Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Matt Carthy T.D.
Chair of the Joint Committee on Justice, Home Affairs and Migration
Leinster House
Kildare Street
Dublin
D02 XR20

26 June 2025

Re: General Scheme of Criminal Law & Civil Law (Miscellaneous Provisions) Bill 2025

Dear Deputy Carthy

The Irish Human Rights and Equality Commission ("IHREC") is pleased to provide you with preliminary written submissions relating to the General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 (the 'General Scheme').[1] We reserve the right to comment further during the passage of the legislation, as appropriate.

IHREC is a multi-mandate body, independent of Government and answerable to the Houses of the Oireachtas.[2] As well as being Ireland's National Human Rights Institution, with A status UN accreditation under the Paris Principles, IHREC is Ireland's National Equality Body for the purposes of EU law, the country's independent National Rapporteur on the Trafficking of Human Beings, the Independent Monitoring Mechanism for the UN Convention on the Rights of Persons with Disabilities (CRPD) and the Coordinating National Preventative Mechanism designate under the Optional Protocol on the Convention Against Torture.

We are making this submission, under our statutory mandate, specifically s10(2)(c)

> *either of its own volition or on being so requested by a Minister of the Government, to examine any legislative proposal and report its views on any implications for human rights or equality*.[3]

[1] https://assets.gov.ie/static/documents/General_Scheme_of_Criminal_Law_and_Civil_Law_Miscellaneous_Provisions_Bill_2025.pdf

[2] Sections 9(2) and 14 of the Irish Human Rights and Equality Commission Act 2014.

[3] https://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10

In our Strategy Statement (2025-2027),[4] we have prioritised enhancing accountability mechanisms to hold the State to account on the human rights and equality matters for which it is responsible; and strengthening the human rights and equality infrastructure in the State. Recognising the role of the Oireachtas as a guardian of human rights and equality, we are working towards increasing the support we provide to, the Oireachtas. We welcome the Committee's views on how IHREC can further support the Committee's work as a guardian of human rights and equality.

General observations on the General Scheme

Given the scope of the General Scheme, an exhaustive analysis is not possible in the time available. We have sought to focus on 6 discrete Heads. The fact that IHREC does not address any particular issue / Head within this submission should not be considered as an endorsement of the General Scheme's provisions. The following Heads and matters are the focus of this submission.

- Head 5 Remote hearings in criminal and international co-operation proceedings generally
- Head 6 Remote hearings in trials and other contested proceedings
- Head 7 Use of electronic means in criminal and international co-operation proceedings
- Head 19 Amendment of Criminal Evidence Act 1992
- Head 20 Amendment of the Firearms Act
- Head 26 Amendment of section 8 of Criminal Justice (Public Orders) Act 1994

We would encourage more clarity in the use of titles of Heads that reference not only the legislation to be amended but also the purpose of the amending provision. The current approach risks limiting public awareness and understanding of legislation, which may reduce democratic engagement in the work of the Oireachtas.

IHREC recommends that the Sections of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 are titled to promote maximum understanding of the objective of the relevant provision.

[4] https://www.ihrec.ie/about/strategy-statement-2025-2027/ See Strategic Priority 2 *Enhance Accountability Mechanisms* and Strategic Aim 3 *Strengthen the human rights and equality infrastructure in the State*

Specific Observations

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

Head 6 Remote hearings in trials and other contested proceedings

Head 5 of the Bill envisages the possibility of remote hearings being held for all types of criminal proceedings and international co-operation proceedings[5], with the exception of trials or other contested hearings. Head 5 outlines that any or all participants may participate in such hearings where the court so directs.

Head 5 provides that the court must be satisfied of the following before a remote hearing could proceed: whether any necessary translation or interpretation facilities are available, that it would not be prejudicial to the accused, that the accused can communicate in confidence with their legal team, that a remote hearing is in the interests of justice having regard to several factors such as the age and mental capacity of the accused and the complexity of the particular.[6]

Head 6 of the Bill provides for remote hearings of trials and contested hearings in criminal proceedings and international co-operation proceedings. Head 6 also applies to criminal trial proceedings whether summary or on indictment.[7]

We note that Head 6(3) outlines that it would be appropriate to have regard to the following factors:

> *(i) the nature of the offence or offences to which the proceedings relate,*
> *(ii) the likely complexity of the proceedings,*
> *(iii) where relevant, the age and mental capacity of the relevant person and of any witnesses who may be required to give evidence, and*
> *(iv) any other particular circumstances of the relevant person or of the case to which the proceedings relate,*
> *(b) the electronic technology provided for the hearing is such as to enable such interpretation or translation as may be necessary during the hearing,*

[5] Section 1(a).

