Opening Statement to the Joint Oireachtas Committee on Justice, Home Affairs and Migration regarding the General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025

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I am grateful for the opportunity to present my research to you today. My contribution will focus on Head 19 of the Bill, that is, the proposals to reform section 19A of the Criminal Evidence Act 1992 (as amended) (i.e. the legislative regime which governs the disclosure of complainants' counselling records in sexual offence trials).

This scheme creates an application process where an application for the disclosure of counselling records will be determined by a judge. Unfortunately, the scheme, which was introduced in the Criminal Law (Sexual Offences) Act 2017, has failed to achieve its intended objective of preventing inappropriate disclosure of counselling notes. This is largely due to the waiver provision which has served to circumvent the scheme as complainants have routinely waived the operation of the scheme and consented to the disclosure of their notes. The challenges posed by the waiver provisions have been highlighted in my research with legal professionals who work within rape trials[1] and by the *O'Malley Review*, and most recently in the Supreme Court decisions in *WC v DPP*[2] and *DPP v AM.*[3]

In abolishing the waiver provision, the proposals in Head 19 of the Bill go some way towards remedying the shortcomings of the current regime. However, abolition of waiver does not go far enough and will not offer optimum protection to complainants in these cases. I would propose that the following be considered as potential further reforms to the regime

(1) Extension of the scheme to all 'personal records'

The use of counselling notes is particularly problematic as their use impacts directly on the healing process for victims of sexual offences. My research with court accompaniment workers who support victims of sexual crime demonstrated that some victims may opt not to go for counselling due to concerns that their notes will be used in court or may opt not to report because they want to engage in counselling without worrying about the possible disclosure of the notes. Thus, it is understandable that section 19A has focused on this form of evidence. However, the concerns associated with counselling notes apply to a range of other personal records which may exist about a complainant. The disclosure of such records and their use in a subsequent trial may be equally intrusive and distressing. This includes material such as medical, school or social work records. The limited nature of section 19A was

[1] Leahy, *The Realities of Rape Trials in Ireland: Perspectives from Practice*, (Dublin Rape Crisis Centre, 2021). Available at: https://www.drcc.ie/news-resources/resources/the-realities-of-rape-trials-in-ireland/

[2] [2024] IESC 48.

[3] [2025] IESC 16.

highlighted by legal professionals in my research who pointed out that other forms of personal records raise very similar challenges to counselling notes but are not covered by section 19A. The *O'Malley Review* also suggested that consideration should be given to whether the disclosure of medical records should be made subject to a statutory disclosure regime.[4] This issue was also highlighted by the Supreme Court in *AM*, Collins J rightfully acknowledging that it is 'a matter for the Oireachtas alone to determine whether to extend the statutory disclosure regime beyond counselling notes'.[5]

The section 19A regime is based upon a similar scheme in the Canadian Criminal Code. However, that scheme applies to all personal records. I submit that serious consideration should be given to extending section 19A to include all personal records. This would offer optimum protection to complainants' privacy and also minimise any potential that personal records may be inappropriately admitted in trials and relied upon to unfairly discredit a complainant's testimony. The definition in the Canadian Criminal Code includes any form of record 'that contains personal information for which there is a reasonable expectation of privacy' [6] and specifically references the types of records which this might encompass, including medical, therapeutic, education and social services records. It even includes personal journals and diaries.

Even if a decision is taken not to expand the remit of the scheme by applying it to all personal records, some attention should be paid to the decision in *AM* where Collins J noted that there is some uncertainty within the current definition of counselling notes and that clarity is needed, for example, as to whether it applies to psychiatric records.[7]

Given the importance of this regime and the fact that the definition of records to which it applies necessarily dictates its remit, it is vital that the definition is clear and suitably expansive to provide appropriate protection to complainants.

(2) <u>Focus on admissibility and not just disclosure</u>

A more expansive recommendation which might be considered is whether the scheme should regulate admissibility as well as disclosure. Again, the Canadian scheme which our rules are based upon has a process for determining whether disclosure should be granted and a separate process for deciding whether and how the material disclosed may be used within a trial.[8] Put simply, this would mean that if information were to be disclosed to the defence, they would then need to go to court again if they wished to introduce the evidence at trial. Admittedly, this creates another layer in the process and there may well be concerns about potential delays to which this may give rise. However, it would offer optimum protection to

[4] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*, (Dublin: Department of Justice and Equality, 2020), para 6.41.
[5] *DPP v AM* [2025] IESC 16, para 80.
[6] Section 278.1.
[7] Ibid, para 72.
[8] Section 278.92.

complainants. While disclosure of personal information to the defence in itself is highly distressing and traumatic, its use within the trial compounds this distress. It also gives rise to the possibility that such information may be used in a way which might unfairly undermine the complainant's credibility by introducing details of a complainant's personal life which may not have direct relevance to the core issues at trial.

In conclusion, the proposals to amend the section 19A regime are both welcome and necessary. However, the current proposal is limited and does not offer optimum protection to sexual offence victims. What I have suggested here includes a variety of options for reform which range from clarification of the application of the regime (the minimum requirement) to its extension to more records and/or to the regulation of admissibility as well as disclosure. A thorough consideration of these options is necessary if the reforms in this Bill are to hold the prospect of meeting their objectives of protecting the privacy and dignity of complainants in sexual offence trials.