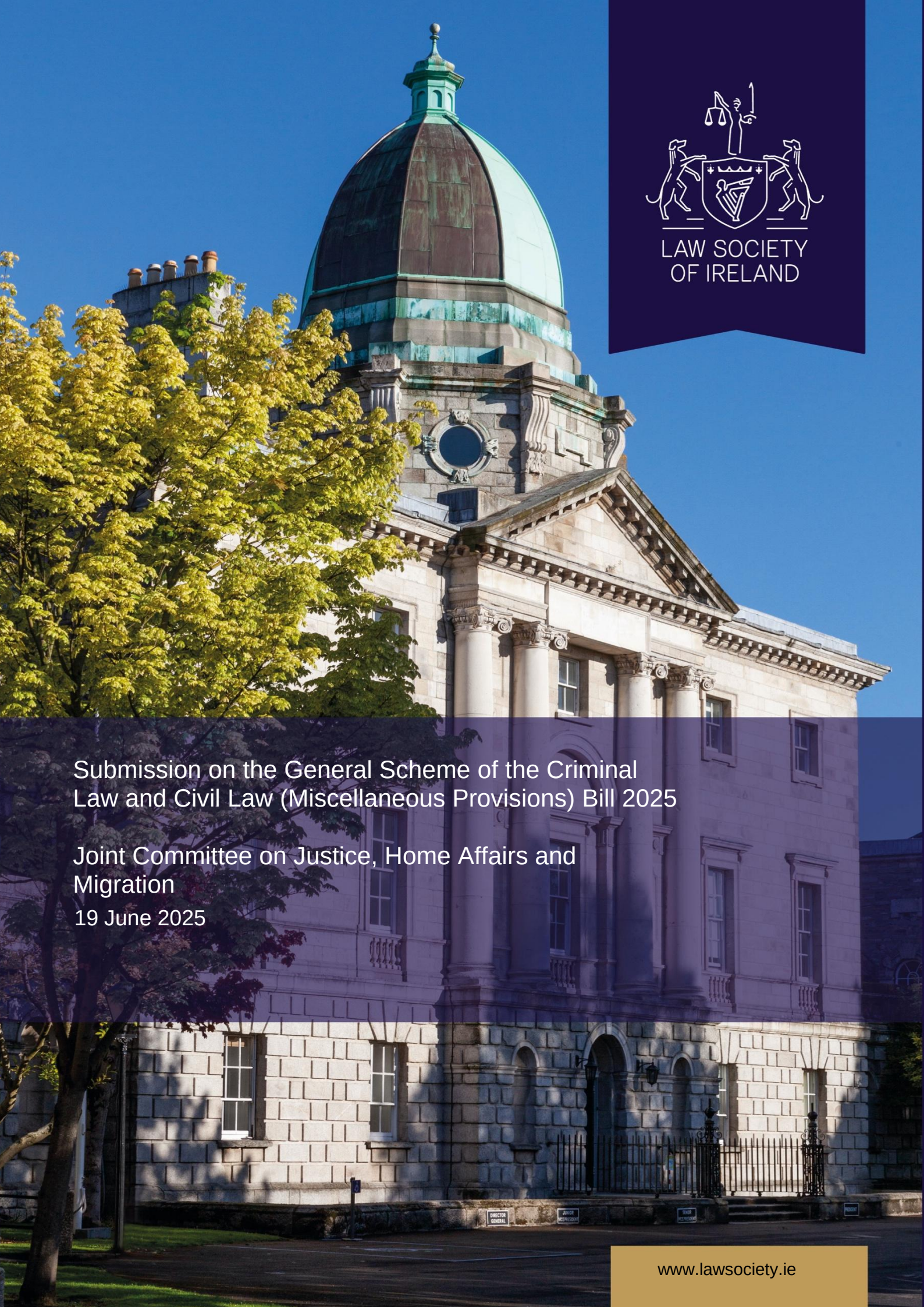


LAW SOCIETY OF IRELAND

Submission on the General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025

Joint Committee on Justice, Home Affairs and Migration

19 June 2025

www.lawsociety.ie

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1. About the Law Society

1.1 The Law Society of Ireland (the **Law Society**) is the educational, representative and professional body of the solicitors' profession in Ireland. The Law Society delivers high-quality legal education and training and places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion. The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

1.2 The Law Society appreciates the opportunity to provide this submission regarding the General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 as part of the pre-legislative scrutiny process.