[6] Section 3(a).

[7] Section 1(c).

(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 or unfair to the other party, and
(e) it is not otherwise contrary to the interests of justice."

IHREC accepts that the use of remote hearings may reduce costs and alleviate a strain on the prison services in terms of conveying accused persons to court. We are cognisant also that proceedings being heard remotely may avoid disruptions to a accused's routine while in custody. Further, remote proceedings may also provide some efficiencies in the context of emergency and late-night court sittings.

However, we have serious concerns about the operation of remote proceedings in practice. As the Independent Monitoring Mechanism for the CRPD, we are concerned about the continued failure to provide adequate and effective access to justice to disabled people in Ireland.[8] Disabled people who encounter the justice system (civil and criminal) are met with multifaceted challenges and barriers, despite often having some of the greatest legal needs. We raised Ireland's inadequate implementation of CRPD Article 13 in our List of Issues Prior to Reporting Parallel Report (20 June 2025), which will be considered by the UN Committee in September 2025.

IHREC recommends that the State publishes any human rights impact assessments undertaken on the General Scheme; and that it conducts and publishes a human rights impact assessment of the Bill in advance of further parliamentary process. Such human rights impacts assessments must specifically consider the impact of remote proceedings on the rights of structurally vulnerable groups including disabled people.

IHREC considers that recourse to the use of remote proceedings, especially in a criminal context, ought to be exercised with extreme caution. It is submitted that remote proceedings are '*temporary fix'* rather than a permanent solution for criminal trials. For example, the International Criminal Court Presidency published a guide for judges which made it possible to follow procedural steps by means of remote communication tools in the context of the

[8] In December 2024, IHREC published a comprehensive baseline report regarding access to justice for disabled people in Ireland. Charles O' Mahony, Access to Justice: A Baseline Study of Article 13 of the UN Convention on the Rights of Persons with Disabilities 2024.

Covid-19 Pandemic. However, it was emphasised that remote proceeds are only a "*temporary solution*". [9]

IHREC recommends that the State outlines all current and planned measures to be taken in order to ensure the limited use of remote proceedings.

IHREC recommends that the State provides assurance that remote proceedings, especially in a criminal context, will be exceptional and not normative.

IHREC recommends that the Bill provides for regulations on the use of remote proceedings and human rights review of the operation of remote proceedings within a three year period of commencement of the legislation

Remote Participation

The ICCPR, ECHR and the Charter of Fundamental Rights all enshrine the right to a fair trial. A fair trial is the cornerstone of any criminal proceeding. Article 6 ECHR guarantees the right of an accused to participate effectively in a criminal trial.[10]

We consider that an accused's absence in a courtroom considerably undermines an accused's ability to effectively participate in criminal proceedings. We take the view that more clarification is required in relation to how criminal proceedings which are held remotely would operate in practice. For example, the Bill provides that in the context of jury trials, members of the jury must "*be present in the same physical location at all times while participating in the trial proceedings.*"[11] However, additional information is required in respect of whether the jury and the accused would both attend the criminal proceedings remotely.

In the event that an accused attends the proceedings remotely while in custody, this would impose a significant "*degree of isolation on the accused as they are not physically present in a*

[9] The Presidency of the ICC, *"Guidelines for the judiciary concerning holding court hearings during covid-19 pandemic"*. Published 23 June 2020. https://www.icc-cpi.int/sites/default/files/itemsDocuments/200623-guidelines-for-court-proceedings-covid-19-eng.pdf

[10] *Murtazaliyeva v. Russia* (2018) at [91].

[11] Head 6, *subsection*(6).

courtroom."[12] In addition, clarity is required in respect of reconciling the requirement that justice is seen to be done by members of the public and also holding trials remotely. For example, in cases where a jury and/or accused appear virtually, it raises the question as to how journalists or the general public would be granted access to the criminal proceedings.

