

THE BAR
OF IRELAND
The Law Library
BARRA NA hÉIREANN
An Leabharlann Dlí

SUBMISSION TO OIREACHTAS JOINT COMMITTEE
ON JUSTICE, HOME AFFAIRS & MIGRATION

GENERAL SCHEME OF THE CRIMINAL LAW AND CIVIL LAW (MISCELLANEOUS PROVISIONS) BILL 2025

26 June 2025

INTRODUCTION

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Joint Committee has invited the Council of the Bar of Ireland ("the Council") to make a written submission on the General Scheme of Criminal Law and Civil Law (Miscellaneous Provisions) Bill, 2025 ("the General Scheme"). The Council welcomes this opportunity to participate in the pre-legislative scrutiny process. and sets out its observations in on a Head-by-Head basis as requested.

The General Scheme runs over 51 Heads and includes a wide range of measures, including the extended use of remote hearings in criminal and international co-operation proceedings, including in relation to providing for remote jury trials; the creation of new criminal offences arising from the sexual exploitation of tenants and the intimidatory wearing of masks in public; the introduction of a requirement for a judicially determined hearing in every case involving the disclosure of counselling records in sex cases notwithstanding the willingness of a complainant to consent to disclosure of relevant records; and the amendment of various pieces of legislation ranging from that relating to outdoor seating at licenced premises to the Extradition Act. Given the wide-ranging nature of the matters addressed in each Head, the Council proposes to comment on particular Heads of the General Scheme and sets out its observations in on a Head-by-Head basis as requested.

GENERAL OBSERVATIONS

1. Before commenting on the General Scheme, the Council would highlight at the outset some observations of importance:

    (i) There are serious concerns about the proposed extension of remote hearings to trials on indictment, without the requirement of any pre-condition of exceptional circumstances and in the absence of research on the potential impact on the quality of

justice, the potential impairment of accused persons' fair trial rights and of victims' interests in the conduct of the trial of serious criminal offences.

(ii) There is a lack of infrastructure both to ensure the smooth running of remote hearings involving multiple parties and multiple witnesses and no adequate facilities to allow communication in confidence with a client in custody during the course of remote hearings of such importance. This is an essential prerequisite to vindicate the rights and safeguards provided for in the General Scheme.

(iii) The move to require a full disclosure hearing in every case involving the disclosure of counselling records identified as relevant by the prosecution in proceedings for sexual offences, even where a complainant has received independent legal advice and is providing informed consent to such disclosure, is likely to have a serious impact on the availability of judges to preside over trials themselves, as judicial resources will have to be diverted to conducting disclosure hearings which may be largely unnecessary in the particular circumstances of individual cases.

HEAD-BY-HEAD DISCUSSION

Head 5: Remote hearings in criminal and international co-operation proceedings generally

2. Head 5 provides a legislative basis to allow for all criminal and international co-operation proceedings, save for those set out in Head 6, to be conducted by way of remote hearing. Head 6, discussed below, relates to more complex contested matters, including jury trials and proceedings determining whether a requested person will be surrendered on foot of a European Arrest Warrant. It should be noted that not all proceedings to which Head 5 relates are 'uncontested' or concerned with relatively inconsequential matters, in that 'section 5 proceedings' will include contested bail applications, arraignment and sentencing hearings.

3. The Council notes that under the existing provisions of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020, a court may already direct that an accused person in custody appears remotely at most of the hearings that are encompassed by Head 5. This is generally done on a case-by-case basis, usually at the request of the accused, save for in the High Court bail lists where the general rule is that accused persons are appear in court remotely, albeit that that this approach has required to be modified to ensure the smooth running of the list.

4. Head 5 provides for the Chief Justice, or president of the applicable court, where satisfied that it is not contrary to the interests of justice, to make a direction that all section 5 proceedings of a particular class, or all section 5 proceedings in which the 'relevant person' (the person to whom the proceedings relate i.e. the accused or person for extradition) is of a particular class, shall proceed by remote hearing. Where no such general direction has been made, an individual court may direct a remote hearing where it is satisfied in relation to various safeguards set out in subhead (3).

