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General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 – Head 19: Disclosure of Counselling Records in Sexual Offence Cases

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Policy and Legislative Briefing Paper

Abstract

This paper provides the legal and policy background to Head 19 of the General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 which relates to the disclosure of counselling records in sexual offence cases.

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Executive Summary

The General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 was published on 6 May 2025 by the Department of Justice, Home Affairs and Migration. The General Scheme is comprised of 51 Heads which are divided into 14 Parts and cover a wide range of distinct civil and criminal matters. The Parliamentary Research Service will publish four *Policy and Legislative Briefing Papers* on selected Heads, which cover key legislative proposals in the General Scheme. This *Policy and Legislative Briefing Paper* provides an overview of the current law on disclosure in sexual offence cases and the proposed amendments set out in Head 19 of the General Scheme.

The prosecution has a duty to the defence to disclose any material which may be relevant to the case. This duty derives from the right to a fair trial, which is protected by Bunreacht na hÉireann, the European Convention on Human Rights and the EU Charter of Fundamental Rights. It is also protected by the EU Directive 2012/13/EU on the right to information in criminal proceedings, which is binding in Ireland.

However, the right to a fair trial is not absolute and therefore, the duty of disclosure may be limited by the potential impact of materials on the victim's right to privacy. This is particularly acute in the disclosure of counselling records in sexual offence cases. Both personal and professional experience of this practice has demonstrated the negative impact such disclosure can have on an individual's life, and many have questioned the probative value of counselling records in such cases.

Section 19A of the Criminal Evidence Act 1992 created a procedure for the right of the accused to a fair trial and the right of a victim to privacy to be weighed up by a trial judge in considering whether counselling records should be disclosed in a sexual offence case. This provision was modelled on the regime in Canada, which was recommended by the Law Commission in England and Wales as the approach to follow in 2025. Research findings, case law of the Supreme Court and Ministerial statements indicate that section 19A has not operated as the Oireachtas intended, due to the lack of disclosure hearings and overuse of the waiver provided for in subsection 17.

Head 19 of the General Scheme of the Criminal Law and Civil Law Miscellaneous Provisions Bill 2025 proposes to delete the waiver, which would in turn require mandatory disclosure hearings in the event that an accused seeks access to a victim's counselling notes. While this approach was welcomed by some during pre-legislative scrutiny, witnesses cautioned against delays to trials and instead recommended more robust legal advice provision in relation to the waiver. Others recommended that the proposals should go further by bringing other personal records within the scope of section 19A and some witnesses called for an absolute prohibition on the disclosure of counselling records in sexual offence cases. In its PLS Report on the General Scheme, the Joint Oireachtas Committee on Justice, Home Affairs and Migration recommended that "Head 19 sets out a complete and unconditional ban on the use of counselling records in sexual offence trials".

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Introduction

The General Scheme of the Criminal Law and Civil Law Miscellaneous Provisions Bill 2025 was published on 6 May 2025 by the Department of Justice, Home Affairs and Migration. The General Scheme is comprised of 51 Heads which are divided into 14 Parts. Given the disparate and discrete nature of the Bill, covering a wide range of distinct criminal and civil matters, the Parliamentary Research Service (PRS) has elected to produce four separate *Policy and Legislative Briefing Papers* on selected Heads of the General Scheme. These papers will provide an overview of the policy and legislative context to the selected Heads.

This *Policy and Legislative Briefing Paper* provides an overview of the proposed amendments to disclosure in sexual offence cases as set out in Head 19 of the General Scheme and will consider the following:

- overview of the legal framework on the disclosure of counselling records in sexual offence cases, including the operation of the law in practice;
- outline of the approach to this issue in other jurisdictions;
- a consideration of legislative proposals for reform, including Private Members Bill, Head 19 of the General Scheme and pre-legislative scrutiny.

The three other *Policy and Legislative Briefing Paper*s will consider the following selected Heads from the General Scheme:

- prohibiting a person offering another person accommodation in exchange for sexual activity in lieu of payment for the accommodation and prohibiting a person advertising or causing the advertisement of an offer of accommodation of SFR. It will be a defence to show that a person did not suspect that the advertisement related to this type of accommodation offer **(Head 39)**,
- permitting members of An Garda Siochana to order removal of face coverings in public if there is concern for public safety **(Head 26)**,
- expanding and enhancing remote hearings for all types of criminal proceedings and international co-operation proceedings, including trials and other contested hearings where the court directs it **(Part 2: Heads 4-11 and Part 4: Heads 15 - 16).**

The PRS has also produced a Bill Resource page, which provides links to a wide range of sources on the Bill (available internally only). The PRS intends to publish a *Bill Digest* ahead of Second Stage debate on the Bill, which will provide an overview of the provisions of the Bill in its entirety. The *Bill Digest* will consider the recommendations arising from PLS and if, and to what extent, the PLS recommendations have been incorporated into the published Bill.

What is disclosure?

In *McKevitt v. DPP,* former Chief Justice Keane outlined the prosecution's duty of disclosure as follows:

> "... the prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution and that if there is such material which is in their possession they are under a constitutional duty to make that available to the defence."[1]

The practice of disclosure is described in the Guidelines for Prosecutors, published by the Office of the Director of Public Prosecutions, as follows:

> "A person charged with a criminal offence has a right to be furnished, firstly, with details of the prosecution evidence that is to be used at the trial, and secondly, with evidence in the prosecution's possession which the prosecution does not intend to use if that evidence could be relevant or could assist the defence. The extent of the duty to disclose is determined by concepts of constitutional justice, natural justice, fair procedures and due process of law as well as by statutory principles. The limits of this duty are not precisely delineated and depend upon the circumstances of each case. Further, the duty to disclose is an ongoing one and turns upon matters which are in issue at any time".[2]

In its review of the law in this area in 2014, the Law Reform Commission noted that there are no procedural rules governing the practice of disclosure. The scope of the duty of disclosure has not been clearly defined and may evolve depending on the circumstances of each case.[3] Heffernan and Daly comment that "it is ironic that disclosure of relevant but unused evidence is thus both fundamental and complex and yet is not regulated by statute or rules of court".[4]

The Guidelines for Prosecutors also note that witnesses may produce certain records or notes as part of their evidence in court[5] and in some instances "the Director of Public Prosecutions has entered into Memoranda of Understanding with a number of agencies for the purpose of assisting in the process of disclosure".[6] An accused may, therefore, seek records or notes which are in the possession of a third party. For example, requests have been made for the

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[1] Unreported, Supreme Court, 18 March 2003.
[2] Office of the Director of Public Prosecutions, Guidelines for Prosecutors, 5th Edition – December 2019, para. 9.3.
[3] Issues Paper on Disclosure and Discovery in Criminal Cases (LRC IP 5-2014), para 1.01.
[4] Heffernan and Daly (2025), *Evidence in Criminal Trials,* Bloomsbury Professional, para. 15.40.
[5] For example, section 4F of the Criminal Procedure Act 1967.
[6] Office of the Director of Public Prosecutions, Guidelines for Prosecutors, 5th Edition – December 2019, para. 9.14.

transcripts of certain phone calls between prosecution witnesses[7] and information relating to the blood-alcohol tests.[8] Daly and Heffernan have highlighted:

> "Third party disclosure has assumed particular importance in the context of trials for sexual offences where contentious issues have arisen regarding defence access to the notes of counsellors and social workers concerning complainants."[9]

The current law and practice in relation to the disclosure of counselling records in sexual offence cases as well as legislative proposals for reform of the law will be considered in further detail in this paper.