Right to legal assistance

We are concerned about whether an accused in criminal proceedings would be able to effectively communicate with Defence Counsel during criminal proceedings which are held remotely. We consider that this would appear to be *quasi* impossible. Studies have demonstrated that in a remote setting, contact between an accused and their Counsel occurs less frequently.[13]

We consider that it is of paramount importance that an accused is provided with effective and adequate access to Defence Counsel. A potential issue that may arise in circumstances where an accused attends a trial remotely is the ability to question witnesses through their defence counsel. We are concerned that this would prove to be quite challenging during remote proceedings. In addition, it may not always be readily apparent from a screen whether an accused wishes to ask a question to Counsel. Further, an accused may have difficulties in communicating this intention to Counsel, especially if an accused is vulnerable or has sensory impairments.

We consider that at a minimum, an accused should be able to communicate with Defence Counsel at trial with relative ease in order to ask clarifying questions or provide further instructions to Counsel. We are of the view that the quality of legal assistance afforded to an accused would be reduced in this regard if the proceedings were held remotely.

According to ECtHR case-law, the ability to take legal advice and assistance is particularly important in cases where the applicant is required to communicate with a courtroom remotely.[14] Further, the Court has underlined that adequate facilities and sufficient time should be allocated to accused when appearing remotely.[15] The Court has also outlined that a

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[12] Sobanski, K., "*Evolution of Remote Participation of the Accused and Victim in International Criminal Proceedings*." International Criminal Law Review 25 (2025) 167-191 at p.181.

[13] R. Factor et Al., '*Videoconferencing in Legal Hearings and Procedural Justice'*, 18(8) *Victims & Offenders* (2023) 1557-1579, p.1568.

[14] *Grigoryevskikh v. Russia*, (2009) at [92].

[15] *Sakhnovskiy v. Russia* (2010).

defendant is entitled to effective and confidential communication with a lawyer in remote proceedings.[16] It is noteworthy that the ECtHR has outlined a preference for accused persons to be physically present during criminal proceedings.[17]

In the International Criminal Court, accused may participate remotely. However, a distinction has been drawn between remote participation in appeal hearings and pre-trial matters versus appearing remotely in trial proceedings. For example, in the case of *Prosecutor v Laurent Gbagbo and Charles Blé Goudé,*[18] the Appeals Chamber found that holding a partially virtual hearing would not affect the rights of the accused or the fairness of the proceedings. Similarly, in *Alppi v Finland*,[19] the Court dismissed the applicant's complaint arising under Article 6 ECHR as being manifestly ill-founded on the basis that one judge had appeared via video-link. Further, the issues discussed pertained to sentencing matters after the applicant's guilt had already been established and not prior.

Case-law emanating from the ECtHR consistently demonstrates that there is a need to ensure that adequate procedural safeguards are in place. Recourse to remote hearings must also serve a legitimate aim and arrangements must be put in place for the giving of evidence which is compatible with the requirements of respect for a fair trial.[20]

In *Marcello Viola v. Italy*[21] it was outlined that an accused's participation in proceedings by way of videoconference does not amount to breach of the Convention *per se*. However, domestic authorities must provide sufficient reasons in order for a defendant to participate in hearings remotely. For example, this aspect was illustrated in *Medvedev v.* Russia[22], the Court held that the Government had failed to justify the decision to arrange for the applicant's virtual attendance for his appeal in Moscow instead of ensuring the applicant's physical presence in the courtroom.

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[16] *Grigoryevskikh v. Russia*.

[17] *Golubev v. Russia* (2006).

[18] Case no. ICC-02/11-01/15-1359.

[19] (2023).

[20] At [67].

[21] (2006).

[22] (2017).

The Presumption of Innocence

Research in relation to remote proceedings also suggests that an accused may be perceived in a more negative light[23] Moreover, this is exacerbated even further in circumstances where it is visible that the accused is attending remotely from a detention facility or is wearing prison attire. [24] There is a high risk that members of a jury may be susceptible to bias if it becomes apparent that an accused is attending the proceedings remotely from custody. We consider that this will inevitably have adverse implications for the accused's presumption of innocence, which in turn, would violate the accused's right to a fair trial as provided under Article 38.1 of the Constitution and Article 6 EHCR.

Remote hearings may also reduce the likelihood of non-verbal cues being observed, in contrast to proceedings taking place in a physical courtroom setting. It is evident that when a witness appears remotely, it is not always possible to fully assess their demeanour or non-verbal cues such as hand gestures which may give an incomplete picture to the Judge and Jury during proceedings which are held remotely.