2. Background and Summary

2.1 The General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 (the **General Scheme**) aims to amend various pieces of legislation. The General Scheme provisions range from amendments adjusting wording in existing legislation to legislating provisions that create criminal offences.

2.2 The General Scheme, which runs over 51 heads, includes *inter alia* the introduction of two specific offences around sexual exploitation in lieu of rent, an amendment to the legislation on disclosure of counselling records in sexual assault proceedings, new powers for members of An Garda Síochána to order removal of face coverings, the use of remote hearing hearings and trials in criminal law and international co-operation proceedings, and the electronic transmission of official documents.

2.3 It is important that the General Scheme reflects the highest standards of protection of fundamental rights. The Law Society proposes to comment on selected heads at the present time and will reserve its position on other aspects of the General Scheme. This focused submission on the General Scheme is set out using the format and headings that are used in the draft General Scheme.

2.4 The Law Society proposes that the General Scheme include an additional head in Part 14 to authorise notaries public to act as solemnisers of civil marriages in the State. The new head would provide that the Civil Registration Act 2004 be amended by the insertion of a new Section 53A. This is a non-controversial proposal which the Joint Committee could progress via the General Scheme.

2.5 The Law Society would also like to take this opportunity to highlight its concerns and propose amending provisions, for inclusion in Part 14, regarding some unintended consequences of the transposition of EU Directive 2016/2341 (known as IORP II). The issue concerns the unenforceability of pension adjustment orders due to the transfer of defined contribution pension schemes to master trusts.

Comments on aspects of the General Scheme

3. We now outline the Law Society's comments on certain aspects of the General Scheme.

Head 5 – Remote hearings in criminal and international co-operation proceedings generally & Head 6 – Remote hearings in trials and other contested proceedings

3.1 Head 5 of the General Scheme provides a new framework for remote hearings in criminal and international co-operation proceedings generally. Head 6 deals with remote hearings in trials and other contested proceedings.

3.2 It can be noted that pursuant to the Criminal Law and Civil Law (Miscellaneous Provisions) Act 2020 a number of applications can be heard remotely. This is the case for bail applications, arraignments or sentence hearings for example. Furthermore, the Criminal Evidence Act 1992 allows for witness in a criminal trial to give evidence by remote hearing in certain circumstances.

3.3 The explanatory note provides various grounds for those provisions including reducing delays before the court, providing an alternative to the judiciary in case of security concerns, prolonged severe weather or industrial actions. The note quotes the Advocate General's opinion in *F.P. and others*[1] which advocates for the use of remote hearing to exercise the right of the accused to be present at their trial, as protected by Directive (EU) 2016/343[2], in extraordinary circumstances. It should be noted that this opinion was provided in the context of interpretation of an EU instrument of which Ireland opted out. In addition, the final judgment in *F.P. and others* in which the Court of Justice of the European Union (the **CJEU**) departed from the opinion of the Advocate General thus the CJEU held that:

> "*under the right laid down in Article 8(1) of Directive 2016/343, an accused person must be able to appear in person at the hearings which are held in connection with his or her trial, without that directive imposing an obligation for any suspect or accused person to be present at his or her trial (see, to that effect, judgments of 15 September 2022, HN (Trial of an accused person removed from the territory), C-420/20, EU:C:2022:679, paragraph 40, and of 8 December 2022, HYA and Others (Impossibility of questioning prosecution witnesses), C-348/21, EU:C:2022:965, paragraphs 34 and 36).*"[3](emphasis added)

3.4 And the CJEU concluded that:

> *"the European Court of Human Rights has held that participation in the proceedings by videoconference is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential*

[1] CJEU, *F.P. and Others,* C-760/22, judgment of 04 July 2024
[2] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Ireland opted out of this directive.
[3] Ibid para. 26.

communication with a lawyer is provided for (ECtHR, 2 November 2010, Sakhnovskiy v. Russia, CE:ECHR:2010:1102JUD002127203, § 98).”[4]

Legal context

3.5 The right for an accused to be present at their trial is protected by Article 6(1) of the European Convention on Human Rights (the **ECHR**) and by Articles 47 and 48 of the European Charter of Fundamental Rights (the **Charter**). In accordance with Article 52(3) of the Charter, the rights enshrined by the Charter have the same meaning and scope as the right guaranteed by the ECHR and its jurisprudence. This includes rights such as the right to a fair trial, the right to examine or have examined witnesses against him, the right to the assistance of an interpreter or the right to have adequate time and facilities for the preparation of a defence[5]. In Ireland, the right to fair procedures is protected by Article 40 of the Constitution. It is arguable that this right can be extended to include presence of the accused in person at their trial.