[7] *People (DPP) v Dundon* [2024] IECA 311.
[8] See for example, *Thompkins v Director of Public Prosecutions* [2010] IEHC 58 and *Director of Public Prosecutions v O'Malley* [2008] IEHC 117.
[9] Heffernan and Daly (2025), *Evidence in Criminal Trials*, Bloomsbury Professional, para. 15.70.

Legal framework on the disclosure of counselling records in sexual offence cases

Section 19A disclosure procedure

Section 19A of the Criminal Evidence Act 1992 ('the 1992 Act') currently sets out the arrangements for the disclosure of counselling records in certain sexual offence cases. This provision was inserted by section 39 of the Criminal Law (Sexual Offences) Act 2017 following a number of Supreme Court cases[10] on this issue and a Report from the Law Reform Commission on Disclosure and Discovery in Criminal Cases. Section 19A came into force on 30 May 2018.[11]

Several terms are defined in section 19A(1), which shape the scope of disclosure of counselling records in sexual offence cases. These are set out in Box 1 below.

Box 1: Definitions in section 19A of the Criminal Evidence Act 1992

- "competent person" means a person who has undertaken training or study or has experience relevant to the process of counselling;
- "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);
- "counselling record" means any record, or part of a record, made by any means, by a competent person in connection with the provision of counselling 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;
- "court" means the Circuit Criminal Court or the Central Criminal Court;
- "sexual offence" means an offence referred to in the Schedule to the Sex Offenders Act 2001.

In its consideration of section 19A in *DPP v AM,* the Supreme Court noted that the definitions section gives rise to questions as to the scope of the disclosure. For example, whether the procedure only relates to records in the hands of a third party, whether psychiatric treatment

[10] For example, *DH v Groarke* [2002] 3 IR 522 (SC); *The People (DPP) v Sweeney* [2001] 4 IR 102; *PG v DPP* [2007] 3 IR 39 (SC); *JF v DPP* [2008] 1 IR 753 (SC).
[11] This provision was commenced by the Criminal Law (Sexual Offences) Act 2017 (Commencement) (No. 2) Order 2018, S.I. No. 172 of 2018.

records falls within the scope and, whether section 19A is confined only to records related to alleged offence and not any records pre-dating the offence.[12]

The procedure applies to prosecutions in the Circuit Criminal Court and the Central Criminal Court only. It applies to prosecutions for an extensive list of sexual offences that are listed in the Schedule to the Sex Offenders Act 2001 as set out in Box 2 below.

Box 2: Offences to which section 19A Criminal Evidence Act 1992 applies

a) Rape;

b) Sexual assault (including the offences known as 'indecent assault upon a female person' and 'indecent assault upon a male person');

c) Aggravated sexual assault (within the meaning of section 3 of the Criminal Law (Rape) (Amendment) Act 1990);

d) Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990;

e) An offence under section 1 or 2 of the Punishment of Incest Act 1908;

f) An offence under the Criminal Law (Sexual Offences) Act 2006;

g) An offence under section 61 or 62 of the Offences against the Person Act 1861;

h) An offence under section 3, 4 or 5 of the Criminal Law (Sexual Offences) Act 1993;

i) An offence under section 11 of the Criminal Law Amendment Act 1885;

j) An offence under section 4 of the Criminal Law Amendment Act 1935;

k) An offence under section 3, 4, 4A, 5, 5A, or 6 of the Child Trafficking and Pornography Act 1998;

l) An offence under the Criminal Law (Human Trafficking) Act 2008 in so far as the offence is committed for the purposes of the sexual exploitation of a person;

m) An offence under section 2 of the Sexual Offences (Jurisdiction) Act 1996;

n) An offence under section 3, 4, 5, 6, 7, 8, 21 or 22 of the Criminal Law (Sexual Offences) Act 2017;

o) An offence consisting of attempting to commit an offence referred to above; aiding, abetting, counselling, procuring or inciting the commission of an offence referred to above; or conspiracy to commit an offence referred to above;

p) An offence under section 6 of the Criminal Law (Sexual Offences) Act 1993.

[12] *DPP v AM* [2025] IESC 16, para.'s 71-72.

Section 19A(2) of the 1992 Act requires the prosecutor to notify the accused of the existence of any counselling records. The accused must then apply in writing to the court for the disclosure of such records and notify the complainant, record holder and others of this application.[13] The court holds a disclosure hearing to decide whether the counselling record must be disclosed and must take the factors in Box 3 below into account when determining whether the counselling record should be disclosed.[14]

Box 3: Factors to be considered by judge when deciding if a counselling record should be disclosed

- the extent to which the record is necessary for the accused to defend the charges against him;
- the probative value of the record;
- the reasonable expectation of privacy with respect to the record;
- the potential prejudice to the right to privacy of any person to whom the record relates;
- the public interest in encouraging the reporting of sexual offences;
- the public interest in encouraging complainants of sexual offences to seek counselling;
- the hearing effect of the determination on the integrity of the trial process;
- the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm.

The person who has possession or control of the counselling record, the complainant and any other person to whom the counselling records relates shall be entitled to appear and be heard at the hearing[15] and legal aid will be provided subject to certain conditions.[16] Such a hearing would be held in private.[17] Following the hearing, the court may make an order for disclosure and may attach conditions to any such order.[18]

Section 19A(17) of the 1992 Act provides that the court procedure does not apply where the victim has waived their right to non-disclosure. In *DPP v AM* the Supreme Court noted:

> "Subsection (17) does not expressly require that any such waiver should be in writing (though, sensibly, it appears to be the practice of the prosecuting authorities to require written waivers). Neither does it provide – at least in express terms – that any

[13] Section 19A(3)-(4) of the Criminal Evidence Act 1992.
[14] Section 19A(10) of the Criminal Evidence Act 1992.
[15] Section 19A(9) of the Criminal Evidence Act 1992.
[16] Section 19A(16) of the Criminal Evidence Act 1992. See also section 27 of the Civil Legal Aid Act 1995.
[17] Section 19A(15) provides: All persons, other than officers of the court, persons directly concerned in the hearing and such other persons (if any) as the court may determine, shall be excluded from the court during the hearing. This is commonly referred to as an in camera hearing.
[18] Section 19A(11)-(12) of the Criminal Evidence Act 1992.