Further, another issue arises in relation to whether remote proceedings could potentially affect the ability of a jury and/or judge to empathise with an accused or their ability to assess the credibility of a witness during the proceedings. Remote trial proceedings could also potentially remove the human and inherently social character of criminal trial proceedings.

IHREC recommends that the Committee considers these aspects in scrutiny of the General Scheme and Bill.

Witness evidence

In this jurisdiction, it is possible in certain cases for victims to give evidence remotely. In other cases, remote communication tools may be utilised and relied upon when a witness cannot physically attend the proceedings for logistical reasons or if their safety is in jeopardy.[25] However, in circumstances where a witness is permitted to give evidence which may also

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[23] A. Bannon et al., "*The Impact of Video Proceedings on Fairness and Access to Justice in Court*" (Brennan Center for Justice at New York University School of Law, New York, NY, 2020), pp.6-7.

[24] C. McKay, '*Video Links from Prison: Court "Appearance" within Carceral space*', 14(2) Law, Culture and the Humanities (2018) 242-262.

[25] C. Stahn, "*A Critical Introduction to International Criminal Law*" (Cambridge University Press, Cambridge, 2019), p.319.

include protective measures such as anonymisation, this may negatively impact an accused's fair trial rights. A balance must be struck between the use of remote proceedings and safeguarding the rights of the accused to ensure a fair trial.[26]

Technical Issues

One of the most frequent issues arising in the context of remote proceedings is the likelihood of technical issues occurring during the proceedings. However, it must be emphasised that even a minor technical glitch could potentially have devastating consequences in circumstances where an accused or Counsel miss a crucial piece of witness evidence. In addition, technical issues could give rise to interruptions and delays in the trial proceedings.

In order for an accused to effectively participate in criminal proceedings, the accused must be in a position to follow and hear the proceedings. Other technical issues such as poor sound quality could cause serious issues in this regard.[27]

The efficacy of a remote trial is also highly dependent on the quality of internet connection which can easily be compromised. In *Grigoryevskikh v. Russia*[28], the ECtHR held that a defendant must be able to follow the criminal proceedings and be heard without technical impediments[29]. This is an important consideration, for example, if a technical issue was to arise mid-way through a closing speech on behalf of the Defence, this would undoubtedly reduce the efficacy of the submissions made on behalf of the Defence.

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

We note that Head 7 provides a basis for the electronic transmission of documents from courts in both criminal and international proceedings. We acknowledge that this measure would significantly expedite the manner in which documents are generated, transmitted and exchanged.

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[26] R. Beqiri, '*Review of Some Procedural Witness Protective Measures at the International Criminal Tribunal for the Former Yugoslavia*', 13(34) *European Scientific Journal* (2017) 251-268, pp.256-259.

[27] *Stanford v. the United Kingdom* (1994) at [26 – 29].

[28] (2009).

[29] *Ibid.,* at [83].

We also consider that this measure would greatly simplify the manner in which documents are filed and served. In addition, this measure would be cost-effective and beneficial to the Court Services as the need for resources would be greatly reduced in respect of document transmission.

Notwithstanding this, it is important that the documents referred to under the Head of this Bill[30] which contain highly sensitive information are appropriately transmitted and exchanged.

Summary: Use of Remote Hearings

Remote criminal trial proceedings do not afford an accused with the same procedural guarantees that would be afforded to an accused in a physical courtroom. Recourse to remote proceedings in order to ensure the right to a speedy trial and avoiding case backlogs, might actually in practice be more detrimental to the rights of an accused if adequate safeguards are not put in place.

In the international sphere, it appears that courts have taken less issue with remote hearings, which involve the participation of an accused in pre-trial matters or appeal hearings, in contrast to trial proceedings themselves.

Our view is that remote proceedings significantly limit an accused's ability to effectively participate at trial and confer confidentially with Counsel during the proceedings. It is imperative that proposed changes to expand the use of remote proceedings are informed by human rights concerns. We consider that the Heads dealing with remote hearings are problematic as they do not provide appropriate safeguards to ensure that the fair trial of an accused is not compromised.

IHREC recommends that Head 5 and Head 6 are significantly amended and should not be pursued as currently drafted.