5. Pursuant to subhead (8), a court may order that a general direction for remote hearing under subhead (2), or particular direction made under subhead (3), is not to apply, where it appears to the court that any of the safeguarding conditions set out in subhead (3) are not met. The conditions of which a court is required to be satisfied in relation holding a remote hearing are that:

> *(a) it is appropriate having regard to—*
>
> > *(i) the likely complexity of the hearing,*
> > *(ii) where relevant, the age and mental capacity of the relevant person, and*
> > *(iv) any other particular circumstances of the relevant person or of the case to which the proceedings relate,*
>
> *(b) the electronic communications technology provided for the hearing is such as to enable such interpretation or translation as may be necessary,*
>
> *(c) where applicable, the relevant person and his or her legal representative can communicate in confidence during the hearing,*
>
> *(d) it would not be prejudicial to the relevant person, and*
>
> *(e) it is not otherwise contrary to the interests of justice.'*

6. The Council notes that an order pursuant to subhead (8) can be made of the court's own motion or on application to it and that the court must give reasons for its decision. The Council regards subheads (8) and (9) as important provisions in terms of guarding against prejudice to an accused person. The Council observes that the fact that subhead (5) permits either party to the proceedings to apply *ex parte* for a remote hearing does not sit well with the right to apply to dispense with the remote hearing direction where it is contended that the safeguarding

conditions are not satisfied. The Council submits that any application by either side for a remote hearing should be on notice to the other side.

7. The Council further notes that our members' experience is that there is a lack of infrastructure to allow effective communication in confidence with accused persons in custody during the course of remote hearings, which is an essential prerequisite to vindicate the safeguards provided for. Such difficulties as already exist are likely to be exacerbated by an increase in the use of remote hearings.

8. The Council notes that while the focus on the remote attendance of an accused has been on production from custody via video-link, Head 5 also envisages accused, persons who are not in custody, attending remotely. A 'remote hearing' is defined in Head 4 as 'a hearing in proceedings in which one or more of the participants participates…by means of electronic communications technology'. The General Scheme does not address the issue of remote attendance by an accused person who is not in custody in terms of satisfaction of bail recognisances conditioned to attend at a particular place at a particular time and the manner of the virtual presentation of an accused on bail.

9. The Council further notes that the General Scheme is silent on whether remote hearings will be required to be tethered to a physical court room where a registrar will sit, where DAR recording will be carried out and which can be attended in person by parties at liberty to do so, the public and the press. The Council submits that inadequate regard has been had in the General Scheme to the Constitutional requirement that justice be administered in public.

Head 6: Remote hearings in trials and other contested proceedings

10. Head 6 represents an extremely significant extension of the use of remote hearings in criminal proceedings. The Council would voice serious reservations about the appropriateness of extending remote hearings to jury trials in particular. The Council is of the view that trials on indictment involving multiple witnesses, some of which will be of crucial importance to the issue of whether an accused person is guilty of the most serious offences, up to and including murder, which attracts a mandatory sentence of life imprisonment, are not suitable for fully remote hearing. If such a step is contemplated, it should at least require circumstances of exceptionality as a pre-condition. While there are safeguards provided for in the General Scheme, it is submitted that where proceedings are contested and concerned with matters of such importance, there is an inherent preference for in person hearing. Where there are specific difficulties arising for individual witnesses, these can be catered for by way of application for

evidence by live television link for those particular witnesses. Arrangements can then be put in place for such witnesses to give evidence from an appropriate location.