> such waiver should be informed and/or that it should be given only after the complainant has received independent legal advice or at least after being given adequate opportunity to obtain such advice."[19]

Daly and Heffernan have also commented "it is regrettable that the legislation did not go further in this respect and state explicitly that any waiver by a complainant must be given on the basis of fully informed consent."[20]

The Guidelines for Prosecutors note:

> "Where counselling records are being disclosed with the express consent of the victim, the Memoranda of Understanding that the DPP has entered into with a number of agencies for the purpose of assisting in the process of disclosure will apply and prosecutors will follow the principles and procedure in those documents."[21]

The Office of the Director of Public Prosecutions has also published a booklet for victims to explain this process with the help of counselling agencies with whom they have Memorandums of Understanding.[22]

Disclosure and balancing competing rights

Bunreacht na hÉireann, the Constitution of Ireland, protects the right to trial in due course of the law (Article 38.1) and fair procedures (Article 40). Case law has demonstrated that these provisions place a duty on the prosecution to disclose material to the defence in advance of trial.[23] The duty of disclosure is also underpinned by Article 6 of the European Convention on Human Rights (ECHR)[24] and Article 47 of the Charter of Fundamental Rights of the European Union, which both protect the right to a fair trial. Article 7 of EU Directive 2012/13/EU on the

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[19] *DPP v AM* [2025] IESC 16 para. 75.
[20] Daly and Heffernan (2025) *Evidence in Criminal Trials*, Bloomsbury Professional, para. 15.82.
[21] Office of the Director of Public Prosecutions, Guidelines for Prosecutors, 5th Edition – December 2019, para. 9.16.
[22] Office of the Director of Public Prosecutions, Releasing my counselling records, revised February 2019.
[23] *DPP v. Tuite* [1983] 2 Frewen 175; *DPP v. Special Criminal Court* [1999] 1 IR 60; *McKevitt v. DPP* (Unreported, Supreme Court, 18 March 2003).
[24] The ECHR has been indirectly incorporated into Irish domestic law by the European Convention on Human Rights Act 2003. In *Rowe v United Kingdom* (2000) 30 EHRR 1 (Application no 28901/95), the European Court of Human Rights found, at para 60, that Article 6.1 ECHR requires "that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused".

right to information in criminal proceedings also provides for the right of access to the materials of a case.[25]

However, the right to a fair trial is not an absolute right. In its report on Disclosure and Discovery in Criminal Cases, the Law Reform Commission noted that this right must be balanced against an individual's constitutional right to privacy, as protected by Article 40.3.1° of the Constitution, where the accused seeks access to counselling records in sexual offence cases.[26]

When this issue was recently dealt with by the Supreme Court, in *WC v DPP,* Charleton J noted:

> "Privacy, whether under Article 21 of the Victims Directive or as the upholding of human dignity under Article 40.3 of the Constitution, remains a central consideration, apart from any protection afforded to counselling records for a complainant in a sexual violence case. Where it is reasonably possible that there is a real connection to an issue at trial, the trial judge deciding on either disclosure for trial purposes or controlling the trial, should remember that fundamental intrusions into the privacy of a complainant or other witness should only be ordered where that encroachment will realistically assist the administration of justice and is otherwise unavoidable."[27]

The right to privacy is also protected by Article 8 ECHR and Article 7 of the EU Charter. In light of this, the European Court of Human Rights has recognised that "it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest."[28] Article 7(4) of EU Directive 2012/13/EU also provides for an exemption to disclosure where "access may lead to a serious threat to the life or the fundamental rights of another".

Discussing the balance struck by section 19A, the Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences, concluded:

> "... section 19A, when implemented in the right spirit, strikes a reasonable balance between the constitutional entitlement of an accused person to a fair trial and the victim's right to personal privacy. It provides for an objective, independent assessment of disclosure application with due regard to the competing right and interests at stake".[29]

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[25] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. Article 11 states that the transposition date is 2 June 2014. While Ireland has opted in to this Directive under Protocol 21 TFEU, no specific primary legislation has been enacted to give effect to the Directive. In *DPP v O'Sullivan* [2018] IESC 15, the Director of Public Prosecutions accepted that the Directive has direct effect in Irish law.
[26] Law Reform Commission (2014) Report on Disclosure and Discovery in Criminal Cases, para. 2.20.
[27] *WC v DPP* [2024] IESC 24, para. 77.
[28] *Rowe v United Kingdom* (2000) 30 EHRR 1 (Application no. 28901/95), para 61.
[29] *Ibid,* para. 6.40.

In *DPP v AM* Collins J noted the challenges presented in finding an appropriate balance between the rights of the accused and the rights of victims but acknowledged ultimately that counselling records "enjoy a high level of constitutional protection" given the implications for privacy rights.[30]

Victims' rights

In *WC v DPP*[31], Charleton J noted "increasing awareness of the experience of being a victim was the impetus for" the Victims' Directive[32], which was given effect by the Criminal Justice (Victims of Crime) Act 2017.[33] Furthermore, in *DPP v AM* the Supreme Court stated:

> "It is important to clearly acknowledge that, both in the specific context of disclosure, and that of the criminal justice system more broadly, the rights and interest of defendants are not the only rights and interests engaged. Victims have significant rights and interests, rooted in the Constitution, in EU law, the ECHR, statute and the common law and there is an increasing understanding of the negative impacts that the criminal justice system can have on victims, particularly victims (and, most especially, child victims) of sexual violence."[34]

International human rights treaties, which Ireland has ratified, also places obligations on the State to protect the rights of victims of gender-based violence. Following its examination of Ireland's record on women's rights in 2025, the United Nations Committee on the Elimination of Discrimination Against Women recommended that Irish law should be amended to "prohibit access to survivors' counselling notes."[35] This was also recommended in 2023 by GREVIO,[36] the treaty monitoring body for the implementation of the Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention).[37] In its 2023 Baseline Report on Ireland, GREVIO stated:

> "... the obligation and practice to disclose the counselling notes of victims of violence against women clearly constitutes a disincentive for women to come forward and

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[30] *People (DPP) v A.M* [2025] IESC 18, para.'s 47 and 50.
[31] *WC v DPP* [2024] IESC 48, para. 9.
[32] Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime.
[33] For example, section 21 of 2017 Act the provides that a court may give directions in relation to questioning in respect of the private life of a victim to avoid the risk of re-victimisation.
[34] *DPP v AM* [2025] IESC 15, para. 40.
[35] UNCEDAW, *Concluding observations on Ireland 2025,* para. 28.
[36] The Group of Experts on Action against Violence against Women and Domestic Violence.
[37] GREVIO (2023), Baseline Report on Ireland, para 119.