[30] Head 7(1)(a).

Head 19 – Disclosure of Counselling records in sexual offence cases

At Head 19, the Bill contains a provision to amend S.19A of the Criminal Evidence Act, 1992 by the deletion of subsection 17. Section 19A entered into force on 30 May 2018. Section 19A permits an accused to apply to the trial court in order to request disclosure of counselling records. Section 19A provides for a disclosure regime in respect of counselling records and has no application to other categories of records, regardless of whether they are private or confidential in nature.

Disclosure in criminal proceedings potentially involves the disclosure of private and sensitive information pertaining to a victim of a sexual offence. It is for this reason that they enjoy a high level of constitutional protection, and any law which provides for disclosure must satisfy a high threshold of both relevance and proportionality.

There has been considerable controversy surrounding the probative value of the disclosure of therapeutic records in the context of criminal proceedings involving sexual offences. In the LRC Report on *Disclosure and Discovery in Criminal Cases,* it was noted that the disclosure of such material might have a 'chilling effect' on the reporting of sexual offences.[31] In 2024 former Minister For Justice, Helen McEntee had originally pledged[32] to outlaw the practice of disclosing counselling notes entirely and to ensure that their usage would no longer be admissible as evidence in rape or sexual assault cases. However, the current position taken by the Minister for Justice, Home Affairs and Migration is to limit and restrict their use.

In other common law jurisdictions such as Australia, several states have enacted legislation restricting the prosecution of counselling records in criminal proceedings such as Western Australia and New South Wales. Tasmania absolutely prohibits the disclosure of counselling communications or the admission of evidence of such communications in any criminal proceedings unless the victim has consented to such disclosure.[33]

Section 19A provides that disclosure may be ordered where it is in the interests of justice to do so but it shall be ordered where there would be a real risk of an unfair trial in its absence

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[31] LRC *Report on Disclosure and Discovery in Criminal Cases* (December 2014) at [2.16]. https://www.lawreform.ie/_fileupload/Reports/r112D&D.pdf.

[32] Irish Times, *" Rape survivors' counselling notes no longer admissible in evidence from next year."* (27 June 2024), https://www.irishtimes.com/ireland/social-affairs/2024/06/27/rape-survivors-counselling-notes-no-longer-admissible-as-evidence-from-next-year/,

[33] [Section 127B, Evidence Act, 2001].

(section 19A(11)). The law currently provides that where a complainant has waived their right to non-disclosure, the procedures set out in the section do not apply. S.19A(10) lists the factors which ought to be taken into consideration in order to determine whether counselling records should be disclosed which also involves a balancing exercise.

Pursuant to S.19A (17), a disclosure hearing will not be required if a complainant waives their right to non-disclosure and agrees to release their records to the accused. Head 19 of the Bill proposes to delete subsection 17.

It is noteworthy that since S.19A has been in force, it has seldom been relied upon. Based on empirical research carried out by Dr. Susan Leahy[34], it appears that the disclosure scheme in respect of S.19A has been used in few cases because complainants generally tend to consent to the disclosure of their records and waive their statutory entitlements to refuse. The proposed Bill is seeking to rectify this issue through the deletion of *subsection* 17.

In the recent Supreme Court decision of *DPP v AM* [2025] IESC 16, important issues are addressed which concern the disclosure of counselling records in proceedings involving sexual offences and the rights of victims.[35]

In the decision, which was delivered on 2nd May 2025, Mr. Justice Collins acknowledged that such disclosure significantly intrudes upon the dignity of victims as well as their privacy rights. Further, Collins J. outlined that a balancing exercise must be carried out. It was also highlighted that it would be an error to approach this issue through the prism that an accused's right to a fair trial supersedes other competing rights:

> "*Finding an appropriate balance between the rights of the accused (including the right to defend themselves effectively, including (but not limited to) the right to challenge the prosecution case by way of cross-examination) and the rights of victims (which in addition to the rights just discussed include important privacy and dignity rights) presents a difficult challenge. However, it is a challenge that our criminal justice system, and the courts that administer it, cannot but confront. The rights of victims, including the rights protected by Article 8 ECHR, are not to be swept away in the name of ensuring a fair trial.*"[36]

In some circumstances, victims may defer receiving immediate counselling due to the prospect of their records being disclosed to the accused and this may also lead to counsellors opting to not taken notes of sessions. The Supreme Court observed that this is

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[34] Leahy, S., "*The Realities of Rape Trials in Ireland: Perspectives from Practice*" (June 2021) at [3.173].