3.6 In light of the above, the Law Society submits that safeguards protecting the defence rights of the relevant person (the accused) should be included in head 6. The current wording of the provision does not provide for a significant degree of protection as required by the conventions.

Benefits of remote hearings

3.7 It is recognised that the conduct of trials remotely present advantages such as costs[6] savings, less demands on staffing and could also benefit prisoner welfare[7]. One specific area of concern currently is the requirement of accused persons to be present for a fitness hearing under the Criminal Law (Insanity) Act 2006. These individuals are often vulnerable and unwell, and need constant support from medical staff in the Central Mental Health Hospital and disruption of their routine is not in their interests.

Challenges presented by remote hearings

3.8 It is submitted that the conduct of criminal trials remotely would present a number of significant challenges. While the General Scheme imbeds some safeguards in head 6, it is submitted that supplemental safeguards are required such as:

(1) access to legal representation by the accused,
(2) participation in the jury selection process by the accused, and
(3) the examination of prosecution witnesses.

3.9 *Adequacy of videoconference facilities.* It has been the practical experience of solicitors engaged in criminal defence that prisons are not equipped with enough video conference facilities to allow timely appearance of those in custody at court hearings. There would be concerns that adding remote hearings to an already strained system could overwhelm it.

3.10 *Interpretation at remote hearings.* The role of interpreters at remote trial needs to be considered in more detail. For instance, would the interpreter be in the same room as the accused? In situations where the interpreter and the accused are in their own room (virtual or physical), will they be in a separate audio room as to not disrupt the course of the trial?

[4] Ibid para. 31.
[5] See Article 6 (2) and (3) of the ECHR.
[6] Reduction of the need transports of prisoners from prisons to court facilities.
[7] If trials were to take place remotely prisoners would not have to spend several hours in transport, checks and see their routine disrupted to attend court.

3.11 *Effective access to legal representation.* Another matter requiring greater consideration is that the current system presents challenges for legal representatives to access their clients when they are presented remotely. Practitioners have reported difficulties in reaching their client by phone before a remote hearing (prison's phone ringing out or line is busy) to take instructions from their client. It is not uncommon for the court to vacate the courtroom so that legal representatives can speak to their client confidentially via videolink creating delays in the court list.

Impact on infrastructure and resources

3.12 *Digital Audio Recordings.* The General Scheme is silent on the use of the Digital Audio Recordings (the **DAR**) of court proceedings. Under the current system, all court proceedings are recorded by the DAR. The DAR provides a neutral account of the proceedings (such as evidence heard, submissions made etc) on which judges, solicitors, barristers or experts can rely in certain circumstances. The continued use of the DAR needs to be clarified in the General Scheme.

3.13 *Structural investments.* The explanatory note indicates that remote hearings will alleviate the difficulties encountered by the justice system in terms of delays. The Law Society would like to emphasise that for remote hearing trials to be efficient commensurate investment in court infrastructure and IT solutions and human resources will be required.

Proposition

3.14 The Law Society proposes that head 6 includes a subsection requiring that the consent of the accused be secured for each application for a remote hearing, in particular when it is envisaged to conduct a trial remotely. The paradigm of head 6 should be reversed. The accused should be entitled to be present in person at their trial and the use of remote trial should be justified. The consent of the accused, or at the very least their opinion, on the use of remote trial should be sought in all cases.

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

4. Head 7 provides for the possibility to transmit documents electronically to and from the courts in criminal and international co-operation proceedings so as to streamline the administration of these proceedings by the courts.

4.1 The reasons detailed for the existence of this head are helpful but seem to tend to prioritise the efficiency of administration, rather than the interests of justice or indeed the interests of the court users affected by these proceedings.

4.2 Head 7(2) states that a copy of a document transmitted by electronic means or a printed version of such a copy may, by direction, be treated as the original of the document. In addition, head 7(2)(b) provides that the identity of the person transmitting such document be verified (including by way of personal public service number).

4.3 The General Scheme is silent as to the location of the original document and is relatively vague as to the ways to ensure identification of the person who created and/or transmitted the document. It is submitted that simply relying on personal public service numbers may not be sufficient. The Law Society submits that any original document transmitted electronically

should be provided to the Court Service for inclusion in the court's file. This would allow for inspection of the document at any moment during the proceedings if there is a disagreement on its content or authenticity.