> seek the needed help, thus running counter to the principles enunciated under Article 18 of the convention. "[38]

Respondents to the Law Reform Commission's consultation on disclosure, who were professionals working with children, called for a special regime for the disclosure of records in respect of children. This position was recommended based on the best interests of the child principle and the stages of child development, as well as the impact of court proceedings on the child's healing process.[39]

Disclosure and data protection law

The Data Protection Act 2018 (the 2018 Act) gives effect to both the General Data Protection Regulation (GDPR), and the "Law Enforcement Directive" (Directive (EU) 2016/680). Parts 5 and 6 of the 2018 Act concerns the processing of personal data by data controllers who are competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, where personal data is being processed for these purposes.

When processing personal data for law enforcement purposes, section 71(1) of the Data Protection Act 2018 articulates more specific requirements that the data shall be:

- processed fairly and lawfully;
- collected for one or more specified, explicit and legitimate purposes and shall not be processed in a manner that is incompatible with such purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected;
- accurate, kept up to date if necessary, and every reasonable step should be taken to ensure (with due regard to the purpose they were collected) inaccurate data are rectified or erased;

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[38] GREVIO (2023), Baseline Report on Ireland, para 117. Article 18 of the Istanbul Convention states: All measures taken by the State should be: based on a gendered understanding of violence against women and domestic violence; have a human rights and victim centred approach; have an integrated approach that takes into account the relationship between victims, perpetrators, children and their environment; avoids secondary victimisation; aims at empowerment and the economic independence of women; allows for a range of support services on the same premises; addresses the needs of vulnerable persons, including child victims. Support services shall not be dependent on pressing charges or testifying against a perpetrator.

[39] Law Reform Commission (2014) Report on Disclosure and Discovery in Criminal Cases, para. 2.16, 2.18.

> • kept in a form that permits the identification of a data subject for no longer than is necessary for the purposes for which the data are collected;
>
> • processed in a manner that ensures appropriate security of the data against unauthorised or unlawful processing and accidental loss damage or destruction.

James Dwyer SC has noted the 2018 Act has limited implications for the duty on prosecutors to disclose and does not appear to go further than existing common law requirements.[40]

Evidentiary issues and the probative value of counselling records

Counselling notes have been described by the Rape Crisis Network Ireland in the following terms:

> "Counselling notes are neither objective, accurate and complete accounts of what is said in counselling, nor sworn statements. They are individual, subjective and fragmented musings by the counsellor or therapist on the client's emotional state. They may be updated as the therapist develops understanding of the client's emotional landscape."[41]

The Law Reform Commission has noted that the nature of counselling records has given rise to significant debate around the probative value of therapeutic notes and the potential for disclosure of counselling records to have a "chilling effect" on the reporting of sexual offences.[42] During a public seminar on the issues identified by the Law Reform Commission, Caroline Counihan, Legal Director, Rape Crisis Network Ireland (RCNI), observed that counselling records may be classified as "double hearsay" since they do not constitute a factual account of events. Counihan recommended that if counselling notes are admitted into evidence they should be "given limited weight and perhaps a judicial warning should be given to the jury in relation to the limitations of relying on inferences drawn from their contents".[43]

In *WC v DPP*, Charleton J drew parallels between the disclosure of counselling records and the regulation of cross-examination in relation to prior sexual experience.[44] In particular, Charleton J noted "[i]n general, prior sexual experience has been rendered irrelevant, unless demonstrated as capable of rationally impacting on the decision of the jury". Furthermore,

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[40] James Dwyer SC, Hard Data: Disclosure in the 21st Century, 23rd Annual National Prosecutors' Conference, 16 November 2022.
[41] Counihan, "Rape Crisis Network Ireland Perspectives on Sexual Violence and the Criminal Justice System" (2013) 4 ICLJ 115, at 121
[42] Law Reform Commission (2014) Report on Disclosure and Discovery in Criminal Cases, para. 2.15-16.
[43] Law Reform Commission (2014) Report of Seminar on Disclosure and Discovery in Criminal Cases.
[44] This is regulated by section 3 of the Criminal Law (Rape) Act 1981, as amended.

Charleton J stated that "putting a burden of demonstrating relevance as to any prior sexual experience on the accused, is central to dealing with disclosure applications".[45]

The issue of relevance of counselling records was a key issue in *DPP v AM*, which was decided by the Supreme Court in May 2025. In that case, AM was convicted of the sexual assault of a minor and appealed his conviction further to a Victim Impact Statement, which referenced counselling records that had not been disclosed prior to trial. One of the records noted that "the sexual abuse happened on more than one occasion" but this was disputed by the victim. AM's appeal was dismissed by both the Court of Appeal and the Supreme Court, which held:

> "... that evidence would have had very limited evidential and forensic value and there is no plausible basis for considering that it might have had any material impact on the jury's assessment or undermined its view of the credibility and reliability of C as a witness."[46]

In that case the Supreme Court also described the "absence of any provision in it [section 19A] specifically addressing the deployment of counselling records in evidence" as a "potential lacuna" in the law.[47]

A 2024 report commissioned by the Department of Justice recommended research to be conducted to establish the extent to which disclosure materials make a material difference to trial outcomes given the nature of such records and the impact on privacy rights.[48]

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[45] *WC v DPP* [2024] IESC 48, para 7-8.
[46] *DPP v AM* [2025] IESC 16, p 87.
[47] *DPP v AM* [2025] IESC 16, para. 71.
[48] Keenan, Healy, McLoughlin-Burke, Keenan (2024) A Review of the Processing of Sexual Offences in Ireland: Stakeholder Experiences, Department of Justice, p 28.

The operation of section 19A in practice

Research findings

In 2021, Dr. Susan Leahy published a report on The Realities of Rape Trials in Ireland: Perspectives from Practice. This research was funded by the Irish Research Council's New Foundations Scheme and conducted in partnership with Dublin Rape Crisis Centre. This research was conducted via semi-structured interviews between July and September 2019 with 16 legal professionals and 12 court accompaniment workers who have experience working within Irish rape trials. In the introduction to the report, Dr Leahy notes "this project contributes to filling a gap in knowledge about sexual offences in Ireland, that is, the lack of empirical data on the practical operation of the current law". Dr Leahy also notes that recommendations for reform are based upon the views of the participants in the study.