[35] At p.83.

[36] At [47].

quite *"problematic"*.[37] It can also place a counsellor in an incommodious position whereby they are faced with an ethical quandary as to whether they should take notes of the sessions as record keeping is a key-aspect of their role.

GREVIO

On 14 Nov 2023, GREVIO completed its first evaluation of Ireland under the Istanbul Convention urging the authorities to eliminate the practice of disclosing confidential counselling notes in the context of criminal proceedings, without delay:[38]

> "*In particular, authorities should remove without delay, including through legislative means, the obligation and practice to disclose victims' counselling/therapy notes as part of court proceedings*."[39]

We note that GREVIO has commenced its first thematic evaluation round on 'Building Trust'.[40] We will be informing GREVIO of the State's approach to the disclosure of confidential counselling notes in our engagement on 'Building Trust'.

IHREC recommends the Committee consider whether Head 19's approach to the disclosure of counselling records in sexual offence cases risks a fundamental breach in trust between the State and victims.

We take issue with the Bill as currently drafted for several reasons: firstly, the proposed amendment to S.19A envisages continuing the disclosure regime practice, rather than ceasing it in its entirety. We consider that the proposed legislation does not adequately reflect the recommendations made by GREVIO.

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[37] At [64].

[38] GREVIO, *Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention): Ireland* GREVIO (2023) 22 (14 November 2023) 13–14, at [117]. The State must report on progress implementing the 17 recommendations of the Committee of the Parties by 2 December 2026.

[39] *Ibid.*, at [119].

[40] Ireland will be sent questionnaire for this evaluation round in March 2026, the deadline for state reports is September 2026, GREVIO will visit Ireland in approximately February/March 2027, and the publication of GREVIO evaluation reports will be November 2027.

The amendment to S.19A risks creating additional delays to criminal trials for sexual offences and this may dissuade victims and survivors from pursuing justice if a disclosure hearing is always necessary. In addition, the proposed amendment only applies to counselling notes and does not cover other personal records which contain highly sensitive material relating to victims.

IHREC recommends that the scope of personal records included in the amendment be reconsidered.

In the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (the "O'Malley Report"), it was recommended that in any future review of the law relating to sexual offences, consideration should be given to the question of whether the disclosure of medical records should be subject to similar rules as those governing counselling records. [41]

IHREC recommends that the S.19A regime ought to be extended to cover medical records.

The Committee's consideration of the General Scheme is contextualised by the UN Committee on the Elimination of Discrimination Against Women's State Review of Ireland, which is currently underway.[42] This matter was discussed at significant length during the Review, and we anticipate the Committee's Concluding Observations in early July.

We welcome the State's policy commitment in 'Zero Tolerance: Third National Strategy on Domestic, Sexual and Gender Based Violence' to embed a victim and survivor centred approach, explained as meaning 'placing the needs and priorities of victims and survivors of domestic, sexual and gender-based violence at the forefront of responses'.[43]

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[41] At [6.42].

[42] https://www.ihrec.ie/victims-survivors-of-dsgbv-continually-failed-by-chronic-lack-of-safe-spaces/ The UN CEDAW session is scheduled 16 June - 4 July 2025.

[43] DOJ_DSGBV_Strategy.indd See p10, and Table 1.1 Key elements of a victim/survivor-centered approach (UN Women) including: Placing victims' / survivors' needs (as expressed by them) at the centre of the co-ordinated response, accountability and any interventions it undertakes; foundational principles should enhance victims' safety and minimise harm; prioritising confidentiality and seeking consent in information-sharing protocols.

We further note the expert position taken by *Beyond Surviving* in respect of the harmful implications of the proposed deletion of subsection 17:

> "*It removes the victim's right to non-disclosure, claiming it to be a solution to victims being 'fearful that if they do not agree to furnish the records, the prospect of a successful prosecution may be put in jeopardy'. It thereby removes the victim's agency entirely, denying any option to exercise the right to nondisclosure.*"[44]

IHREC's view is that the amendment may cause unnecessary harm to victims of sexual offences. It is important to highlight that disclosure hearings can prove to be traumatic and stressful, and a victim-/survivor-centric, trauma-informed approach is required in this regard.