11. The Council notes the Head 6 requires the court to be satisfied in relation to *'the age and mental capacity of the relevant person and of any witnesses who may be required to give evidence'*. The Council observes that persons with addiction difficulties, cognitive issues, neurodiverse conditions, poor educational attainment and other vulnerabilities are overrepresented in the cohort of individuals who appear as accused persons in respect of criminal proceedings. Indeed, it is unfortunately often the case that such a cohort are overrepresented in the population of victims of crime. The potential harm to these individuals, where their vulnerabilities and difficulties may not receive sufficient attention in any direction to hold remote hearings in serious contested matters, is grave, as such individuals are more likely to encounter difficulties in fully engaging with the process where it is conducted remotely.

12. While the explanatory notes indicate the view that the General Scheme will merely bring Ireland in line with international practice, such as in the United Kingdom, there does not appear to have been any qualitative analysis of how provisions enabling remote jury trials have been utilised in neighbouring jurisdiction. According to the UK National Audit Office (NAO) reports[1], the implementation of proper infrastructure and a 'common platform' for criminal cases has been plagued with issues, delays and cost overruns. A recent overview of remote hearings prepared by the UK Bar Council found that while barristers in general welcomed remote hearings where appropriate, there was general agreement that for trials, especially longer ones, and hearings where contested evidence is involved, in-person hearings should be the norm[2]. Concerns were also articulated about the lack of consistency of approach across courts and judges which can cause confusion and uncertainty. The UK Bar Council noted that: *A principal complaint is as to the lack of consistency of approach across courts and judges which can cause confusion and lead to uncertainty amongst all court users. Barristers tell us that there should be a consistent, uniform, and pragmatic approach to remote hearings, rather than what appears sometimes to be an unpredictable, even arbitrary approach*.

13. It appears that remote jury trials have not in fact been widely used in the UK and there is a dearth of analysis and evaluation of the impact of holding such trials on the quality of justice and the fair trial rights of an accused.

14. Furthermore, it appears the UK Equality and Human Rights Commission published findings very early in the pandemic flagging up serious concerns about some users' ability to engage

[1] NAO-Progress on the courts and tribunals reform programme. 16 February 2023.
[2] A Lens on Justice: The Move to Remote Justice (May 2024), Bar Council of the UK

with remote justice and pointed towards the specific communication needs of people with cognitive impairments, mental health conditions and/or neurodiverse conditions and stated that these needs could not be met via a remote link. The report emphasised that the implications of remote justice are not fully understood and should be evaluated in full before their use is made more widespread[3].

15. There is an express right of an accused person to be 'present' at their trial as enshrined in Directive 2016/343 under Article 8(1). The presence of the accused at trial is seen as a constituent part of the overarching right to a fair trial, enshrined in domestic law, EU Charters, and the ECHR. The European Committee for the Efficiency of Justice published guidelines for the use of videoconferencing in judicial proceedings in 2021. One of the four fundamental principles outlined in those guidelines is that;

> *'All guarantees to a fair trial under ECHR apply to remote hearings in all judicial proceedings. The key elements are the right to effective access to a court, fairness of the proceedings, adversarial character of the process, equality of arms, proper administration of evidence, time to prepare and access to materials, the court's decision in a reasonable time, data security and risk management.'*

16. The character of criminal proceedings involving a jury adjudicating on the guilt of an accused should maintain a presumption of an in-person hearing which it is submitted should only be departed from in exceptional circumstances. The foundations of this presumption are not limited to considerations of efficiency and practicality, but are built on the right to a fair trial of the accused (with its many constituent elements), the complexity of the issues in dispute, and the need for engagement of all parties with the case.

17. As set out in the explanatory notes, the Criminal Evidence Act, 1992, already makes provision for witnesses to give evidence by live television link in certain circumstances. In the majority of cases, these provisions are utilised to allow professional/expert witnesses or gardai to give evidence remotely. Where witnesses are giving evidence remotely, it is necessary for the trial court to be satisfied that the conditions in which the evidence is being given is appropriate. Significant concerns may arise where lay witnesses connect by videoconferencing technology and give evidence from a location where they may be other unknown people present in the room or nearby; where the witness may be subject to pressure or interference and where the court and the jury are simply not in a position to observe fully the conditions in which the evidence is being given. Where there are particular reasons that a witness cannot give evidence in person, this can be addressed under existing legislation.

