scale lobbying exercise by the feminist movement which highlighted the impact of disclosure of therapeutic records on complainants in sexual offence cases.⁶⁵ The rationale behind the amendment is set out in the Preamble which reads:

“the Parliament of Canada recognises that violence has a disadvantageous impact on the equal participation of women and children in society and on the rights on women and children to the security of the person, privacy and equal benefit under the law.”⁶⁶

2.24 *Bill C-46* introduced a two-part test of “likely relevance” and “necessity” where the accused seeks access to therapeutic records in a sexual offences case. It is noted that this test has been adopted in Head 52 of the Department of Justice and Equality’s *General Scheme of a Criminal Law (Sexual Offences) Bill 2014*, which was published in November 2014. *Bill C-46* 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, namely:

“(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;

(d) whether production of the record is based on a discriminatory belief or bias;

⁶⁴ Gotell “The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: the Implications of the Charter for Sexual Assault Law” [2002] 40(2-3) *Osgoode Hall Law Journal* 251 at 261.

⁶⁵ See Busby “Discriminatory Uses of Personal Records in Sexual Violence Cases” (1999) (9) *Canadian Journal of Women and Law* 148.

⁶⁶ *Bill C-46, An Act to amend the Criminal Code* (production of records in sexual offence proceedings), 2d Sess., 35th Parl. 1997 (assented to 25 April 1997), S.C. 1997, c.30 (Bill C-46).

- (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.⁶⁷

2.25 Procedural rules require the defence to 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.

2.26 The constitutionality of *Bill C-46* was unsuccessfully challenged in *R v Mills*,⁶⁸ a sexual assault case where the accused sought production of records relating to the complainant held by a psychiatrist and a child and adolescent services association. The accused claimed that the provisions set out in *Bill C-46*, which were designed to protect the privacy and equality rights of complainants in sexual offence cases, infringed sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. Delivering the majority judgment McLachlin and Iacobucci JJ stated that while the Supreme Court had dealt with the issue of third party disclosure in sexual offence cases in *O'Connor* "parliament was free to craft its own solution to the problem consistent with the Charter".⁶⁹ Having conducted an analysis of the apparent rights in conflict, namely the right of the accused to full answer and defence and the right of the complainant to privacy and equality, the Supreme Court held that the legislative provisions were in fact constitutional and did not infringe section 7 of the *Canadian Charter of Rights and Freedoms*. The Supreme Court has been criticised for undue deference to the legislature since in *O'Connor* the Court appeared to place the right to make full answer and defence at the top of the hierarchy of rights.⁷⁰

⁶⁷ Section 278.5(2) of the *Canadian Criminal Code*.

⁶⁸ [1999] 3 SCR 668.

⁶⁹ *Ibid* at paragraph 20.

⁷⁰ 'Editorial' (2000) 43(2) *The Criminal Law Quarterly* 145.

2.27 Subsequent cases have highlighted the ongoing tension between the rights of the accused and of the victim or of other prosecution witnesses. In *R v Shearing*,⁷¹ an historical child sexual abuse case, the accused came into possession through a third party of a diary written by the complainant. In that case the Supreme Court held that neither *Mills* nor the *O'Connor* disclosure regime applied because the accused had not wrongly come into possession of the diary and there was no issue of production in this case. As a result the analysis of the Court centred on the complainant's privacy interest, which did not substantially outweigh the accused's right to test the complainant's memory by cross-examination on the absence of entries in the diary recording abuse. L'Heureux-Dubé J dissented on the basis that the prejudicial effect of the proposed line of questioning on the diary would outweigh its probative value. The Court ordered a new trial. The majority decision has been criticised for its failure to respect the complainant's Charter rights due to narrow legislative interpretation.⁷²

2.28 In *R v McNeil*⁷³ it was held that section 278 of the *Canadian Criminal Code* does not displace the Crown's duty to make reasonable inquiries and obtain potentially relevant material. Having conducted an analysis of the case law post-section 278, Gotell criticises the section 278 regime for being too malleable and notes that the large measure of discretion afforded to judges has resulted in a "judicial narrowing" of standards and a subsequent erosion of complainants' Charter rights.⁷⁴ By contrast, in 2014 in *R v Quesnelle* the Supreme Court of Canada disagreed with an argument put forward by the Criminal Lawyers Association of Ontario that an 'expansive' interpretation of 'records' in section 278.1 of the *Canadian Criminal Code* would have a negative impact on the right to a fair trial because material falling into that category would be subject to a stricter disclosure regime.⁷⁵ This case involved a dispute as to which disclosure regime (either the *O'Connor regime* or the *Mills regime*) should

⁷¹ [2002] 3 SCR 33.

⁷² Marshall "Canada-Production of private records of victims of sexual assault in *R v. Shearing*" (2004) 2 (1) *International Journal of Constitutional Law* 139.

⁷³ [2009] 301 DLR (4th) 1.

⁷⁴ 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.

⁷⁵ [2014] 375 DLR (4th) 71. A similar conclusion was also reached in *R v Gebrekirstos* [2013] O.J. No. 2241.

apply to police occurrence reports that were made outside the course of the investigation of charges against the accused. The Supreme Court of Canada held that the police occurrence reports were subject to the *Mills* regime. It remains the case, therefore, that both disclosure regimes in Canada continue to give rise to some difficulties in practice.

