Submission to Joint Committee on Justice, Home Affairs and Migration

Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025

Introduction

I welcome the opportunity to make this submission on the above-named legislation. Given my expertise on sexual offences and victims' rights, my submission will focus on Head 19, relating to the disclosure of counselling notes. I have researched extensively on this topic, including empirical research with legal professionals and court accompaniment workers who work in Irish rape trials.[1] My research has been cited by the Supreme Court in its recent judgment in this area (*DPP v AM*[2]). I have also provided expert advice on this topic to the English Law Commission, who are currently reviewing their law on disclosure in sexual offence trials.[3]

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

While absolute prohibition of the disclosure of counselling notes in rape trials would be the optimum reform from the perspective of protection of victims' privacy interests, and this has been mooted previously as a potential reform, it is not workable. Given defendants' fair trial rights, such a provision would be constitutionally vulnerable. Despite the very limited circumstances in which such evidence may be relevant, its absolute prohibition may result in a case where there is information in such a record which may be legitimately relevant to a defendant's case and result in potentially exculpatory evidence being inadmissible. This would be an impermissible incursion on defendants' fair trial rights in Article 38.1.

Likewise, the proposal to introduce a therapeutic privilege for counselling and therapeutic professionals is not a solution to the immediate problem of improving section 19A. While this is a reform which is worth consideration, such a privilege would have ramifications beyond sexual offence cases. Consequently, it is not an immediate solution to the issues raised in these trials and should be considered in its broader context.

The current proposed removal of the waiver provisions from section 19A is welcome. It is clear that waiver is operating to undermine the intention of the section 19A regime. The challenges posed by waiver have recently been highlighted by the Supreme Court in the judgments in *WC v DPP*[4] and *DPP v AM*[5] , demonstrating the importance of this legislative reform. However,

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[1] Leahy, The Realities of Rape Trials in Ireland: Perspectives from Practice, (Dublin: Dublin Rape Crisis Centre, 2021). Available at: https://www.drcc.ie/news-resources/resources/the-realities-of-rape-trials-in-ireland/
This research involved interviews with 16 legal professionals and 12 court accompaniment workers.

[2] [2025] IESC 16

[3] Law Commission, *Evidence in Sexual Offences Prosecutions: A Consultation Paper*, (London: Law Commission, 2023).

[4] [2024] IESC 48.

[5] [2025] IESC 16.

while this is a welcome reform, it is limited and may not represent the optimum legislative intervention to protect the privacy of complainants and, importantly, to minimise the potential for the introduction of irrelevant evidence which may unfairly prejudice the complainant's credibility.

Below are some additional issues which should be considered in this reform effort to maximise its potential to protect complainants and ensure fairness in sexual offence trials:

(1) Remit of Section 19A- Extending protection to all personal records

For the purposes of this process, a 'counselling record' is defined as:

> '…any record, or part of a record, made by any means, by a competent person[6] in connection with the provision of counselling[7] to a person in respect of whom a sexual offence is alleged to have been committed ('the complainant'), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy.'[8]

The focus on counselling records in section 19A is understandable given the significant intrusion on privacy which is entailed in disclosure of these notes, and the questionable relevance of such notes within the trial process. With regard to the latter point, it is important to remember that counselling notes are not witness statements and represent a counsellor's interpretation of an engagement with a client. They are not created as a verbatim account of what an individual has said, but as an aide for the provision of therapy and support. Most notably, the client will not have had sight of these notes and they may not consequently represent the precise tenor of what has been said. In this way, they cannot be compared with evidence such as witness statements to police which are signed and verified by the relevant witness Indeed the limited usefulness of such records as evidence was recently acknowledged by the Supreme Court in *AM*.

However, while the focus on counselling notes is warranted, the exclusion of other forms of personal records from the section 19A regime is a blind spot in the legislation which means that, even if this scheme operated well to regulate the use of counselling notes, complainants

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[6] A 'competent person' is defined as 'a person who has undertaken training or study or has experience relevant to the process of counselling': section 19A(1) of the Criminal Evidence Act (as amended).

[7] 'Counselling' means listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration)': section 19A(1) of the Criminal Evidence Act 1992 (as amended).