4.4 The safeguards provided for in head 5 and 6 should be repeated in the context of head 7.

Head 17 – Amendment to Section 10 of the Misuse of Drugs Act 1984

5. Section 10 of the Misuse of Drugs Act, 1984 (the **1984 Act**) relates to "*Evidential value of certain certificates*". Head 17 seeks to amend Section 10 of the 1984 Act by the insertion of Subsections (2) & (3) after Subsection (1) so that the entire section would read as follows:

> *"(1)In any proceedings for an offence under the Principal Act or section 5 of this Act, the production of a certificate purporting to be signed by an officer of the Forensic Science Laboratory of the Department of Justice and relating to an examination, inspection, test or analysis, as the case may be, specified in the certificate of a controlled drug or other substance, product or preparation so specified shall, until the contrary is proved, be evidence of any fact thereby certified without proof of any signature thereon or that any such signature is that of such an officer.*
>
> *(2) In any proceedings for an offence under the Principal Act or under section 5 of this Act, the production of a certificate purporting to be signed by a member of garda personnel and relating to an examination, inspection, test or analysis of a controlled drug or other substance, product or preparation specified in the certificate shall, until the contrary is proved, be evidence of any fact thereby stated without proof of any signature thereon or that any such signature is that of the member.*
>
> *(3) In this section, "member of garda personnel" shall be construed in accordance with the Policing, Security and Community Safety Act 2024."*

"Garda Personnel" has been defined in Section 44 of the Policing, Security and Community Safety Act 2024 as follows:

> *"The personnel of An Garda Síochána shall be comprised of the following members (in this Act referred to as "members of garda personnel"): members of An Garda Siochana; members of garda staff."*

5.1 The Appointment of "*Members of Garda Staff*" is dealt with under Section 54 of the Policing, Security and Community Safety Act 2024 which is wide ranging. It includes for example civilian staff.

5.2 Under the current system each certificate setting out results of preventive drug testing are signed by an officer of the Forensic Science Ireland of the Department of Justice which means that the person who signs the certificate has a qualification and an expertise in the area. This is best practice and provides an element of reassurance of the integrity of the criminal justice system. Head 17 as set out above seeks to amend the foregoing to allow for Certificates setting out the results of PDT to be performed by personnel of An Garda Síochána which includes both members of An Garda Síochána and members of garda staff who would have no such qualification or expertise in the area which the Law Society believes would undermine the credibility of the procedure.

5.3 Head 17 also provides for a legal presumption in favour of the evidential value of such certificates thus allowing for them to be relied on in Criminal Proceedings under the Misuse of Drugs Act 1984 as amended unless such evidence is rebutted. The Law Society notes that it would be extremely difficult, if not impossible, for accused person to rebut the presumption without access to the full details of the procedural steps followed. This would be of concern when certificates are not authenticated by the signature of an officer of the Forensic Science Ireland Laboratory.

5.4 Owing to these concerns, the Law Society objects to the inclusion of this head in the General scheme in its current wording. The Law Society suggests that only officers of the Forensic Science Ireland Laboratory of the Department of Justice should be allowed to sign Section 10 of the 1984 Act certificate as provided by subsection 1. Alternatively, the Law Society would limit the extension of the power to sign those types of certificates, to members of An Garda Síochána (not all garda personnel or staff).

Head 19 – Amendment of the Criminal Evidence Act 1992

6. Head 19 of the General Scheme deals with disclosure of counselling records in sexual offence cases. It proposes to amend Section 19A of the Criminal Evidence Act 1992 (the **1992 Act**) by requiring that a disclosure hearing takes place in all cases and removing the possibility to waive this step by the complainants.

6.1 The Law Society does not object to making disclosure hearing dealing with counselling records mandatory but wishes to bring a number of points to the attention of the Joint Committee, such as a recent development in the jurisprudence and the need for representation of complainants at disclosure hearing.

The current system

6.2 The current system of disclosure of counselling records in sexual offence cases is governed by Section 19A of the 1992 Act as amended by the Criminal Law (Sexual Offences) Act 2017. Any such records may not be disclosed without the leave of the court. Applications to the court have to provide particulars of the basis upon which it is determined that these records are likely to be relevant to the trial.

6.3 The criteria to be considered by the court in such applications include privacy rights, public interest and the probative value of the records sought. The court may refuse the application, grant it in full or grant it subject to redactions, and may prescribe limitations restricting access only to the legal team.

6.4 The system allows the possibility for complainants to sign a waiver releasing their records where they do not wish to have the matter litigated in court pursuant to subsection 17 of the 1992 Act.