2.29 Notwithstanding these difficulties in practice Irish commentators as well as consultees have commended the Canadian *Criminal Code* model for a number of reasons with one commentator noting that it would be “an inherently sensible solution to fill the current gap in Irish law”.⁷⁶ Some consultees have acknowledged that, while they might prefer something close to absolute privilege being made available for counselling records in sexual offence cases, it would not be permissible to implement such a regime having regard to the accused’s right to a fair trial under Article 38 of the Constitution. Moreover, it is recognised that absolute confidentiality cannot be given because disclosure or reporting may be required where a victim reveals during counselling significant and ongoing risk of abuse.⁷⁷ In that respect, many consultees expressed the view that the Canadian regime is a generally suitable basis for reform, particularly because it provides for a judicially-based process in which the rights of the accused can be considered along with the rights of the complainant.

2.30 As noted above, in November 2014 the Department of Justice and Equality published the *General Scheme of a Criminal Law (Sexual Offences) Bill 2014*, Head 52 of which provides for a disclosure regime in sexual cases that, broadly, follows the *Canadian Criminal Code* model. The Commission agrees that this is a suitable model to follow in sexual offences, and notes that the reforms proposed in this Report apply to all criminal offences.

(3) Provision for pre-trial preliminary hearings

2.31 The 2003 *Report of the Working Group on the Jurisdiction of the Courts* (the Fennelly Report) recommended the introduction of a pre-trial preliminary hearing procedure. The Report stated:

“A pre-trial procedure has the potential to reduce the need for determination in the course of trial, by way of a *voir dire*, of issues of

⁷⁶ 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) ICLJ 34.

⁷⁷ Reporting of such ongoing abuse arises from the ethical obligations of a counsellor; and may also arise from the mandatory reporting requirements concerning certain offences in the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012*.

admissibility of certain categories of evidence. Clearly, some admissibility issues may arise during, or may appropriately only be resolved at the trial itself. Others such as the determination of the validity of a warrant or other legal instrument, or of evidence within a chain, may be disposable in advance of trial, and a pre-trial hearing should provide an effective vehicle for this.”

2.32 This view was reiterated in the 2013 *Report of the Working Group to Identify and Report on Efficiencies in the Criminal Justice System* and in the 2013 *Report of the Expert Group on Article 13 of the European Convention on Human Rights* (the McDermott Report). In March 2014 the Department of Justice and Equality published the *General Scheme of a Criminal Procedure Bill 2014* which proposes a wide-ranging preliminary hearing process in which matters that are currently dealt with in the *voir dire* could be resolved at the pre-trial stage. The Commission considers that this would be a suitable setting for the resolution of the admissibility of material in respect of which claims to privilege or confidentiality are asserted, including material held by third parties.

2.33 The Canadian model has been criticised for a number of reasons, one of which is the lack of funding for complainants and record holders to be represented during disclosure hearings.⁷⁸ Given that many Canadian complainants and record holders were representing themselves, it was not possible for their perspectives to be adequately assessed. Moreover, since many counsellors work for not-for-profit organisations it may be the case that such organisations would not be in a position to allocate scarce resources to legal representation. As a result it has been argued both by commentators⁷⁹ and during the consultation process that civil legal aid should be provided for both complainants and record holders for hearings of applications for third party disclosure. In light of the importance of the right of the victim to be heard and the right to legal aid to facilitate such a hearing as set out in the EU Directive on Victims' Rights, the Commission considers that the complainant and/or record holder should be represented in a disclosure hearing in the interests of equality of arms. This approach is already reflected in the context of section 3 of the

⁷⁸ In an analysis of cases concerning access to sexual assault complainants' records in Canada, Gotell found that less than half of the complainants were represented, 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) 20 *Canadian Journal of Women and the Law* 111 at 125.

⁷⁹ 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) 22(2) *Irish Criminal Law Journal* 34 at 38.

Criminal Law (Rape) Act 1981 (as amended by the *Criminal Law (Rape) (Amendment) Act 1990*) under which evidence of previous sexual history may only be adduced with leave of the trial judge. During an application for leave to introduce evidence of previous sexual history, the complainant is entitled to be legally represented, free of any contribution, in accordance with section 26 of the *Civil Legal Aid Act 1995* (as amended by the *Criminal Law (Sexual Offences) (Amendment) Act 2007*). The Commission notes that Head 52 of the *General Scheme of a Criminal Law (Sexual Offences) Bill 2014*, published by the Department of Justice and Equality in November 2014, also proposes to provide for legal aid under the 1995 Act in the disclosure regime Scheme proposed for sexual cases.