[3] Equality and Human Rights Commission (April 2020) Inclusive justice: a system designed for all.

18. The Council repeats the observations made in relation Head 5 at paragraphs 9, 10 and 11 above in relation to the adequacy of video-conferencing technology to conduct a remote trial; the lack of adequate facilities to consult with an accused during the hearing; the omission to provide expressly that the trial proceedings will be tethered to a physical court room where a court registrar will sit and which can be attended by those that wish to appear in person, the public and the press.

19. In summary, while the Council notes the safeguarding conditions included in Head 6, it is submitted that remote hearings should not be extended to jury trials, and to summary trials involving the potential for imprisonment. The experience of our neighbours has been that remote hearings are not suitable for lengthy contested matters involving oral evidence.

20. In the alternative, where such provision is made, any direction that jury trials are to proceed remotely should be expressly stated to apply only in exceptional circumstances.

Head 7: Use of electronic means in criminal and international co-operation proceedings

21. The Council recognises the need for modernisation and for the courts to keep pace with the development of technology and to recognise that important documents can now be authenticated in electronic form, including by specific electronic signature software which is used to execute contracts and other legal agreements. Likewise, the Council recognises that the facilitation of electronic transmission of documents is likely to result in increased efficiency in the court process and is to be welcomed where deemed appropriate by the relevant judicial entity.

Head 11: Amendment of Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020

22. Head 11(c) proposes amending section 20 of the 2020 Act which addresses the use of electronic "means" in civil proceedings. The 2020 Act allows for rules of Court to provide for the e-lodgement, e-filing , e-issuing and e-transmission of documents. The proposed amendment replaces the existing scheme so that these matters are to be dealt with by direction of the Chief Justice or the President of the relevant Court following consultation with the chief executive of the Courts Service. It is suggested that where possible such procedural matters should be provided for by rules of court and that references to the rules of court should not be excised from section 20 (1) to (4). The new arrangement could be included as an alternative in each subsection or alternatively by means of an alternative subsection 4A which would provide for "further provision" by direction of the Court.

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Head 17: Amendment of section 10 of Misuse of Drugs Act, 1984

23. This Head proposes to extend the category of persons who can provide certificate evidence in respect of analysis of controlled drugs from officers of Forensic Science Ireland (who must hold a relevant professional qualification) to include 'members of garda personnel' as defined by the Policing, Security and Community Safety Act, 2024, which includes civilian workers. Forensic Science Ireland is a statutory agency independent from An Garda Siochana, resulting in its officers' evidence being routinely accepted without challenge. Furthermore, the staff of Forensic Science Ireland are widely accepted to have the necessary expertise and independence to provide expert opinion. The Council submits that it is not appropriate to permit garda personnel to present certificates with the same evidential presumption that attaches to one issued by an officer of Forensic Science Ireland as such a witness cannot be said to enjoy the same presumption of independence and consequently will not attract the same degree of confidence.

Head 19: Amendment of section 19A of Criminal Evidence Act, 1992

24. This Head provides for the removal of the provision under s.19A of the Criminal Evidence Act, 1992, which provides that a court hearing to determine the issue of disclosure of a counselling record in a sexual offence case is not required where a complainant consents to the disclosure.

25. The Council observes that the requirement for a mandatory s.19A hearing in every case will place a considerable burden on judicial resources and is likely to have a negative impact on the delay in getting cases on for trial due to the diversion of judges who would be available to preside over a trial to instead preside over disclosure hearings which involve the perusal of records by the court itself to determine whether same will be disclosed. Furthermore, mandatory hearings is every case will likely encounter significant difficulties arising from the increased demand on the resources available to the Legal Aid Board, which provides representation to complainants, introducing further delays to the system.

