COMMISSIONER FOR VICTIMS OF CRIME

A 'Second Assault'

The impact of third party disclosure practice on victims of sexual abuse in Northern Ireland

November 2023

"I would like to thank all the 'Cathys' whose experiences and voices are peppered throughout this report. "

Foreword

In my first week of taking up post I was introduced to the story of a young female who had been groomed, abused and seriously sexually assaulted between the ages of 14 to 17 years old by an adult male. Cathy [2] had been under the supposed care and protection of the Northern Ireland Health and Social Care system throughout her years of abuse and both statutory and prosecution agencies were aware of her experiences. Cathy bravely came forward and officially reported these offences to the police in 2017. The young woman I met in mid-2022 shared a heart-breaking story of abuse, neglect and state failure to protect, which ultimately culminated in a criminal justice experience which left her feeling angry, silenced, let down and further harmed by the process. Amidst the many issues Cathy shared, one caused me particular alarm; the fact that our current practice for the handling of third party material led this vulnerable young woman to decide to forgo therapeutic support whilst she waited for the criminal justice system to investigate and prosecute her offender. Cathy waited five years for this case to reach court and the offender to plead guilty to six counts of sexual assault.

Cathys case is unfortunately not unique and it is her experience, and that of countless others, that led me to identify disclosure as one of the key priority areas in which I would like to see reform during my term in office. The investigation of this issue had led me to engage with victims, support providers, criminal justice agencies and the legal profession. It is clear from this examination that, not only are our laws not robust enough in protecting the privacy needs of victims, but we are also failing to deliver the level of protection for victims that our legislation and guidance currently dictates.

I would like to thank all the 'Cathys' whose experiences and voices are peppered throughout this report. They have not only shown bravery in reporting these crimes but have demonstrated both selflessness and courage in sharing their experiences with me and my team with the sole aim of improving the system for those who come behind them. We are all forever in their debt. The responsibility is now on both practitioners and our law makers to ensure that their sacrifices have not been in vain.

[1] Not her real name

Geraldine Hanna
Commissioner Designate

Contents

COMMISSIONER FOR VICTIMS OF CRIME

Introduction

The wider context: sexual offences in Northern Ireland

Despite ongoing efforts across the criminal justice system to improve the responses to the investigation and prosecution of sexual offence cases, reporting and conviction levels for these types of crimes remain low.

The most conspicuous relate to rape, with just 21 successful convictions secured in 2021/22. This is against 1,243 Police Service of Northern Ireland (PSNI) recorded cases of rape in the same year and 600 files involving an offence of rape passed to the Public Prosecution Service (PPS) for a decision to prosecute. The convictions above refer to offences that would have been committed in prior years (given the time lapse between a case being reported and making it to court). Nevertheless, this represents roughly 1.69% of cases reported to the PSNI and 3.5% of rape charges that were subsequently sent by the PSNI to the PPS that resulted in a conviction.

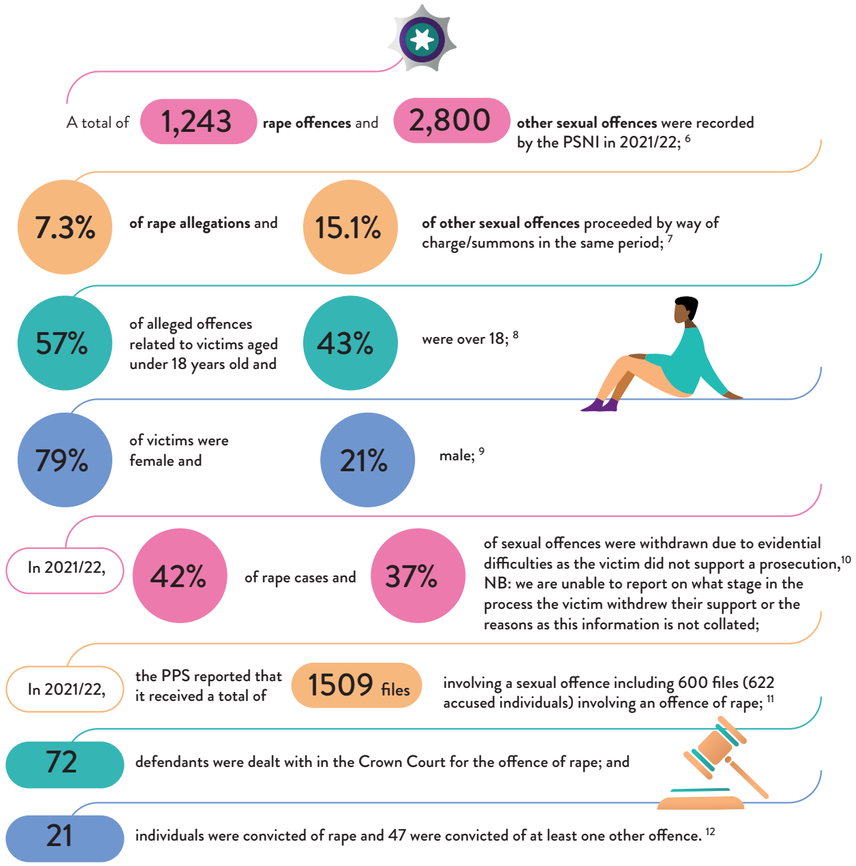
This is not just a Northern Ireland (NI) problem. The persistently low levels of convictions of cases of sexual offence across the UK has led to the assertion that rape has effectively been 'decriminalised'.[2] We also know from international research that rape and sexual assault cases are significantly under-reported with the Crime Survey in England and Wales [3] estimating that 5 out of 6 (83%) victims choose never to report to the police.