C Recommendations

- 2.34 Provision should be made in legislation for a pre-trial preliminary hearing, as envisaged in the *Scheme of a Criminal Procedure Bill 2014*, in which the defence, the prosecution and a third party or any person affected by a request for disclosure are provided with an opportunity to have a judicial determination of the disclosure of prosecution material, including where a claim for privilege or confidentiality is made.**
- 2.35 In such hearings it would be presumed, unless the contrary is established to the satisfaction of the court, that disclosure of the material is to be ordered in the interests of justice to ensure a trial in due course of law and to allow the preparation of the defence and the court should have regard to all the circumstances in determining whether to make an order for disclosure.**
- 2.36 The court should, provided this does not prejudice the right to a trial in due course of law, refuse to make an order for disclosure where:**
- (a) the material is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public interest privilege or informer privilege,**
 - (b) access to the material may lead to a serious threat to the life or the fundamental rights of another person, or**
 - (c) the refusal is strictly necessary to safeguard an important public interest, including where access to the prosecution material could prejudice an ongoing investigation or seriously harm the national security of the State. These exceptions are based on a combination of established law in Ireland concerning claims to privilege and Article 7(4) of Directive 2012/13/EU, the 2012 EU Directive on the right to information in criminal proceedings.**

2.37 When deciding on whether to order disclosure, a court should be required to take a number of factors into consideration including, but not limited to, the following:

(a) the probative value of the material,

(b) whether it is necessary for the accused's right to a trial in due course of law and the public interest in preserving the integrity of the criminal justice process,

(c) the rights of any person to whom the material held by the third party relates, including any reasonable expectation of privacy of that person, and any potential harm (whether physical or emotional), including the risk of secondary and repeat victimisation, which disclosure of the material held by the third party may cause to that person, and

(d) whether it is necessary to make an immediate order for disclosure and, in particular, whether it would be appropriate in the circumstances to postpone until the trial consideration of disclosure of the material, including having regard to other probative evidence that has already been disclosed concerning any person to whom the material held by the third party relates.

2.38 In a sexual offence case, the court should be required to take the following additional factors into consideration:

(a) society's interest in encouraging the reporting of sexual offences;

(b) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(c) the public interest in ensuring that adequate records are kept of counselling communications.

2.39 In such a disclosure pre-trial hearing, the complainant, a third party or any person affected by the making of a disclosure order should be on notice and should be entitled to be legally represented, free of any contribution, under the *Civil Legal Aid Act 1995*.

CHAPTER 3 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report are as follows:

- 3.01 **A statutory framework should be enacted setting out the scope of the prosecution duty of disclosure and its application in trials on indictment and summary prosecutions. [paragraph 1.49]**
- 3.02 **The statutory framework should reflect the centrality of the right of the accused under Article 38.1 of the Constitution to a trial in due course of law and should include elements consistent with the 2012 EU Directive on the right to information in criminal proceedings. [paragraph 1.50]**
- 3.03 **The statutory statement of the duty of disclosure should be consistent with existing case law and should provide that the prosecution must, in order to ensure a trial in due course of law and to facilitate the preparation of the defence, disclose to the accused or his or her solicitor any prosecution material which:**
- (a) is in the possession or power of procurement of the prosecution,**
 - (b) is relevant to the case,**
 - (c) has not previously been disclosed by the prosecutor to the accused or his or her solicitor, and**
 - (d) can help the case for the defence, damage the case for the prosecution or give a lead to other evidence. Disclosure should be made as early as possible and in sufficient time as to allow the effective exercise of the rights of the defence. [paragraph 1.51]**
- 3.04 **The statutory test of relevance should be supplemented by a list of factors set out in guidelines; and the current *Guidelines for Prosecutors* constitute a suitable vehicle for this purpose. [paragraph 1.52]**
- 3.05 **The statutory framework should provide for a scheduling system. The schedules would comprise:**

(a) prosecution material that the prosecutor agrees to be disclosed;

(b) prosecution material that the prosecutor considers should not be disclosed on the ground that it:

(i) is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public interest privilege and legal professional privilege,

or,

(ii) should not for other stated reasons, including that it is not relevant, be disclosed to the accused;

and

(c) prosecution material of which the prosecutor is aware but which is not, at the time of completing the prescribed form, in the possession or power of procurement of the prosecutor. [paragraph 1.53]

3.06 Objective material, such as CCTV footage and forensic evidence, should be disclosed at an early stage, including at the point where a person is detained in Garda custody. Further disclosure of scheduled materials will occur after this. [paragraph 1.54]

3.07 In relation to summary prosecutions the legislative framework should indicate that the duty of disclosure applies and that it should occur as soon as practicable and in any event alongside the summons or charge sheet. There should also be a proportionality test which sets down factors to be considered with respect to disclosure in summary proceedings, as set out in *Director of Public Prosecutions v Doyle (Gary)*.¹ [paragraph 1.55]

3.08 In relation to prosecutions on indictment, disclosure should occur as soon as is practicable and in any event not later than either the date on which the accused is put on his or her election or the date on which the documents specified in section 4B(1)(b) of the *Criminal Procedure Act 1967* (the “book of evidence”) are served on the accused or the accused’s solicitor. [paragraph 1.56]

¹ [1994] 2 IR 286.