Judicial guidance

6.5 In the recent judgment of *DPP v. A.M.*[8], the Supreme Court enunciates tests and protections for the victim in any Section 19A of the 1992 Act application by the defence. The Court recalled that an effective disclosure regime is an essential element of any fair system of criminal justice. Nonetheless, the rights and interests of the complainants are protected by the Constitution, EU law, the ECHR, statute and the common law. Counselling records are highly sensitive personal and private information relating to the complainant. They are part of the complainant's personal integrity, privacy and associated rights, which are not lost simply because a person makes a complaint that they have been victim of a crime. The disclosure of those records must satisfy an elevated threshold of relevance and proportionality. A judge should only allow disclosure of such records where they are necessary in the interests of justice.

6.6 The Supreme Court noted an absence of practical guidance in relation to the operation of Section 19A and lack of provision for legal advice to the complainant relating to waiving their right to privacy so that they can provide an informed consent[9]. The Court laid down guidelines on criteria to apply when ruling on an application for disclosure of counselling records and other records.

Concerns

6.7 In light of the above, and in particular to the content of the *A.M.* judgment, the protection of the complainant's rights requires attention. The Law Society submits that complainants should be provided with legal advice and representation at the hearing in relation to disclosure hearing brought before the courts pursuant to Section 19A of the 1992 Act.

Amendment suggested

6.8 The Law Society proposes that head 19 of the General Scheme be expanded to provide as follows:

> ***"****Section 19A of the Criminal Evidence Act 1992 is amended as follows:*
>
> *(a) in subsection (9) by the addition of "Any person entitled to appear and be heard at the hearing referred to in subsection (8) shall be entitled to seek legal advice and legal representation" after "…and be heard at the hearing referred to in subsection (8)".*
>
> *(b) subsection (17) is deleted."*

Head 29 – Amendment to Section 13 of the Act of 2003

7. Head 29 purports to remove the need for the Central Authority to apply to the High Court for the endorsement of a warrant for its execution. The explanatory notes refer for clarification that the High Court acts independently in endorsing warrants presented to it "*rather than adjudicating on an application by the Central Authority*". The proposed amendments are justified by a need to clarify that the Central Authority "*is providing only practical and administrative assistance to the executing judicial authority*" as required by the European

[8] *DPP v. A.M.* [2025] IESC 16, judgment of 02 May 2025.
[9] ibid, para. 84-85.

Arrest Warrant Framework Decision (the **EAW FD**)[10]. Under the EAW FD, a warrant is executed by a judicial authority, with the assistance of a central authority appointed by the member state. The jurisdiction to execute a warrant rests on the judicial power. In Ireland, the judicial power executing European Arrest Warrants (**EAWs**) is the High Court.

7.1 Under the system the High Court exercises a control of the EAW produced before it by ensuring that formal and substantive requirements are fulfilled. This is an effective control rather than a rubber-stamping exercise.

7.2 It should be noted that under the case law of the CJEU "*executing judicial authority"* within the meaning of article 6(2) of the EAW FD refers to a judge, a court, or a judicial authority, which enjoys the necessary independence vis-à-vis the executive[11]. The Luxembourg Court adds that the executing judicial authority must exercise its responsibilities to guaranty effective judicial protection and to ensure that their orders effectively safeguard the level of judicial protection required by the EAW FD.

7.3 The Law Society expresses concerns that the amendments proposed to Section 13(1) and (2) of the 2003 Act gives an appearance of substantially altering the spirit of said act and of the EAW FD by no longer allowing an independent role of adjudicating for the executing judicial authority.

7.4 The Law Society believes that it is of paramount importance that the High Court retains responsibility for the effective control of the validity of the EAW.

Part 14: Miscellaneous

8. Proposed New Head to Authorise Notaries Public to act as solemnisers of civil marriages in the State

8.1 The Law Society proposes that the General Scheme should include provisions to authorise notaries public to act as solemnisers of civil marriages in the State.

8.2 To that end, we propose the insertion of a new section in Part 14 of the General Scheme. The new head would provide for the Civil Registration Act 2004 be amended by the insertion of a new Section 53A, enabling notaries public to be registered as marriage solemnisers. This is a non-controversial proposal which should be reflected in the General Scheme.

8.3 Currently the Civil Registration Acts 2004 to 2019 provide for marriages to be solemnised by one of three categories of people: an employee within the Health Services Executive authorised as a registrar, a member of a religious body, or a member of a secular body the objects of which are secular, ethical, and humanist.