Victim withdrawal has been identified as a significant source of attrition in cases of sexual violence.[4]

Attrition is the proportion of reported sexual violence offences that do not progress through the criminal justice system to conviction stage, but rather drop out at various points along the way. Research on the level of attrition in sexual assault cases indicates that a victim may withdraw from the process for many reasons, including to avoid stress and trauma, fear of the perpetrator and their experience of going through the criminal justice system.[5]

[2] The Decriminalisation of Rape, Why the justice system is failing rape survivors and what needs to change (2020) – Rape Crisis England & Wales, Centre for Women's Justice, End Violence Against Women Coalition & Imkaan, - https://rcew.fra1.cdn.digitaloceanspaces.com/media/documents/c-decriminalisation-of-rape-report-cwj-evaw-imkaan-rcew-nov-2020.pdf
[3] ONS Survey - Crime in England & Wales - Crime in England and Wales - Office for National Statistics (ons.gov.uk)
[4] Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales - Hohl, K. and Stanko, E. (2015)
[5] Sexual Assault Case Attrition: The Voices of Survivors - Jodie Murphy-Oikonen, Lori Chambers, Ainsley Miller, Karen McQueen (2022)

The following figures provides a snapshot of cases going through the NI criminal justice system in 2021/22 and highlights the impact of attrition. It should be noted that these figures relate to one calendar year; statistical collation does not easily lend itself to tracking the progress of a sample of cases across what can often be numerous years.



[6] Police Recorded Crime Statistics | PSNI
[7] ibid
[8] ibid
[9] ibid
[10] PSNI Outcomes of Crime Report published 30 November 2022
[11] www.ppsni.gov.uk/thematic-bulletins-sexual-offences
[12] ibid

The prevalence of sexual crime and serious levels of under-reporting has increased the demand for the NI criminal justice system to radically reform how these cases are handled. The Gillen Review of the law and procedures in serious sexual offences in Northern Ireland highlighted how these cases *'defy the normal trial process'*. [13] It identified a range of weaknesses including delays, rape myths, social media, disclosure issues, consent, training, education and resources which informed a staggering 253 recommendations for improvements. Despite several significant improvements such as the introduction of victim legal advocates and remote evidence centres, work is on-going to implement all recommendations amidst a pace of change that is both slow and incremental.

The impact of sexual crime & criminal justice system processes on victims

Exposure to any crime, particularly sexual crime, can cause significant trauma for victims. Although victims experience sexual violence in numerous and different ways, there is strong evidence to demonstrate that it is associated with an increased risk of multiple forms of psychological harm. This can result in a range of negative physical and mental health outcomes such as depression, anxiety, PTSD, substance misuse, fertility issues, eating disorders, and chronic pain. [14]

If left unaddressed, the psychological and emotional impacts felt by a victim have the potential to become chronic and more difficult to resolve. As a result early intervention, commonly in the form of counselling or therapy, remain crucial to the recovery of those who have experienced sexual violence. [15] Under the NI Victim Charter, all victims, including victims of sexual violence, have a statutory right to be referred and have access to a range of confidential specialist support services. It is vitally important that victims are supported and can access timely therapy to enable their recovery and ensure that specialist support is available during often lengthy and destabilising investigations and court processes.