- 3.09 **Provision should also be made for pre-trial preliminary hearings in which disputed questions concerning disclosure may be determined by the court on the application of the accused, the prosecution or any third party who may be affected by disclosure, including a potential third party witness. [paragraph 1.57]**
- 3.10 **Provision should be made in legislation for a pre-trial preliminary hearing, as envisaged in the *Scheme of a Criminal Procedure Bill 2014* in which the defence, the prosecution, a third party or any person affected by a request for disclosure are provided with an opportunity to have a judicial determination of the disclosure of prosecution material, including where a claim for privilege or confidentiality is made. [paragraph 2.34]**
- 3.11 **In such hearings it would be presumed, unless the contrary is established to the satisfaction of the court, that disclosure of the material is to be ordered in the interests of justice to ensure a trial in due course of law and to allow the preparation of the defence and the court should have regard to all the circumstances in determining whether to make an order for disclosure. [paragraph 2.35]**
- 3.12 **The court should, provided this does not prejudice the right to a trial in due course of law, refuse to make an order for disclosure where: (a) the material is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public interest privilege or informer privilege, (b) access to the material may lead to a serious threat to the life or the fundamental rights of another person, or (c) the refusal is strictly necessary to safeguard an important public interest, including where access to the prosecution material could prejudice an ongoing investigation or seriously harm the national security of the State. These exceptions are based on a combination of established law in Ireland concerning claims to privilege and Article 7(4) of Directive 2012/13/EU, the 2012 EU Directive on the right to information in criminal proceedings. [paragraph 2.36]**
- 3.13 **When deciding on whether to order disclosure, a court should be required to take a number of factors into consideration including, but not limited to, the following:**
- (a) the probative value of the material;**

(b) whether it is necessary for the accused's right to a trial in due course of law and the public interest in preserving the integrity of the criminal justice process;

(c) the rights of any person to whom the material held by the third party relates, including any reasonable expectation of privacy of that person, and any potential harm (whether physical or emotional), including the risk of secondary and repeat victimisation, which disclosure of the material held by the third party may cause to that person; and

(d) whether it is necessary to make an immediate order for disclosure and, in particular, whether it would be appropriate in the circumstances to postpone until the trial consideration of disclosure of the material, including having regard to other probative evidence that has already been disclosed concerning any person to whom the material held by the third party relates. [paragraph 2.37]

3.14 In a sexual offence case, the court should be required to take the following additional factors into consideration:

(a) society's interest in encouraging the reporting of sexual offences;

(b) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(c) the public interest in ensuring that adequate records are kept of counselling communications. [paragraph 2.38]

3.15 In such a disclosure pre-trial hearing, the complainant, a third party or any person affected by the making of a disclosure order should be on notice and should be entitled to be legally represented, free of any contribution, under the *Civil Legal Aid Act 1995*. [paragraph 2.39]

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ACTS REFERRED TO

Civil Legal Aid Act 1995 (No.32 of 1995)

Criminal Procedure Act 1967 (No.12 of 1967)

Sex Offenders Act 2001 (No.18 of 2001)

DRAFT CRIMINAL PROCEDURE (DISCLOSURE) BILL 2014

BILL

entitled

An Act to amend the law on criminal procedure concerning the duty of disclosure and to provide for related matters.

Be it enacted by the Oireachtas as follows:

Short title and commencement

1. —(1) This Act may be cited as the Criminal Procedure (Disclosure) Act 2014.

(2) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory Note

Section 1 contains standard provisions on the Short Title of the Bill and commencement arrangements.

Interpretation

2. — In this Act —

“material” means material of all kinds, and in particular includes references to—

- (a) information in any form or format (including recorded information in a durable or retrievable form, such as writing, tape, CCTV or information available on the internet), and
- (b) objects of all descriptions;

“the Minister” means the Minister for Justice and Equality;

“prescribed” means prescribed in Rules of Court;

“the prosecutor” means, as the case may be—

- (a) the Director of Public Prosecutions,
- (b) a person prosecuting the offence at the suit of the Director of Public Prosecutions, or
- (c) a person or body authorised by law to prosecute the offence;

“prosecution material” means material—

- (a) which is in the prosecutor’s possession or power of procurement, and came into the prosecutor’s possession or power of procurement in connection with the case for the prosecution against the accused, or
- (b) which the prosecutor has inspected in connection with the case for the prosecution against the accused;

“relevant person” means—

- (a) a person whose capacity to consent to a sexual act is called into question, or
- (b) a person who lacks capacity to consent to a sexual act;

“sexual offence” has the same meaning as in section 3 of the *Sex Offenders Act 2001*.

Explanatory Note

Section 2 contains definitions for the purposes of the Bill.

The terms “material” and “prosecution material” are derived from comparable terms in the English *Criminal Procedure and Investigations Act 1996*. The use of the phrase “possession or power of procurement” is derived from the comparable term used in connection with the law on discovery of documents, discussed in the Report.

The term “prosecutor” is defined as: (a) in relation to an offence prosecuted on indictment, the Director of Public Prosecutions, and (b) in relation to an offence prosecuted summarily, either (i) a person prosecuting the offence at the suit of the Director of Public Prosecutions or (ii) a person authorised by law to

prosecute the offence. This is intended to ensure that the duty of disclosure applies whether a case is tried on indictment or is tried summarily, and is based on the definition in section 4 of the *Criminal Procedure Act 1967*, as amended.

The term “relevant person” is the term used by the Commission in its 2013 *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013), Introduction, paragraph 11, that is, (a) a person whose capacity to consent to a sexual act is called into question or (b) a person who lacks capacity to consent to a sexual act.