We recommend that this proposed amendment would be revisited and expanded upon in order to have adequate regard to the rights of victims of sexual offences; coherence with the 'Zero Tolerance' policy commitment to a victim/survivor-centred approach; and a victim-/survivor-centric, trauma-informed approach to legislation and its implementation.

Head 20 – Use of Incapacitant Spray

We express deep concern regarding the proposed amendment under Head 20 of the Bill which would enable prison officers and civilian gardai to have recourse to incapacitant spray.

Head 20 intends to amend the Firearms Act, 1925 in order to enable prisoner officers and civilian gardai to use incapacitant sprays in the course of their duties. It is important to underscore that incapacitant sprays such as pepper spray and PAVA spray cause severe pain and inflame tissue and skin which is contaminated with the chemical irritants contained within the spray.

Incapacitant sprays can have serious negative side-effects such as irritation of the respiratory tract, the eyes and cause spasms. In circumstances where a considerable amount of spray is used, this may result in internal haemorrhaging and pulmonary oedema. The effects of incapacitant sprays can also last between 30 – 40 minutes in duration.

[44] Beyond Surviving, "*The Committee on the Elimination of all forms of Discrimination against Women in advance of CEDAW's examination of Ireland's eighth periodic report (91st Session June 2025) under the UN Convention on the Elimination of all forms of Discrimination against Women*." (19 May 2025).

From a human rights perspective, the use of incapacitant spray engages several Convention Rights.[45] In *Tali v Estonia*[46], the ECtHR unanimously held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights in circumstances where pepper spray had been used against the applicant while a detainee. The pepper spray had been utilised by prison officers when the applicant had failed to comply with their orders. The applicant was also strapped to a restraint bed when the pepper spray was released.

In carrying out an assessment of the alleged violation of the European Convention, the Court referred to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concerning the use of pepper sprays by law enforcement. According to the CPT, pepper spray is not to be used in confined spaces as it is a dangerous substance. Further, pepper spray should never be utilised against a person who has already been brought under control or restrained.

The Court held that pepper spray must not be used in confined spaces. Further, the Court highlighted that the use of the spray had not been justified as there were alternative means available to the prison officers to immobilise the applicant.

Similarly, in *El-Asmar v Denmark*[47], the ECtHR found that there had been a violation of article 3 ECHR due to the treatment of the applicant who was pepper sprayed by two guards while being held in an observational cell. The applicant had contended that the use of force was excessive and unwarranted as he had been compliant prior to being pepper sprayed. The Court considered that the excessive use of force was in violation of the Convention.

The ECtHR has also observed that in exceptional circumstances where pepper spray is required to be deployed in open spaces, there should be safeguards in place.[48] For example, there is a need for ventilation when such sprays are deployed. It is also evident that these sprays are not suitable to be discharged in a prison cell or crowded spaces such as a prison environment. Further, it is important to highlight the dangers that such sprays present if they are discharged from a height, such as a prison landing as this would potentially result in air contamination.

We are concerned that the proposed amendment may result in an over-reliance on incapacitant sprays which could lead to potential misuse and an abuse of power.

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[45] Article 2, 3 and 8 ECHR.

[46] (Application no. 66393/10)

[47] *Ibid*.

[48] Case of *El-Asmar v Denmark*, App No 277753/19 (ECHR, 3 October 2023) at [78-79].

We are of the view that the introduction of this amendment is not necessary in order to enable prison staff or civilian gardai to de-escalate high-tension situations. Alternative methods are available without having to resort to using incapacitant sprays.

IHREC recommends that the Head 20 is removed from the Bill and that a power to use incapacitant sprays by Prison Officers and Civil Gardai is not introduced in this jurisdiction.

Head 26 – Power to remove face coverings in a public order context

Head 26 of the Bill proposes to amend section 8 of the Criminal Justice (Public Order) Act, 1994 by enabling members of An Garda Siochana if they have reasonable cause, to direct the removal of face coverings in a public place in circumstances where there is a "*reasonable apprehension*" for the safety of persons, property or in order to maintain the public peace. In addition, if the face coverings are worn to intimidate others or conceal a person's identity in order to facilitate the commission an offence or to hinder the investigation or prosecution of an offence, the face coverings may be removed.