One of the questions posed in the study was the extent to which complainant's counselling records are introduced in trials. The study found that legal professionals had little if any experience of the section 19A regime for the disclosure of counselling records. The study notes that this may be due to the fact that this legislation had only commenced one year prior to the interviews taking place. On the other hand, six of the respondents noted that it is common for complainants to waive the right to non-disclosure under section 19A(17), thereby consenting to disclosure of their counselling records. Two of the legal professional respondents noted:

> "LP1 suggested that complainants consent to disclosure 'because they don't want anything to derail the trial', with LP12 mentioning that sometimes complainants waive 'for the purposes of expedition'."[49]

Dr. Leahy also interviewed court accompaniment workers who offered the following views:

> "... AW7 referred to instances where victims of sexual abuse chose not to pursue a formal complaint due to a fear that their counselling or other such records would be introduced at trial. Similarly, AW9 and AW11 recounted instances where complainants had delayed engaging in counselling until after a trial was concluded due to a fear that their counselling notes would have been used as evidence in the case."[50]

Similar findings were evident in the Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences, which was led by leading criminal law

[49] Dr Susan Leahy (2021), The Realities of Rape Trials in Ireland: Perspectives from Practice, p 31.
[50] Dr Susan Leahy (2021), The Realities of Rape Trials in Ireland: Perspectives from Practice, p 33.

academic and practitioner, Thomas O'Malley SC.[51] The Report noted that section 19A is seldom used, with only one application to the Central Criminal Court and a very small number of applications in the Circuit Court in its first two years of operation.[52] The Review concluded:

> "It seems to remain the norm for victims and other witnesses to waive their right to a court hearing and to consent to the disclosure of counselling records. However, it bears mentioning in this regard that the Office of the Director of Public Prosecutions imposes strict conditions on the disclosure of such records, even where there has been a waiver."[53]

A Review of the Processing of Sexual Offences in Ireland: Stakeholder Experiences, published by the Department of Justice in June 2024, highlights disclosure as a source of delay in sexual offence cases.[54] This research notes Dr Leahy's findings in relation to the waiver of the court procedure for disclosure of counselling records set out in section 19A(17) of the Criminal Evidence Act 1992. Therefore, the experiences highlighted in the report relate to instances where a victim has waived the right to non-disclosure and a section 19A court hearing has not taken place. In that regard, it is of interest to note that stakeholders representing different agencies involved in processing sexual offence cases, namely the Gardaí, prosecutors, court registrars and NGO representatives, all highlighted issues related to the disclosure of counselling records.[55] In particular, NGO representatives stated that "counsellors now keep concise records that are of little use to the defence, raising questions about the value of these more recent type of counselling records to the justice process".[56]

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[51] In August 2018, the Minister for Justice and Equality appointed a Working Group comprised of representatives from key criminal justice agencies, to review and report upon the protections available for vulnerable witnesses in the investigation and prosecution of sexual offences. The Terms of Reference for the Review included a consideration of the use of preliminary trial hearings to determine evidential issues.

[52] Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences, para. 6.39.

[53] Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences, (the 'O'Malley Review') (Department of Justice, July 2020) para. 6.39.

[54] Keenan, Healy, McLoughlin-Burke, Keenan (2024) A Review of the Processing of Sexual Offences in Ireland: Stakeholder Experiences, Department of Justice. The study employed a qualitative design involving semi-structured interviews with key stakeholders to capture their experiences of delays in the processing of sexual offences, their views on the reasons for these delays, and their recommendations regarding possible solutions. 73 interviews were conducted with 78 stakeholder representatives involved in the processing of sexual offences. Further information available in Methodology section of the report.

[55] *Ibid.*

[56] *Ibid,* p. 77.

Views of healthcare professionals

Respondents to the Law Reform Commission's consultation, who were professionals working with children, called for special consideration to be given to the position of children within the disclosure regime.

> "In particular, consultees expressed concerns about the need to take into consideration the stages of child development as well as the impact of court proceedings on the child's healing process. While many consultees felt absolute privilege would be the most appropriate solution for counselling records pertaining to children, based on the best interests of the child principle, it was also recognised that in order to achieve a balance with the right to a fair trial it might be necessary to introduce a system of qualified privilege."[57]

Niamh Ní Dhomhnaill has described the therapeutic process from the perspective of a clinical psychologist working in mental health and someone with personal experience of sexual violence and whose therapy notes were requested in the legal process. Commenting specifically on the use of records in courts, she questions:

> "From a professional perspective, are there policies and procedures that guide the process of reading and interpreting notes? Are there standards around what information is cited or left out?"[58]

Similarly, professional representative bodies have written an open letter to Ministers calling for the use of clinical notes in sexual offence cases to be prohibited.[59]

Lived experience of victim-survivors

During pre-legislative scrutiny hearing, Ms Hazel Behan shared the following quotes from survivors on their experience:

> "I felt stripped bare a second time in that courtroom, not by my attacker but by the system I turned to for justice.
>
> I never went to counselling because I couldn't bear the thought of my notes being used against me.

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[57] Law Reform Commission (2014) Report on Disclosure and Discovery in Criminal Cases, para. 2.16, 2.18.
[58] Niamh Ní Dhomhnaill: Rape survivors' counselling notes should not be weaponised, *Irish Examiner,* 21 February 2025.
[59] See: Open letter to ministers: Stop the use of clinical notes in rape cases. See also: Psychologists raise alarm over use of victims' counselling notes in sexual assault trials.

> I would not want to put myself through the emotional turmoil of pursuing a court case in Ireland. The way survivors are treated is unacceptable and needs to change.
>
> It is a brutal victim blaming system. I know I will eventually find a way through what happened but I am not convinced I will survive the brutality of the "justice" system.
>
> This country has ruined our lives. I'm still being harassed. Reporting is worse than the experience itself by a million."[60]

Ms Behan also made the following statements related to her own experience:

> "To be totally honest, if I had known when I started going to counselling, many years ago, that my records would be used against me in court years later, I would not have gone.
>
> ...
>
> To be honest, I would not be here today if I had not gone to counselling and therapy. I do not say that lightly or for shock value. It is the truth. Following the unthinkable, a person no longer exists. The Hazel I was before was not there any more. Therapy was about getting to know this new person I had become, and figuring out life after that. 99% of the conversations I had with my therapist during our sessions did not concentrate on what happened. They were about navigating life after what happened. They were about navigating normal everyday things that unfortunately seem more difficult when you are going through dealing with such trauma. While my therapist knew what happened to me and it certainly was something I discussed, the majority of our sessions concentrated on the after, not on the then and what happened then. If I did not have that, I can confidently say I would not be here today; without a doubt."[61]

At the launch of the Joint Oireachtas Committee on Justice's pre-legislative scrutiny report on the General Scheme, Paula Doyle spoke of the negative impact of reviewing counselling records prior to trial and the experience of excerpts from counselling records being put to her during cross-examination.[62]

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[60] Joint Committee on Justice, Home Affairs and Migration debate - Tuesday, 30 Sep 2025
[61] Joint Committee on Justice, Home Affairs and Migration debate - Tuesday, 30 Sep 2025
[62] See also Anna Moore, 'I couldn't let this monster get away with it': how I survived rape – and sent my attacker to prison', *Irish Examiner* 28 January 2025. Anna Moore, 'I couldn't let this monster get away with it': how I survived rape – and sent my attacker to prison', *The Guardian* 28 January 2025.