26. An alternative method of dealing with the concerns articulated in the explanatory memorandum in respect of complainants feeling pressurised to waive their right to a disclosure hearing, would be to instead strengthen the provisions in relation to the provision of legal advice to complainants in advance of any waiver of a hearing in order to ensure that the complainant is giving informed consent to the disclosure of relevant material. The

recent Supreme Court decision in DPP v AM [2025] IESC 16 recognises both the duty disclose relevant material and the necessity to protect the privacy rights of the complainant. The Supreme Court noted the necessity for informed consent to any waiver and the requirement of access to legal advice order to facilitate same.

27. The Council suggests that expressly providing for the provision of legal advice for complainants (in respect of proceedings for all sexual offences) in advance of the decision to waive the right to a full disclosure hearing and of a requirement that the complainant's legal representative confirm to the court that advice had been provided, and informed consent given, is an alternative worthy of consideration given the impact on judicial resources if a hearing is required in every case. Where a particular record is of a nature that is almost certainly going to be determined to be disclosable by the court on a s.19A hearing, it is arguably of more assistance to ensure that this is explained to a complainant by an independent legal advisor and to allow the complainant to provide informed consent to disclosure where s/he wishes to rather than holding a largely unnecessary hearing.

Part 7: Amendment of Extradition Act, 1965
Heads 21 to 24

28. The Council notes that these Heads seek to facilitate the operation of the Schengen Information System (SIS) in respect of countries which are not part of the European Arrest Warrant and to honour a commitment to do so made by the State to the European Commission. The procedure mirrors that in place in respect of the SIS alert system in place under the European Arrest Warrant Act.

Head 25: Amendment of Criminal Justice (Community Service) Act, 1983

29. This Head intends to expand the use of community service as a sanction and ultimately implement calls for the greater use of non-custodial disposal of criminal offences. The Council observes that the increase in the maximum number of hours from 240 hours to 480 hours allows for an increase in severity of the sanction which may assist in bridging any apprehended gap between the previous maximum of 240 hours and the custodial threshold.

Head 26: Amendment of section 8 of Criminal Justice (Public Order) Act, 1994

30. This Head proposes an addition to the Criminal Justice (Public Order) Act 1994 to address issues which may present themselves by someone wearing a face covering in a public place.

The Council observes that much of the behaviour this Head seeks to proscribe is likely to already be proscribed by sections 5, 6 and 8 of the Criminal Justice (Public Order) Act, 1994.

Head 30: Amendment of section 14B of Act of European Arrest Warrant Act, 2003

31. The Council would seek further information as to what class of persons other than members of An Garda Siochana would be authorised to take persons who are subject to a temporary transfer order to and from the place in which they are detained.

Head 49: Amendment of Schedule to Bail Act, 1997

32. This Head amends the schedule of offences which can invoke an objection under Section 2 of the Bail Act 1997.

33. The Council notes the proposed substitution of "(c) section 112 (taking vehicle without lawful authority)" in s.19(c) of the Schedule to the Bail Act, 1997. Section 112(1)(a) of the Road Traffic Act, 1961, as amended, creates an indictable offence of both 'using' and 'taking possession of' a mechanically propelled vehicle without the consent of the owner. The Council suggests amending the wording of Head 49(a) to read "(c) section 112 (using or taking vehicle without lawful authority)" unless it is the intent of the legislature that unlawful *use* of the vehicle without the consent of owner would not be a scheduled offence pursuant to the Bail Act, 1997.

34. The new offences added to the schedule by Head 49(b) are serious in nature and appear to be appropriate additions to the schedule of offences in respect of which an objection to bail under s.2 of the Bail Act, 1997, can be made.

CONCLUSION:

35. The Council appreciates the invitation to make this written submission to the Oireachtas Joint Committee on Justice and welcomes continued engagement in respect of the Bill. The Council furthermore remains available to the Joint Committee should it have any queries or requests for clarification in relation to any aspect of its submission.



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