[8] Section 19A(1) of the Criminal Evidence Act 1992 (as amended).

would still be vulnerable to unwarranted intrusions on their privacy as a result of disclosure of other personal records which are not regulated by the regime. The limited focus of section 19A was highlighted by legal professionals who participated in my research on Irish rape trials, with some questioning why it was limited to counselling records and proposing that other types of records (e.g. medical or social work records) should also be included.[9]

> *'…because the counselling records tend to be written in a way where the counsellor seems to know that these may well be disclosed, so very little of substance tends to be recorded. But it's the much more personal stuff, the psychiatric records, the psychological records going back ten years, you know, that was prior to a complaint. That can be much more personal…'* (LP12)

> *'…the problem with [section 19A] is though, it just refers specifically to counselling records. So whoever came up with that idea doesn't really understand that well, you can have psychiatric records, medical records, psychological records, are they counselling records?* (LP14)[10]

The potential for the extension of the scheme to include other forms of records was also highlighted in the *O'Malley Review*, which suggested that consideration should be given to whether the disclosure of medical records should be made subject to a statutory disclosure regime because they give rise to a similar expectation of privacy.[11] 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'.[12]

There are many more forms of records which contain equally personal information and may be similarly problematic for use as evidence in trials. Indeed, the risk of the current focus on counselling notes only could result in a very limited reform which would simply lead to increased use of other forms of personal records in sexual offence trials as these would not

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[9] In total, four legal professionals raised this issue: LP9; LP10; LP12; LP14.
[10] LP14 also mentioned that social work records could be relevant and should be protected by the regime.
[11] 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
[12] Para 80.

be regulated by legislation. Thus, it is proposed that Irish law should be reformed to protect all personal records. This would replicate that Canadian scheme on which section 19A is largely based, which protects all complainants' personal records. Section 278.1 of the Canadian Criminal Code defines as 'record' as:

> 'any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.'

Adoption of this more expansive definition in Irish law would maximise the protection of complainants' privacy and reflects the reality of sexual offence trials where there are many records other than counselling records which may be sought to be adduced at trial and the use of which is equally problematic from the perspective of complainants' privacy rights and indeed, give rise to similar concerns about the potential for such irrelevant evidence to be used to unfairly prejudice a complainant's testimony.

Even if development of the law to protect all 'personal records' is not within the scope of the current reform effort, the current definition of 'counselling record' must be reconsidered in light of its potentially porous nature, as identified in the judgment in *AM*:

> 'Is it not immediately clear whether it encompasses records relating to psychiatric treatment. More fundamentally, there is scope for uncertainty as to whether it relates only to counselling given to a person alleging to have been the victim of a sexual offence (in other words counselling relating to the alleged offence committed against the complainant), in which case counselling pre-dating the alleged offence would fall outside the scope of the section, or whether it operates more broadly and encompasses any counselling record relating to the complainant, including records predating, and unconnected with, the alleged offence.'[13]

It is likely that the current definition is sufficiently broad to include all counselling records and not the potentially restrictive category of notes suggested in the passage above. However, it is worth including some clarification of the definition in the current proposed reforms. This

[13] *DPP v AM* [2025] IESC 16, para 72.

would be relatively minor amendment, which could be included with minimal effort but would ensure that any lack of clarity in the definition cannot be exploited to circumvent the application of the section 19A process by suggesting that a record falls outside the scope of the regime. Averting any potential for this to occur is important given that the removal of waiver will mean that disclosure applications will occur more frequently and there may thus be temptation to seek to avoid its application by suggesting that material falls outside of its remit.

(2) Regulating Admissibility

While disclosure of counselling notes or other private information to the defence is traumatising for complainants and a significant interference with their privacy rights, a broader associated issue which compounds this distress is the admission of this material at trial as evidence. Disclosure and admissibility are two separate issues. Disclosure of records to the defence gives rise to serious concerns about complainants' privacy. Admissibility at trial also similarly raises concerns about the potentially prejudicial impact of the use of such evidence at trial (e.g. where they may be used to suggest that a complainant's credibility may be questionable due to a history of addiction or mental health struggles).