Discussion of the operation of section 19A by the Supreme Court in *AM*

As mentioned above, the disclosure of counselling records was a key issue in *DPP v AM*, which was decided by the Supreme Court in May 2025. In that case, AM was convicted of the sexual assault of a minor and appealed his conviction further to a Victim Impact Statement, which referenced counselling records that had not been disclosed prior to trial. This record contended that the abuse occurred more than once, which was disputed by the victim. AM's appeal was dismissed by both the Court of Appeal and the Supreme Court.

Commenting on the operation of section 19A, the Supreme Court stated:

> "It is striking that, despite the fact that it is nearly 7 years since the commencement of section 19A (the section came into operation on 30 May 2018), there does not appear to be a single recorded judgment addressing its application in an actual disclosure dispute (the section was considered in general terms in *WC* but there had not been any application under it in that case). There is, therefore, no practical guidance as to the operation of the section or the circumstances in which disclosure should be directed."[63]

As mentioned above, the Supreme Court asserted that counselling notes attract a high level of constitutional protection, and it also noted:

> "That the law may operate to deter victims of sexual violence from seeking timely counselling – or, conversely, may deter victims from making or pursuing a criminal complaint – should be a matter of the utmost concern to all actors in the justice system."[64]

The Supreme Court also stressed the importance of the statutory right to non-disclosure set out in section 19A and noted that a waiver of this right must be "fully informed". Elaborating on what this means, the Supreme Court stated:

> "Informed consent requires at a minimum that the victim is informed of the records it is proposed to disclose and is aware of their contents before being asked to give consent. Consent should be the last stage of the disclosure process, rather than, as here, the first stage."[65]

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[63] *DPP v AM* [2025] IESC 16, para. 76.

[64] *DPP v AM* [2025] IESC 16, para. 64.

[65] *Ibid,* para. 84.

Discussing the need for such consent to be informed by independent legal advice, the Supreme Court noted:

> "The absence of any provision for independent legal advice for the victim as to whether to waive their rights is also problematic. Many complainants will lack the necessary resources to obtain such advice and so will have to make a decision on waiver without fully understanding the alternative court process or being in a position to make an informed judgment as to the likely outcome of that process if triggered. If (as the legislature clearly recognised) the court process is sufficiently complex and important to warrant the provision of publicly funded (and non-means tested) legal representation for complainants, it is difficult to understand how complainants should be expected to navigate the waiver issue without legal advice."[66]

Lastly, commenting on the need to address the deficiencies in the operation of section 19A in *DPP v AM* , the Supreme Court stated:

> "Should it be the case that, notwithstanding the enactment of Section 19A, sweeping and unreasoned requests for disclosure of counselling records are routinely made in prosecutions for sexual offences and such disclosure is routinely made by the prosecution on the basis of consent procured from complainants who do not, in practice, have access to independent legal advice – and that is certainly the picture suggested by this appeal – that points to the failure of the important reform intended to be achieved by Section 19A and suggests an urgent need for the Oireachtas to revisit this area."[67]

This clarification of disclosure obligations has been welcomed by the Director for Public Prosecutions, who noted "there is a clear need to re-examine the policies and practices that underpin our current approach to disclosure".[68]

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[66] *Ibid,* para. 85.
[67] *Ibid,* para. 86.
[68] Director of Public Prosecutions (2025) Annual Report 2024, p. 6.

Approach in other jurisdictions

EU Directive

As noted above, Article 7(4) of EU Directive 2012/13/EU provides for an exception to general disclosure obligations where:

> "access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest…".

In its assessment of the implementation of the Directive, the European Commission noted that 10 Member States allow refusals based on the grounds set out in the Directive and others apply a less restrictive approach.[69] The Report also found:

> "As regards a refusal of access to the file on the ground of a serious threat to the life or the fundamental rights of individuals, some Member States require a 'serious danger to the life, health, physical integrity or freedom of a person', or 'a risk to individuals and a serious violation of their privacy'. However, in other jurisdictions the 'risk' for individuals is not required to be serious. Some provide that 'private interests or interests of other persons' can be invoked."[70]

Canadian model

Section 278 of the Canadian Criminal Code contains a two-part test of "likely relevance" and "necessity" where the accused seeks access to therapeutic records in a sexual offences case. A trial judge is required to take a number of factors into consideration when weighing the right of the accused to a fair trial against the right of the complainant to privacy, similar to those set out in section 19A of the Criminal Evidence Act 1992.

Similarly, in Scotland, the significant probative value must be likely to outweigh any risk of prejudice to the proper administration of justice: Criminal Procedure (Scotland) Act 1995, s 275(1)(a)-(c).[71]

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[69] Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, COM(2018) 858 final, Brussels, 18.12.2018, p 15-16.
[70] *Ibid,* p 16.
[71] Discussed in further detail in Law Commission (2025) Evidence in sexual offences prosecutions: a final report.

Privilege and qualified privilege in certain jurisdictions

In its Report on Disclosure and Discovery in Criminal Cases, the Law Reform Commission noted that a form of privilege to protect communications or material between a patient and a psychiatrist exists in many states in the United States, as well as a number of Australian states. For example, in the Australian state of New South Wales, Division 2 of the Criminal Procedure Act 1986 provides for privilege for counselling communications in sexual assault cases. An application may be made to the Court for production of such documents and before granting this request the Court is obliged to consider the probative value of the document and the public interest in preserving confidentiality.[72]

New proposals for reform in England and Wales

There is currently no special statutory framework related to the disclosure of counselling records in sexual offence cases in England and Wales. The general statutory framework for criminal investigations and disclosure is contained in the Criminal Procedure and Investigations Act 1996 (the CPIA 1996). The Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice (revised in 2020) sets out the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation. Further to this, the Attorney General published Guidelines on Disclosure, which were effective from 29 May 2024.