8.4 Consequently, other than the State's registrars, the authorised solemnisers must be of a religious or a humanist background. Religious body members are from within the philosophy of their respective religions, while humanist body members subscribe to a nontheistic humanist philosophy, which while secular, nonetheless involves a particular humanist philosophical belief.

[10] Council Framework Decision 2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, article 6(2) and 7(2).
[11] CJEU, *AZ*, judgment of 20 November 2020, C-510/19 PPU, para. 54-55.

8.5 The legal professional known in many countries as the Notary is part of an ancient profession, with some references to the Notary pre-dating the common era calendar. Widespread usage of the Notary in ecclesiastical circles is known to have pre-dated the Magna Carta Libertatum by at least 400 years. The Notary Public in Ireland is a public office, appointed by the Chief Justice of Ireland, whose notarial work carries an authority that is recognised and relied upon worldwide.

Benefit to society

8.6 An ever-increasing proportion of the State's citizens are secular with neither religious nor humanist philosophical beliefs. While adherents to a religious or humanist philosophy are able to arrange their marriage ceremony through a solemniser within their own background, with great flexibility as to date and time, those who do not adhere to religious or humanist philosophy are constrained by the availability of State registrars.

8.7 Having a secular option to the State registrars will greatly increase the flexibility available to citizens when it comes to arranging the date and time of their marriages. Moreover, it will redress the perceived unfairness arising from the greater scope for flexibility made available to religious or humanist adherents, which is not currently available to citizens who are secular with neither religious nor humanist philosophical beliefs.

Benefit to the State

8.8 While anecdotal reports are that State registrars do their best to be facilitative, this is within capacity limits. The demand for secular solemnisation can be expected to grow. Providing a private sector, but public-sector adjacent, route for marriage solemnisation, allows the State to increase capacity, increase the flexibility offered by it, to its citizens, and eliminates the perceived unfairness that citizens without religious or humanist beliefs are subject to more constraints than citizens who are religious or humanist adherents.

8.9 There is already a misunderstanding within certain elements of the population that Notaries Public are authorised to solemnise marriages. Many Notaries Public have had the experience of being asked to solemnise a marriage and of having to decline so to do. This expectation is most likely fed by an increasing internationalisation of the population, who are exposed to the Notary Public in other jurisdictions being able to carry out such public acts.

8.10 By virtue of the having to be appointed by the Chief Justice of Ireland, each Notary Public has already been through a significant screening process and is already a person of gravitas within the State. Not all Notaries Public would avail of the opportunity to become registered as a solemniser, but many would see it as a beneficial additional service to offer, and as a worthy return to the historic public office roots of the profession.

8.11 Text of proposed new Head 52 for inclusion in General Scheme

Head 52

"Provide that the Civil Registration Act 2004 be amended by inserting a new section 53A, enabling Notaries Public appointed by the Chief Justice of Ireland, to be registered as marriage solemnisers. Potential text of the proposed new section 53A of the Civil Registration Act 2004 could read as follows:

(1) A Notary Public appointed by the Chief Justice of Ireland may apply to an tArd-Chláraitheoir to be registered in the Register of Solemnisers.

(2) An application under subsection (1) shall be in such form and contain particulars in relation to such matters as an tArd-Chláraitheoir may determine.

(3) An tArd-Chláraitheoir shall register a person in respect of whom an application is made under subsection (1) if the applicant is a Notary Public appointed by the Chief Justice of Ireland.

(4) An tArd-Chláraitheoir shall refuse to register a person, pursuant to subsection (3) or subsequently revoke such a person's registration if he or she considers that—

(a) the form of marriage ceremony used by the person concerned has not been approved by an tArd-Chláraitheoir, or

(b) the person is not a fit and proper person to solemnise a marriage, or

(c) the person's appointment as a Notary Public has been revoked.

(5) The registration of a person registered in the Register pursuant to subsection (3), shall be cancelled upon request by a person so registered to an tArd-Chláraitheoir, or upon their death.

(6) It shall be the duty of a person registered in the Register pursuant to subsection (3) to notify an tArd-Chláraitheoir as soon as practicable of any change in the information provided in the application, and an tArd-Chláraitheoir shall make such amendments of the Register as he or she considers necessary.

(7) An entry in the Register shall be in such form and contain such particulars as an tArd-Chláraitheoir may determine."