The new power included in the General Scheme is intended to act as a deterrent against disorderly conduct. Similarly, in the UK, Section 60 AA of the Criminal Justice and Public Order Act, 1994 permits a police officer of the rank of inspector or above to authorise any uniformed police officer to require a person to remove any item which they reasonably believe is being worn wholly or mainly to conceal identity and seize said item.

We express deep concern regarding the introduction of a power which would enable law enforcement to remove face coverings. The Constitution provides for the right to privacy, freedom of expression, assembly and association. We are of the view that these rights are potentially threatened by the introduction of the proposed amendment.

We consider that proposed amendment is highly problematic. Firstly, it could have a potentially chilling effect[49] on free speech and the freedom of expression[50]. Further, it may dissuade individuals from enjoying their fundamental right to protest.[51] An individual's right to privacy, expression and the right to protest are all fundamental rights in any functioning democratic society.

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[49] https://www.irishlegal.com/articles/warning-that-ban-on-face-coverings-at-protests-could-have-chilling-effect.

[50] Article 10 ECHR.

[51] Article 11 ECHR

Peaceful protest is an important form of the exercise of the rights to freedom of peaceful assembly, of expression, of association and of participation in the conduct of public affairs. These rights are enshrined in the ICCPR and the UN Declaration of Human Rights. Protests should also be presumed to be peaceful unless there is compelling evidence to the contrary and ought to continue to be regarded in this light unless participants engage in serious and widespread violence.[52]

The Human Rights Committee has outlined that everyone has the right to freedom of peaceful assembly without discrimination based on for example, race, colour, age, sex, religion, belief, disability or sexual orientation.[53] In *Ibragimova v. Russia*[54], the ECtHR held that Russia had violated the applicant's right to freedom of expression. The applicant had protested the conviction of several members of a political activist group and stood in a public place holding a sign in support of this group while wearing a balaclava. The Court considered that the national courts had failed to adequately consider the applicant's freedom of expression rights and the symbolic nature of the balaclava face covering and her lack of intention of hiding her identity from law enforcement.[55]

Face coverings are worn for a variety of reasons: many wear masks due to health concerns, in particular those who are immunocompromised and have respiratory diseases. Another concern in the removal of masks, is the transmission of infectious diseases and illnesses. In both of these scenarios, individuals may be dissuaded from exercising their right to protest due to the potential prospect of having their face coverings removed by members of An Garda Siochana. However, it is submitted that this issue could be entirely circumvented by not proceeding with the proposed amendment.

Face coverings are also worn for religious and cultural reasons. The proposed power to remove face coverings could result in discrimination and in certain cases, amount to a breach of rights under the Convention.

Protesting is an intrinsic part of political and social change. However, the proposed new power will disproportionately affect specific members of society such as Muslim women and structurally vulnerable individuals including disabled people who may not feel comfortable in public places without wearing a face covering.

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[52] Human Rights Committee, general comment No.37 (2020), paras.15 and 17.

[53] Human Rights Committee, general comment No.37 (2020) at [6 and 25].

[54]Case No. 68537/13 (30 November 2022).

[55] *Ibid.,* at p.10.

Privacy concerns may arise in respect of the proposed amendment for those who may wish to protest anonymously. We live in an age of ubiquitous surveillance where rapidly advancing facial recognition technology is being relied upon. Certain individuals may prefer to wear a face covering, while still exercising their right to peacefully protest in a public place and speak out on issues of public concern. Protesting in relation to certain contentious matters may also have negative implications for certain people, for example, in relation to their employment if they are recognised while protesting. Face coverings protect their identity in this regard while simultaneously allowing individuals to exercise their right to protest.

We are concerned that, if the proposed amendment is enacted, serious issues will arise. Further, members of An Garda Siochana will be faced with the difficult and somewhat impossible task of having to distinguish between those who are wearing face coverings to conceal their identity for criminal purposes and those who are wearing face coverings to protect themselves for health reasons, religious, cultural or otherwise.

IHREC recommends that Head 26 of the Bill should be subject to extensive human rights scrutiny.

Conclusion

The General Scheme does not evidence sufficient human rights and equality impact assessment. It does not provide the necessary guarantees or reassurance.

We remain available to the Committee to support your scrutiny of the wide-ranging legislation, which raises significant human rights issues.



Deirdre Malone

Director, IHREC