Independent academic research on the operation of this regime noted, despite some progress:

> "..., in a case that involved a suspect who had not been known to the complainant prior to the evening in question, the lawyer advised that "the issue in this case is likely to be her credibility and reliability," and instructed the police to obtain her GP records, spanning over a decade, as well as her counselling records."[73]

In 2025, the Law Commission recommended the introduction of a bespoke regime for sexual offence cases, similar to the Canadian model. In this Report, the Law Commission considered the question of an absolute prohibition on access, disclosure or admissibility of pre-trial therapy records but concluded this "is not justified given the risk to fair trial rights".[74] Similar to Irish law, the Law Commission recommended the introduction of a court application where an individual does not consent to disclosure.[75]

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[72] Discussed in further detail in Law Commission (2025) Evidence in sexual offences prosecutions: a final report and Law Reform Commission (2014) Issues Paper on Disclosure and Discovery in Criminal Cases.
[73] A King, VE Munro, L Young Andrade, Operation Soteria: Improving CPS Responses to Rape Complainants and Complainants Final Findings from Independent Academic Research (December 2023). Cited in Appendix 2 of Law Commission (2025) Evidence in sexual offences prosecutions: a final report.
[74] Law Commission (2025) Evidence in sexual offences prosecutions: a final report, para 2.147.
[75] Law Commission (2025) Evidence in sexual offences prosecutions: a final report, pp 58 – 75.

Legislative proposals for reform

The Programme for Government: Our Shared Future 2025 commits to "amend laws on counselling notes disclosure". The Zero Tolerance: Third National Strategy on Domestic, Sexual and Gender Based Violence - Implementation Plan 2025-2026 also contains a commitment to "strengthen protections to guard against the disclosure of counselling notes as part of court proceedings" including through the enactment of legislative amendments.

In this section, the proposal set out in the General Scheme as well as the Criminal Law (Prohibition of the Disclosure of Counselling Records) Bill 2025 [Private Members Bill] will be outlined.

Private Members Bill 2025

On 29 April 2025 the Criminal Law (Prohibition of the Disclosure of Counselling Records) Bill 2025 [PMB] was initiated in Dáil Éireann. The Bill was sponsored by Ruth Coppinger TD; Richard Boyd Barrett TD and Paul Murphy TD.

The Criminal Law (Prohibition of the Disclosure of Counselling Records) Bill 2025 is comprised of two sections. Section 1 proposes to delete the existing section 19A of the Criminal Evidence Act 1992 and to replace it with a new section 19A, which is summarised in Box 3 below.

Box 4: Summary of the Criminal Law (Prohibition of the Disclosure of Counselling Records) Bill 2025

Subsection 1 sets out the definitions that would apply in respect of this section. Most of the terms defined are identical those defined in section 19A(1) of the 1992 Act, namely 'competent person'; 'counselling'; 'counselling record' and 'court'. The definition of a 'relevant offence' in the Bill differs because it proposes to include definitions of 'coercive control' and 'intimate partner violence'.

Subsection 2 prohibits the disclosure of counselling records in sexual offence cases, coercive control cases (s. 39 of the Domestic Violence Act 2018) and cases of intimate partner violence.

Subsection 3 prohibits anyone who has undertaken training or study or has experience relevant to the process of counselling from disclosing counselling records or the content of such records in sexual offence cases, coercive control cases (s. 39 of the Domestic Violence Act 2018) and cases of intimate partner violence.

Subsection 4 prohibits the accused from requesting disclosure of counselling records.

Subsection 5 provides that anyone involved in counselling must continue to comply with their reporting obligations under the Children First Act 2015.

During Second Stage debate on the Bill, the Minister of State at the Department of Housing, Local Government and Heritage, Christopher O'Sullivan TD, introduced an amendment that the Bill would be deemed to be read a second time in twelve months' time. Outlining the Attorney General's advice on the possible unconstitutionality of some provisions of the PMB, the Minister stated:

> "The Attorney General's office points out that the constitutional right to trial in due course of law entails a duty upon the prosecution authorities to ensure that appropriate disclosure takes place of matters that may help the defence or damage the prosecution in any criminal prosecution, meaning that appropriate disclosure is a bedrock of a procedurally fair and just process of prosecution. The Attorney General's office advises that this Bill creates an absolute carve-out for counselling records, which almost inevitably breaches Article 38.1. Elevating the rights of a victim of an alleged sexual offence in this way inevitably comes at the cost of defence rights and trial in due course of law. In the event of such a challenge, it appears highly probable that this proposed amendment would result in a finding of constitutional invalidity."[76]

General Scheme

On 6 May 2025 the General Scheme of the Criminal Law and Civil Law Miscellaneous Provisions Bill 2025 was published. Head 19 proposes to delete subsection 17 of section 19A of the Criminal Evidence Act 1992. Section 19A(17) currently provides:

> "This section does not apply where a complainant or witness has expressly waived his or her right to non-disclosure of a counselling record without leave of the court."

This proposed amendment would remove the complainant's ability to waive their right to non-disclosure and result in mandatory disclosure hearings. Commenting on this, Minister for Justice, Jim O'Callaghan TD, stated:

> "The law in this area was substantially reformed in 2017 by introducing a new process whereby the court would decide at a pre-trial disclosure hearing if counselling notes are materially relevant and should be released to the defence. This has not operated as intended. I am therefore proposing to amend the existing legislation by requiring that a disclosure hearing takes place in all cases and removing the provision that allows for this step to be waived."

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[76] Criminal Law (Prohibition of the Disclosure of Counselling Records) Bill 2025: Second Stage [Private Members] – Dáil Éireann (34th Dáil) – Thursday, 12 Jun 2025 – Houses of the Oireachtas

Pre-legislative scrutiny

The Joint Oireachtas Committee on Justice, Home Affairs and Migration invited submissions on the General Scheme as part of its pre-legislative scrutiny process. The Committee also held a public hearing on 30 September 2025.

During the PLS hearing a number of witnesses expressed a range of views about the Government's proposals. Some suggested that the removal of the waiver may lead to further delays in sexual offence cases, which will be discussed in more detail below. Others advocated for a total ban on the disclosure of counselling records[77] and some recommended the inclusion of additional records, such as medical records, within the scope of the section 19A regime, or a similar framework.[78]

On 13 November 2025, the Joint Oireachtas Committee on Justice, Home Affairs and Migration published its PLS Report on the General Scheme which made the following recommendation in respect of Head 19:

> "The Committee recommends that Head 19 sets out a complete and unconditional ban on the use of counselling records in sexual offence trials."