Proposed New Head to Rectify Issues in the Law Related to Certain Contingent Benefits and Pension Adjustment Orders

9. The Law Society suggests that the Government should consider the inclusion of a series of legislative amendments under Part 14 of the General Scheme.

9.1 To that end, our proposed legislative amendments will, if included in the General Scheme, rectify an issue with Pension Adjustment Orders and how they relate to the current movement of pensions to the Master Trust that may result in serious financial consequences for Irish families.

9.2 These proposed legislative amendments will affect the Family Law Act 1995, the Family Law (Divorce) Act 1996, and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Our proposed wording for this amendment would become Head 53 of the General Scheme.

9.3 We now explain the issue, and our main reasoning for suggesting such changes.

Context

9.4 As a result of Ireland's transposition of EU Directive 2016/2341 on the Institutions for Occupational Retirement Provision (also known as **IORP II**), certain pension funds have been transferred to Master Trusts, and as a result certain, existing Pension Adjustment Orders (**PAO**s) are rendered unenforceable.

9.5 An example of this is in the case of Defined Contribution Pension (**DCP**) Schemes (which also possess a Death in Service element to them). The issue concerning retirement benefits can be solved by the trustees of the scheme (which is in the process of being wound-up) splitting the benefits into "member spouse" and "non-member spouse" benefits and transferring both sets of benefits to the Master Trust. Unfortunately, this does not always happen in practice and this method does not apply in the case of contingent benefit orders.

9.6 We will provide an example below which illustrates the potentially serious unintended consequences that may arise where certain PAOs are found to be unenforceable. A husband and wife with three minor children divorce with the above type of PAO in order to receive this type of contingent benefit. The Contingent Benefit Pension Adjustment Order grants the Death in Service payment to one spouse in the event that the other spouse dies in service so that the surviving spouse with minor children will have "security for maintenance". As things stand, if the deceased spouse had remarried before his death and his pension had been moved to the Master Trust, there is no legislative mechanism for PAOs to transfer between trusts. Each PAO is specifically addressed to the trustees of the relevant scheme: when that scheme is wound-up and the assets are transferred to a Master Trust, the PAOs made against the scheme do not follow the assets. In this case, the Death in Service payment under the pension rules is instead transferred to the second spouse.

9.7 There are practical steps that can be taken by trustees of the winding-up scheme to deal with this: for example, a trustee can split benefits between member and non-member spouses for a retirement benefit provision under a PAO and then transfer both benefits to the Master Trust. However, there is no ability to do this for contingent benefit orders (unless less than 12 months has elapsed since the date of the decree of divorce or judicial separation). Currently, no application can be made for a contingent benefit order after this period.

9.8 This would leave the former spouse with dependent children without the payment as security for maintenance. As such, the former spouse might be financially burdened by their obligations to provide maintenance to their children without access to the Death in Service payment(s). The security for maintenance falls away on the death of the relevant paying spouse, so the contingent benefit is a vital protection for families who would be made financially vulnerable in the event of the death of the payor.

Proposed remedies

9.9 *Amending the legislation.* By making amendments to existing legislation, this would be a way to ensure that all PAOs that had affected any pensions prior to the transfer to the Master Trusts, continue to be effective as against the trustees in the new Master Trusts.

9.10 We now put forward some suggested wording for such an amendment, to be applied against the legislation cited below. However, the implications of an amendment with broad application would need to be carefully considered.

9.11 We would also propose the repeal of the one-year rule following the introduction of a PAO after an Order for Divorce has been made by a court so that new PAOs might be issued where appropriate. The Law Society understands that any change to legislation would be

prospective only meaning vulnerable families, where benefits have already transferred to a Master Trust, will have to try and obtain new orders from the Court. Unfortunately, the 12-month time limit with regard to contingent orders (as seen in Section 17(3) of the Family Law (Divorce) Act 1996) renders this almost impossible as family members will generally be applying after this restrictive 12-month period has already lapsed.

9.12 We have provided below some suggested draft legislative amendments to address this lacuna in the law. The wording of this amendment would have to be applied to three pieces of legislation in order to resolve the issues in relation to pension orders:

- Section 12(3) of the Family Law Act 1995,
- Section 17(3) of the Family Law (Divorce) Act 1996, and
- Section 121(5) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

9.13 *Amending the Pension Authority Guidelines*. While this is not a remedy itself, our understanding is that, while trustees are not legally bound by guidelines, the issuing by the Pension Authority of guidelines that trustees should implement a PAO from the prior trust that was transferred to the Master Trust would also contribute significantly towards mitigating this potentially serious issue.