The term “sexual offence” has the same meaning as in section 3 of the *Sex Offenders Act 2001*, the Schedule to which (as amended) contains a list of sexual offences. The list in the 2001 Act includes: (a) rape under section 2 of the *Criminal Law (Rape) Act 1981*; (b) sexual assault under section 2 of the *Criminal Law (Rape) (Amendment) Act 1990* (which replaced the offence of indecent assault); (c) aggravated sexual assault under section 3 of the 1990 Act; rape under section 4 of the 1990 Act; (d) incest offences under the *Punishment of Incest Act 1908*; (e) sexual offences involving females under the age of 17 (sometimes referred to as statutory rape); (f) sexual offences under section 5 of the *Criminal Law (Sexual Offences) Act 1993*;¹ (g) offences under the *Child Trafficking and Pornography Act 1998*; and (h) offences under the *Criminal Law (Human Trafficking) Act 2008*.

General duty of disclosure by prosecutor

3. — (1) Subject to the provisions of this Act, the prosecutor shall, in order to ensure a trial in due course of law and to facilitate the preparation of the defence, disclose to the accused or his or her solicitor (if any) any prosecution material which —

- (a) is in the possession or power of procurement of the prosecutor,
- (b) is relevant to the case,
- (c) has not previously been disclosed by the prosecutor to the accused or his or her solicitor (if any), and
- (d) can help the case for the defence, damage the case for the prosecution or give a lead to other evidence.

¹ The Commission recommended the replacement of section 5 of the 1993 Act in its *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013).

(2) The prosecutor shall disclose the prosecution material to the accused or his or her solicitor (if any) in a prescribed form organised according to the following schedules —

- (a) prosecution material that the prosecutor agrees to be disclosed,
- (b) prosecution material that the prosecutor considers should not be disclosed on the ground that it —
 - (i) is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public interest privilege or legal professional privilege, or
 - (ii) should not, for other stated reason, be disclosed to the accused or his or her solicitor (if any),
- (c) prosecution material of which the prosecutor is aware but which is not, at the time of completing the prescribed form, in the possession or power of procurement of the prosecutor.

(3) If the prosecutor does not have any prosecution material referred to in *subsection (1)*, the prosecutor shall give to the accused or his or her solicitor (if any) a written statement to that effect.

(4) Where material consists of information which has been recorded in any form the prosecutor shall be regarded as having disclosed it for the purposes of this section—

- (a) by securing that a copy is made of it and that the copy is given to the accused or his or her solicitor (if any), or
- (b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused or his or her solicitor (if any) to inspect it at a reasonable time and a reasonable place or by taking steps to secure that the accused or his or her solicitor (if any) is allowed to do so,

and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

(5) Where material consists of information which has not been recorded the prosecutor shall be regarded as having disclosed it for the purposes of this section by securing that it is recorded in such form as the prosecutor thinks fit and—

- (a) by securing that a copy is made of it and that the copy is given to the accused or his or her solicitor (if any), or

- (b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused or his or her solicitor (if any) to inspect it at a reasonable time and a reasonable place or by taking steps to secure that the accused or his or her solicitor (if any) is allowed to do so.

(6) Where material does not consist of information the prosecutor shall be regarded as having disclosed it for the purposes of this section by allowing the accused or his or her solicitor (if any) to inspect it at a reasonable time and a reasonable place or by taking steps to secure that the accused or his or her solicitor (if any) is allowed to do so.

Explanatory Note

Section 3(1) implements the recommendation in paragraph 1.49 that there should be a general statutory framework setting out the scope of the prosecution duty of disclosure to the accused or his or her solicitor. The general duty in section 3(1) reflects the established case law in this area, which has emphasised that this is a necessary part of ensuring a trial in due course of law and to facilitate the preparation of the defence, as required by Article 38.1 of the Constitution.

The general duty is broken down into four elements, namely, that the material: (a) is in the possession or power of procurement of the prosecutor, (b) is relevant to the case, (c) has not previously been disclosed by the prosecutor to the accused or his or her solicitor (if any), and (d) can help the case for the defence, damage the case for the prosecution or give a lead to other evidence. The general duty in section 3(1) also reflects the requirements of Article 7(2) of Directive 2012/13/EU, the 2012 EU Directive on the right to information in criminal proceedings.

The proviso in *section 3(1)* that this duty is "[s]ubject to the provisions of this Act" is to take account of the exceptions to the general duty, including those in *section 6* of the Bill concerning the proportionality criteria to be applied in summary prosecutions and those in *section 8* concerning where a court determines that disclosure should not be ordered in a preliminary trial hearing under *section 7*.