This recommendation and the extent to which, if any, it is incorporated into the published Bill will be considered in the Parliamentary Research Service's forthcoming *Bill Digest.*

Delays in sexual offence cases

Some witnesses expressed concerns that the introduction of mandatory disclosure hearings would increase delays, which would have a negative impact on victims.[79] Concerns in relation to delays were also echoed by the Bar Council which suggested that mandatory hearings would place "a considerable burden on judicial resources" as well as an "increased demand on the resources available to the Legal Aid Board".[80] It may also be of interest to note that a new statutory entitlement to compensation for undue delay was enacted in 2024.[81]

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[77] *Ibid.*
[78] *Ibid.* See also; NWC Submission to the General Scheme of Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025, p 3. Cautious welcome for announcement on counselling notes | Dublin Rape Crisis Centre. This was also suggested in the O'Malley Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences, para. 6.42. This was discussed by Collins J in the Supreme Court case *People (DPP) v AM* [2025] IESC 16, para 52.
[79] NWC Submission to the General Scheme of Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025, p 3. Cautious welcome for announcement on counselling notes | Dublin Rape Crisis Centre.
[80] The Council of the Bar of Ireland, Submission to Oireachtas Joint Committee On Justice, Home Affairs & Migration General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025, 26 June 2025, para 27.
[81] Section 11 of the Court Proceedings (Delays) Act 2024. This provision has not yet been commenced.

As an alternative to deleting the waiver, both the Law Society and the Bar Council recommended that legal advice be provided prior to an individual waiving their right to non-disclosure under section 19A(17).[82] The Bar Council has also suggested:

> "Where a particular record is of a nature that is almost certainly going to be determined to be disclosable by the court on a s.19A hearing, it is arguably of more assistance to ensure that this is explained to a complainant by an independent legal advisor and to allow the complainant to provide informed consent to disclosure where s/he wishes to rather than holding a largely unnecessary hearing."[83]

As mentioned earlier in this paper, A Review of the Processing of Sexual Offences in Ireland: Stakeholder Experiences, published by the Department of Justice in June 2024, highlights disclosure as a source of delay in sexual offence cases.[84] This report noted the findings of Dr. Leahy's study, which was discussed above, in relation to the waiver of section 19A disclosure hearings. The study also considered the use of pre-trial hearings, which may include section 19A disclosure hearings, under the Criminal Procedure Act 2021.[85] While most of the stakeholders had limited experience of pre-trial hearings, mixed views were expressed about their potential to address delays in the processing of sexual offences.[86]

Nevertheless, A Rapid Review of Evidence on Delays in Processing Criminal Adult Sexual Cases, published by the Department of Justice in June 2024, notes:

> "There is a dearth of up-to-date data on delays in the criminal process in Ireland, so the best data available were provided by the National Crime Council (2006), which examined rape cases in the Central Criminal Court from 2002 to 2004. These data show that rape cases were taking much longer to process in this country than in England and Wales and Northern Ireland – twice as long as in the former and three times longer than in the latter. There is no reason to believe that rape cases are being dealt with any more quickly in Ireland today."[87]

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[82] Law Society Submission on the General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025, June 2025, para 6.8. The Council of the Bar of Ireland, Submission to Oireachtas Joint Committee On Justice, Home Affairs & Migration General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025, 26 June 2025, para 26.
[83] The Council of the Bar of Ireland, Submission to Oireachtas Joint Committee On Justice, Home Affairs & Migration General Scheme of the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025, 26 June 2025, para 26.
[84] Keenan, Healy, McLoughlin-Burke, Keenan (2024) A Review of the Processing of Sexual Offences in Ireland: Stakeholder Experiences, Department of Justice.
[85] In *WC v Director of Public Prosecutions* [2024] IESC 48 the Supreme Court took the view that section 6(8)(f) of the Criminal Procedure Act 2021, gives a court power to make orders in relation to disclosure as part of a preliminary trial hearing under section 16A: per Charleton J at para. 38.
[86] Keenan, Healy, McLoughlin-Burke, Keenan (2024) A Review of the Processing of Sexual Offences in Ireland: Stakeholder Experiences, Department of Justice, pp 200 – 204.
[87] Hanly and Cassidy (2024) A Rapid Review of Evidence on Delays in Processing Criminal Adult Sexual Cases, Department of Justice, p. 67.

In October 2024 the Department of Justice stated the appointment of additional judges has had a:

> "... large impact on delay in trials for most serious offences (Central Criminal) from 87 weeks (Q1 2023) to 52 weeks (Q2 2024) for persons on bail and from 61 weeks (Q1 2023) to 50 weeks (Q2 2024) for those in custody. In Q1 2024, as many as 12 Central Criminal Court jury trials concurrently, an all-time high of cases run simultaneously."[88]

At the time of writing the Courts and Civil Law (Miscellaneous Provisions) Bill 2025 was undergoing Committee Stage. This Bill proposes to further increase the number of judges of the District Court, Circuit Court, High Court and Court of Appeal. For example, section 7 of the Bill amends section 10 of the Courts and Court Officers Act 1995, increasing the number of ordinary judges of the Circuit Court by 6 to 51.[89] It is anticipated that this will also reduce delays in criminal proceedings.

[88] Minister McEntee secures government approval for 20 additional Judges, Department of Justice, Home Affairs and Migration Press Release, 23 October 2024.
[89] See L&RS Digest on Courts and Civil Law (Miscellaneous Provisions) Bill 2025.

Conclusion

Section 19A of the Criminal Evidence Act 1992 created a procedure for the right of the accused to a fair trial and the right of a victim to privacy to be weighed up by a trial judge in considering whether counselling records should be disclosed in a sexual offence case. However, it would appear from the research findings, case law of the Supreme Court and Ministerial statements cited above that section 19A has not operated as the Oireachtas intended, due to the lack of disclosure hearings and overuse of the waiver provided for in subsection 17. Head 19 of the General Scheme of the Criminal Law and Civil Law Miscellaneous Provisions Bill 2025 proposes to delete the waiver, which would in turn require mandatory disclosure hearings in the event that an accused seeks access to a victim's counselling notes. While this approach was welcomed by some during pre-legislative scrutiny, witnesses cautioned against delays to trials and instead recommended more robust legal advice provision in relation to the waiver. Others recommended that the proposals should go further by bringing other personal records within the scope of section 19A and some witnesses called for an absolute prohibition on the disclosure of counselling records in sexual offence cases. In its PLS Report on the General Scheme, the Joint Oireachtas Committee on Justice, Home Affairs and Migration recommended that "Head 19 sets out a complete and unconditional ban on the use of counselling records in sexual offence trials".