9.14 The Law Society understands that guidelines are viewed as being particularly important by trustees and that trustees would overwhelmingly abide by them. In an instance where pensions have been transferred with the benefit of a PAO the trustees should abide by the terms of the guidance, unless there is some overriding reason otherwise.

9.15 The Law Society submits that this is not the ideal solution as this issue would be better served being addressed via a legislative solution. However, in the absence of legislative change, the issuance of guidelines may assist in mitigating the effects of this lacuna in the law.

9.16 *Further considerations.* We acknowledge that any amendment or other solution would, by nature, be prospective meaning that they would not seek to retrospectively correct pensions that have already been transferred to the Master Trust. The Law Society understands that many of relevant pensions have already been transferred to the Master Trust. If legislative amendments are to be made, it is suggested that care is taken to not impose additional obligations on Master Trust trustees to pay out benefits from schemes which have not expressly funded for them or insured the relevant contingent benefits.

9.17 Despite this, our primary aims in raising this issue (despite the reality that very many such pensions have already been transferred) are to (a) prevent further pensions from being transferred to the Master Trust in this manner, and (b) to make the Government aware that pensions which have already been transferred risk serious unintended financial consequences for Irish families (as in the example we have provided above) and that this issue may need to be rectified in the future.

9.18 Text proposed of new head 53 for inclusion in the General Scheme

Head 53
Provide that amendments be made to Section 17(3) of the Family Law (Divorce) Act 1996, Section 12(3) of the Family Law Act 1995, and Section 121(5) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Potential text of proposed new Head 53 is as follows:

"Subject to subsection (3A) and to the provisions of this section, where a decree of divorce ("the decree") has been granted, the court, if it so thinks fit, may, in relation to a contingent benefit under a scheme of which one of the spouses concerned is a member, on application to it in that behalf not more than one year after the making of the order for the decree by either of the spouses or by a person on behalf of a dependent member of the family concerned, make an order providing for the payment, upon the death of the member spouse, to either of the following, or to both of them in such proportions as the court may determine, that is to say –

(a) the other spouse, and

(b) such person as may be specified in the order for the benefit of a dependent member of the family,

of, either, as the court may determine, the whole, or such part (expressed as a percentage) as the court considers appropriate, of that part of any contingent benefit that is payable (or which, but for the making of the order for the decree, would have been payable) under the scheme.

(3A) (a) Subject always to paragraphs (b) and (c) below, where:

(i) the court makes an order under subsection (3) in favour of a spouse ("the spouse") and/or a dependent member of the family concerned ("the dependant 1 member");

(ii) the scheme to which the order relates ("the relevant scheme") is wound up in accordance with the rules of the relevant scheme; and

(iii) the member spouse to whom the order relates becomes entitled to contingent benefits under another scheme ("the new scheme")

the trustees of the relevant scheme shall, without undue delay, provide the trustees of the new scheme with a copy of the order and notwithstanding anything to the contrary contained in the rules of the new scheme, the trustees of the new scheme shall give effect to the order in accordance with its terms and comply with the provisions of this section as though such order had been made in relation to the new scheme and not to the relevant scheme and the trustees of the relevant scheme shall be discharged from any further obligation in relation to the order.

(b) Where for any reason, there is no trustee of the relevant scheme capable of providing the trustees of the new scheme with a copy of the order in accordance with paragraph (a) of this subsection (3A), the spouse or a person on behalf of a dependant 1 member of the family may of their own volition provide the trustees of the new scheme with a copy of the order and subject always to paragraph (c) below, the trustees of the new scheme shall give effect to the order in accordance with its terms and with the provisions of this section as though such order had been made in relation to the new scheme and not to the relevant scheme.

(c) Where, prior to being notified of the existence of an order in accordance with the provisions of paragraphs (a) or (b) of this subsection (3A), the trustees of the new scheme pay a contingent benefit in respect of a member spouse in accordance with the rules of the new scheme, nothing in this subsection (3A) shall compel the

trustees of the new scheme or any insurer of any contingent benefit under the new scheme:

(i) to pay an additional contingent benefit to any person named in the order; or

(ii) to seek repayment from any beneficiary of any contingent benefit previously paid to them under the rules of the new scheme."

Conclusion

10. The Law Society appreciates the opportunity to provide this submission to the Joint Oireachtas Committee on Justice, Home Affairs and Migration. The Law Society remains available to assist the Joint Committee in its consideration of the General Scheme.

10.1 For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: PolicyTeam@LawSociety.ie



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