Section 3(2) implements the recommendation in paragraph 1.53 that the statutory framework should provide for material to be organised by means of scheduling, which would allow for the categorisation of material to be disclosed. The schedules would comprise: (a) prosecution material that the prosecutor agrees to be disclosed; (b) prosecution material that the prosecutor considers should not be disclosed on the ground that it: (i) is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public

interest privilege or legal professional privilege, or (ii) should not for other stated reason be disclosed; and (c) prosecution material of which the prosecutor is aware but which is not, at the time of completing the prescribed form, in the possession or power of procurement of the prosecutor. This scheduling system broadly corresponds to the scheduling that currently applies where discovery of documents is sought in civil proceedings. This also broadly reflects the process that applies in the statutory disclosure regime under the English *Criminal Procedure and Investigations Act 1996* and which has been adopted on an administrative basis in this jurisdiction by some prosecutors. The details of the forms to be completed, including the scheduling of material, will be set out in Rules of Court.

Section 3(3) provides that if the prosecutor does not have any prosecution material referred to in *subsection (1)*, the prosecutor shall give to the accused or his or her solicitor (if any) a written statement to that effect. This is broadly comparable to a provision to the same effect in section 3 of the English *Criminal Procedure and Investigations Act 1996*.

Section 3(4)-(6) set out the procedural arrangements as to how the prosecutor ensures appropriate access under the general duty of disclosure. These are broadly comparable to those in section 3 of the English *Criminal Procedure and Investigations Act 1996*. Access arrangements for sensitive material are provided for in *section 8(5)* of the Bill, below.

Duty of disclosure to person arrested and detained in Garda custody

4.—(1) Without prejudice to the general duty of disclosure in *section 3*, where a person has been arrested and is being held in detention in the custody of the Garda Síochána, the officer of the Garda Síochána (or other person authorised by law) in charge of the investigation shall, at the time of such detention, disclose to the person so detained or his or her solicitor (if any)—

(a) any material which is essential to challenging effectively the lawfulness of the arrest or detention, and

(b) without prejudice to the generality of the duty in *paragraph (a)*, any recorded material, including CCTV or comparable recorded information.

(2) If the officer of the Garda Síochána (or other person authorised by law) in charge of the investigation does not have any material referred to in *subsection (1)*, he or she shall give to the person detained or his or her solicitor (if any) a written statement to that effect.

Explanatory Note

Section 4 implements the recommendation in paragraph 1.45 that objective material, such as CCTV footage, should be disclosed at an early stage of an investigation, and also reflects the requirement of Article 7(1) of Directive 2012/13/EU, the 2012 EU Directive on the right to information in criminal proceedings. It also takes account of the direction of the Director of Public Prosecutions, made in May 2014 in the aftermath of the decision of the Supreme Court in *The People (DPP) v Gormley* [2014] IESC 17, that provision be made for a solicitor to be present during Garda questioning.

Timing of disclosure where case is to be tried on indictment

5. — Where the accused is to be tried on indictment, the prosecutor shall (subject to *section 8*) disclose the prosecution material to the accused in the prescribed form in accordance with *section 3* as soon as is practicable and in any event not later than either the date on which the accused is put on his or her election or the date on which the documents specified in section 4B(1)(b) of the *Criminal Procedure Act 1967* are served on the accused or his or her solicitor (if any).

Explanatory Note

Section 5 implements the recommendation in paragraph 1.56 that where the accused is to be tried on indictment, disclosure should be made as soon as is practicable and in any event not later than either the date on which the accused is put on his or her election or the date on which the documents specified in section 4B(1)(b) of the *Criminal Procedure Act 1967* (usually referred to as the “book of evidence”) are served on the accused or his or her solicitor (if any). A person cannot be sent forward for trial on indictment from the District Court until the book of evidence has been served. This general duty is subject to the exceptions to disclosure set out in *section 8* of the Bill.

Duty of disclosure where case is tried summarily

6.— (1) Where the accused is to be tried summarily, the prosecutor shall, where the case falls within *subsection (2)*, disclose the prosecution material to the accused or his or her solicitor (if any) in the prescribed form in accordance with

section 3 as soon as is practicable and in any event not later than the date on which the summons or, as the case may be, charge sheet is served on the accused.

(2) In determining whether disclosure is required in an individual case where the accused is to be tried summarily, the prosecutor shall consider all the circumstances of the case, including the following—

- (a) the seriousness of the charge,
- (b) the importance of the prosecution material,
- (c) the fact that the accused has already been adequately informed of the nature and substance of the accusation, and
- (d) the likelihood that there is no risk of injustice in failing to furnish the prosecution material in issue to the accused or his or her solicitor (if any).

Explanatory Note

Section 6 implements the recommendation in paragraph 1.55 that, where a case that is to be tried summarily (that is, in the District Court) meets the criteria set out below, then the duty of disclosure also applies to such a case. The criteria to be applied for summary proceedings are based on the four set out by the Supreme Court in *Director of Public Prosecutions v Doyle* [1994] 2 IR 286: (a) the seriousness of the charge, (b) the importance of the material, (c) the fact that the accused has already been adequately informed of the nature and substance of the accusation, and (d) the likelihood that there is no risk of injustice in failing to furnish the material in issue to the accused or his or her solicitor (if any).

Section 6 also implements the recommendation in paragraph 1.56 that the material should be served on the accused or his or her solicitor (if any) as soon as is practicable and in any event not later than the date on which the summons or, as the case may be, charge sheet is served on the accused.