There is a clear case to be made for regulating admissibility separately to disclosure, thereby ensuring that disclosure does not result in unregulated use of this material as evidence at trial. Of course, trial judges will exercise their discretion to control inappropriate questioning on matters irrelevant to the case during the trial process. Indeed, judges are specifically directed to be mindful of the invasion of the privacy rights of victims by section 21 of the Criminal Justice (Victims of Crime) Act 2017 which provides that:

> 'In any proceedings relating to an offence, where a court is satisfied that—
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> > (a) the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and
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> > (b) it would not be contrary to the interests of justice in the case,
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> the court may give such directions as it considers just and proper regarding any evidence adduced or sought to be adduced and any question asked in cross-

examination at the trial, which relates to the private life of a victim and is unrelated to the offence.'

In addition to provisions such as section 21, the recent decision in *AM* highlights that:

> 'courts have a power- indeed a constitutional duty- to ensure that [counselling] records (and other records in which the victim has a strong expectation of privacy such as medical records) are disclosed only where such disclosure is necessary in the interests of justice'.[14]

While these measures certainly provide general protection for the privacy rights of complainants, there is a clear case to be made for specific regulation of the admissibility of material held in personal records within sexual offence cases. Such regulation will ensure that such evidence is never introduced unless it is strictly relevant and that the introduction of such evidence goes no further than is necessary, thereby ensuring maximum respect for the privacy rights of complainants and minimising the potential for secondary victimisation caused by unnecessary and intrusive questioning about personal and intimate details of the complainant's life.

A model for this may again be found in the Canadian Criminal Code, where section 278.92 provides for the admissibility of personal records, notwithstanding whether disclosure has been previously ordered or not. The provision provides that records are inadmissible unless the judge determines that it 'is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice'. Importantly, the legislation provides a list of factors which the judge must consider when deciding whether the evidence is admissible. The judge is required to take into account:

> (a) the interests of justice, including the right of the accused to make a full answer and defence;
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> (b) society's interest in encouraging the reporting of sexual assault offences;
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> (c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
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> (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
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> (e) the need to remove from the fact-finding process any discriminatory belief or bias;

[14] Ibid, para 134.

(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(g) the potential prejudice to the complainant's personal dignity and right of privacy;

(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(i) any other factor that the judge, provincial court judge or justice considers relevant.[15]

An application for admissibility must be made to the judge in the same way as an application for disclosure would operate. The inclusion of such provision in Irish law would thus require a similar process to that which already exists in section 19A, that is, that the application takes place on notice to the complainant and that the complainant is entitled to legal representation for the purposes of the application. This would replicate the relevant provisions of the Canadian Criminal Code on admissibility applications in this context.

Further, it is proposed that Irish reform in this area should replicate the equivalent Canadian provisions in requiring that the judge provide reasons for his/her decision regarding admissibility and that specifically, the judge is required to provide detail on the following matters:

a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

b) the factors referred to in the legislation that affected the determination; and

c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.[16]

It is recommended that the Irish reform should also include a provision equivalent to section 278.96 of the Canadian Criminal Code which provides that 'if evidence is admitted at trial on the basis of a determination made under [these provisions], the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.' This would provide a final layer of protection in ensuring that any such evidence is not interpreted inappropriately by the jury and that they attach appropriate weight to the evidence, linking it with the pertinent issues within the trial to which it directly relates.

[15] Section 278.92(3).
[16] See section 278.94(4).

Reform of Irish law to regulate not only disclosure but also admissibility of counselling records (and, ideally all personal records, under a fully reformed scheme), would ensure maximum protection for complainants but without any unnecessary incursions on the rights of defendants. This additional step means that disclosure does not allow for relevant evidence to be used as the defence sees fit but that the introduction of such evidence at trial will be properly regulated and minimise any unnecessary or potentially prejudicial reference to complainants' personal information. However, judicial oversight will ensure that where it is necessary to do so, such evidence may be introduced in a controlled way to ensure that defendants' rights are not prejudiced.

Conclusion

The proposed reform in Head 19 is not only important but, as a result of recent Supreme Court jurisprudence, wholly necessary. While removal of the waiver provisions is both worthwhile and necessary, it would be regrettable if the opportunity were lost to consider more wide-ranging reform, which would recognise that concerns about complainants' privacy rights in sexual offence trials requires more than a narrow focus on counselling notes. Importantly, it must be realised that even if the abolition of waiver were to successfully regulate the use of counselling notes in these trials, complainants will still be vulnerable to invasion of their privacy as attention will inevitably turn to other personal records, which would remain unregulated, and thus open to unwarranted and potentially prejudicial deployment in trials.