Preliminary trial hearings concerning disclosure

7. — (1) The accused may apply on notice to the court for a preliminary trial hearing where the accused has at any time reasonable cause to believe that there is prosecution material which is required by this Act to be disclosed to the accused and has not been so disclosed, including material which falls within

section 3(2)(b) or *section 3(2)(c)*, and the court on such application shall determine whether to order such disclosure.

(2) The prosecutor may apply on notice to the court for a preliminary trial hearing in respect of prosecution material which is either in the prosecutor's possession or power of procurement or which even though it is not in the prosecutor's possession or power of procurement the prosecutor is aware of its existence, and the court on such application shall determine whether to order disclosure of that material.

(3) A third party may apply on notice to the court for a preliminary trial hearing in respect of material which the prosecutor has sought from the third party for the purposes of disclosure under this Act, which the third party has reasonable grounds for asserting should not be disclosed including on any of the grounds set out in *section 8*, and the court on such application shall determine whether to order disclosure of that material.

(4) In any preliminary trial hearing the accused and the prosecutor shall be on notice and shall be entitled to be represented and to make representations as to whether an order is made and, where the hearing relates to disclosure of material held by a third party, the third party and any person to whom the material held by the third party relates shall also be on notice and shall be entitled to be represented and to make representations as to whether an order is made.

(5) In this section "the court" means —

- (a) where the case is being tried on indictment, as the case may be, the Circuit Court having jurisdiction over the trial, the Central Criminal Court or the Special Criminal Court,
- (b) where the case is being tried summarily, the District Court having jurisdiction over the trial.

(6) In this section "third party" and "person to whom the material held by the third party relates" mean persons other than the prosecutor or the accused, and include a witness or any person proposed to be called as a witness.

(7) In any hearing under this section, the third party and any person to whom the material held by the third party relates shall be entitled to a legal aid certificate, free of any contribution, under the Civil Legal Aid Act 1995.

Explanatory Note

Section 7 implements the recommendation in paragraph 2.34 that provision be made for pre-trial preliminary trial hearings in which disputed questions concerning disclosure may be determined by the court on the application of the

accused, the prosecution or any third party who may be affected by disclosure, including a potential third party witness. The reference to a “preliminary trial hearing” takes account of the proposals in the *Draft General Scheme of a Criminal Procedure Bill*, published by the Department of Justice and Equality in 2014, to provide for an expanded range of circumstances in which such pre-trial hearings may be heard. It also implements the recommendation in paragraph 2.39 that in any such hearing, the third party and any person to whom the material held by the third party relates shall be entitled to a legal aid certificate, free of any contribution, under the *Civil Legal Aid Act 1995*.

Matters to be considered in preliminary trial hearings concerning disclosure, and exceptions to disclosure

8.—(1) (a) In a preliminary trial hearing under *section 7*, it shall be presumed, unless the contrary is established to the satisfaction of the court, that disclosure of the material is to be ordered in the interests of justice to ensure a trial in due course of law and to facilitate the preparation of the defence.

(b) Without prejudice to *paragraph (a)*, the court shall have regard to all the circumstances in determining whether to make an order for disclosure in a preliminary trial hearing under *section 7*, including whether disclosure is not to be made arising from the provision of any enactment or rule of law (including the provisions of this section).

(2) Without prejudice to the generality of *subsection (1)*, the court may, provided this does not prejudice the right to a trial in due course of law, refuse to make an order for disclosure under *section 7* where—

(a) the material is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public interest privilege or informer privilege,

(b) access to the material may lead to a serious threat to the life or the fundamental rights of another person, or

(c) the refusal is strictly necessary to safeguard an important public interest, including where access to the prosecution material could prejudice an ongoing investigation or seriously harm the national security of the State.

(3) Without prejudice to *subsections (1) and (2)*, where a preliminary trial hearing under *section 7* relates to disclosure of material held by a third party,

the court shall also have regard to the following matters in determining whether to make an order for disclosure—

- (a) the probative value of the material,
- (b) whether it is necessary for the accused's right to a trial in due course of law and the public interest in preserving the integrity of the criminal justice process,
- (c) the rights of any person to whom the material held by the third party relates, including any reasonable expectation of privacy of that person, and any potential harm (whether physical or emotional), including the risk of secondary and repeat victimisation, which disclosure of the material held by the third party may cause to that person, and
- (d) whether it is necessary to make an immediate order for disclosure and, in particular, whether it would be appropriate in the circumstances to postpone until the trial consideration of disclosure of the material having regard to all relevant factors, including any other probative evidence that has already been disclosed concerning any person to whom the material held by the third party relates.

(4) Without prejudice to *subsections (1), (2) and (3)*, where a preliminary trial hearing under *section 7* relates to disclosure of material held by a third party and the accused is charged with a sexual offence, the court, while always having due regard to the accused's right to a trial in due course of law, shall also have regard to the following matters in determining whether to make an order for disclosure—

- (a) any additional factors concerning the matters referred to in *subsection 3(c)*, including that the person to whom the material held by the third party relates is a child or a relevant person,²
- (b) the public interest in encouraging the reporting of sexual offences,
- (c) the public interest in encouraging the obtaining of treatment by complainants in cases of sexual offences, and
- (d) the public interest in ensuring that adequate records are kept of counselling and therapeutic communications, in particular where

² The reference to “relevant person” is to the phrase used by the Commission in its 2013 *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013), Introduction, paragraph 11, that is, (a) a person whose capacity to consent to a sexual act is called into question or (b) a person who lacks capacity to consent to a sexual act.

the communications have no probative value for a criminal trial and have been made in confidence.

(5) (a) Where the court makes an order for disclosure under *section 7* it may impose such conditions as appear to the court to be just.

(b) Without prejudice to *paragraph (a)*, the conditions may include any or all of the following—

(i) that the material is edited or redacted (subject to approval by the court) so that it excludes irrelevant material, including sensitive personal information, the disclosure of which is not required by the accused's right to a trial in due course of law,

(ii) that the material shall be disclosed to a specified person only (including where the accused is legally represented, to the accused's solicitor and counsel or both), or

(iii) that the material is used solely for the purposes of the conduct of the trial.

(6) In *subsection (4)(d)* "counselling and therapeutic communications" means communications made between a person receiving counselling or therapy from a person who—

(a) has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and

(b) who—

(i) listens to and gives verbal or other support to the other person receiving the counselling or therapy, or

(ii) advises, gives therapy to or treats the other person, whether or not for fee or reward.

Explanatory Note

Section 8(1) implements the recommendation in paragraph 2.37 that in a preliminary trial hearing under *section 7* of the Bill: (a) it is to be presumed, unless the contrary is established to the satisfaction of the court, that disclosure of the material is to be ordered in the interests of justice to ensure a trial in due course of law and to facilitate the preparation of the defence; and (b) without prejudice to this presumption, the court shall have regard to all the circumstances in determining whether to make an order for disclosure in a preliminary trial hearing under *section 7*, including whether disclosure is not to

be made arising from the provision of any enactment or rule of law (including the exceptions to disclosure set out in the remainder of *section 8* of the Bill).

Section 8(2) implements the recommendation in paragraph 2.36 concerning the general exceptions to making an order for disclosure, which are permissible provided they do not prejudice the right to a trial in due course of law. These are where: (a) the material is subject to a privilege from disclosure that is recognised by any enactment or rule of law, including public interest privilege, informer privilege or legal professional privilege; (b) access to the material may lead to a serious threat to the life or the fundamental rights of another person, or (c) the refusal is strictly necessary to safeguard an important public interest, including where access to the prosecution material could prejudice an ongoing investigation or seriously harm the national security of the State. The exception in paragraph (a) concerning privilege from disclosure that is recognised by any enactment or rule of law (including public interest privilege, informer privilege or legal professional privilege) is based on established law in Ireland concerning claims to privilege. The exceptions in paragraphs (b) and (c) concerning a serious threat to the life or the fundamental rights of another person, or safeguarding an important public interest (including where access to the prosecution material could prejudice an ongoing investigation or seriously harm the national security of the State) are derived from Article 7(4) of Directive 2012/13/EU, the 2012 EU Directive on the right to information in criminal proceedings.

Section 8(3) implements the recommendation in paragraph 2.37 concerning the additional specific factors that are to be taken into account by a court where the disclosure concerns material held by a third party: (a) the probative value of the material, (b) whether it is necessary for the accused's right to a trial in due course of law and the public interest in preserving the integrity of the criminal justice process, (c) the rights of any person to whom the material held by the third party relates, including any reasonable expectation of privacy of that person, and any potential harm (whether physical or emotional), including the risk of secondary and repeat victimisation, which disclosure of the material held by the third party may cause to that person, and (d) whether it is necessary to make an immediate order for disclosure and, in particular, whether it would be appropriate in the circumstances to postpone until the trial consideration of disclosure of the material, including having regard to other probative evidence that has already been disclosed concerning any person to whom the material held by the third party relates.

Section 8(4) implements the recommendation in paragraph 2.38 concerning the additional specific factors that are to be taken into account by a court where the disclosure concerns material held by a third party and where the accused is

charged with a sexual offence: (a) any additional factors concerning the matters referred to in subsection 3(c), including because the person to whom the material held by the third party relates is a child or a relevant person (as defined in *section 2* of the Bill, above);³ (b) the public interest in encouraging the reporting of sexual offences; (c) the public interest in encouraging the obtaining of treatment by complainants of sexual offences; and (d) the public interest in ensuring that adequate records are kept of counselling and therapeutic communications, in particular where they have no probative value for a criminal trial.

Section 8(5) implements the recommendation in paragraph 2.38 that a disclosure order made under *section 7* may include such conditions as appear to the court to be just; and that these may include any or all of the following: (i) that the material is edited or redacted (subject to approval by the court) so that it excludes irrelevant, including sensitive personal, material whose disclosure is not required by the accused's right to a trial in due course of law; (ii) that the material shall be disclosed to a specified person only (including where the accused is legally represented, to the accused's solicitor and counsel or both); or (iii) that the material is used solely for the purposes of the conduct of the trial.

Section 8(6) defines counselling and therapeutic communications.

³ The reference to "relevant person" is to the phrase used by the Commission in its 2013 *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013), Introduction, paragraph 11, that is, (a) a person whose capacity to consent to a sexual act is called into question or (b) a person who lacks capacity to consent to a sexual act.