The police, as part of any ongoing investigation, are obliged to pursue all reasonable lines of inquiry that may prove or disprove the allegations made against the accused. This can include a range of information such as medical notes, educational records or any counselling records pertaining to the victim, both previous to and following the alleged incident(s). This information must be shared with the prosecution where it is deemed relevant and if it undermines the prosecution case or assists the defence case, it will be disclosed to the defence. If the material has not been obtained at the initial investigation stage it may be sought at a later stage by defence representatives via a court order.

It is clear that the issue of third party disclosure arises most frequently in sexual violence cases. Figures provided to the Commissioner Designate's office from the Northern Ireland Courts and Tribunal Service (NICTS) in 2022 showed that 46% of Crown Court cases that included a disclosure order were for sexual offence cases with 30% related to cases involving a multitude of charges, which were also likely to include sexual offences. Unfortunately records are not collated on how frequently third party material is actually used in the trial itself or circumstances where such material was of significant value in the case.

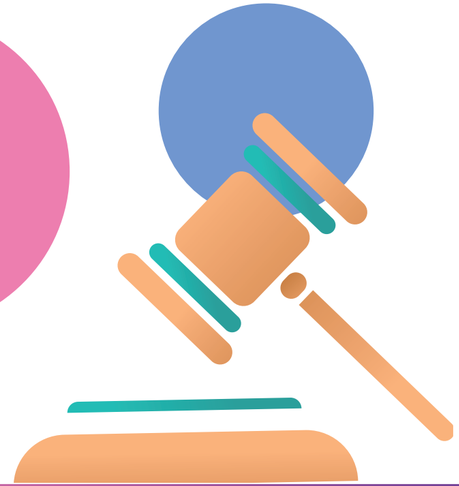
[13] Gillen Review - Report into the law and procedures in serious sexual offences in Northern Ireland (2019) - gillen-report-may-2019.pdf (justice-ni.gov.uk)
[14] Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-analysis.Mayo Clinic (2020) - Chen, Laura & Murad, M. Hassan & Paras, Molly & Colbenson, Kristina & Sattler, Amelia & Goranson, Erin & Mohamed, Benyagoub & Seime, Richard & Shinozaki, Gen & Prokop, Larry & Zirakzadeh, Ali.
[15] The Victim Recovery Journey - Understanding the recovery journey: Stages, facilitators and inhibitors of recovery (2021) - Microsoft Word - Victim recovery journey - Final Report (KMG).docx (victimsupportni.com)

Legal safeguards are in place to ensure that this process is handled fairly for all parties. Despite these safeguards, this paper highlights the system's failure to adhere to practice guidance and case law, which exists to help protect the European Convention on Human Rights (ECHR) Article 8 rights of the victim in the disclosure process. Furthermore, the legal parameters governing such disclosure, even when complied with, risk undermining the confidence of victims in the criminal justice system and causing secondary victimisation and harm.

Section 1 of this paper examines what procedures should be adhered to when accessing and sharing third party material. It highlights failures to comply with existing case law and guidance and exposes weaknesses in the State's duty to duly protect the ECHR Article 8 rights of victims at all stages of the court process. It outlines the experience of victims engaging with the Commissioner Designate's office and considers how a victim's application for criminal injury compensation is being used to play on jury myths regarding the 'perfect victim'.

Section 2 considers in detail the specific issue of disclosure of victim's counselling records and the impact of practice on victim's mental health and confidence in the criminal justice system. Section 3 explores practices in other jurisdictions in relation to disclosure including that of counselling records. It draws on the findings of the Law Commission in England and Wales and their recent consultation and recommends legislative change in NI to help strengthen safeguards in the disclosure process.

These recommendations aim to help enable the courts to more effectively ensure the rights of the victim alongside the rights of the accused in the court process.



SECTION

01

Examining what procedures should be adhered to when accessing and sharing third party material

At Investigative stage

The theory: The law and guidance governing the use of third party material in sexual offence cases

As part of any criminal investigation, the Police Service of Northern Ireland (PSNI) are required to 'pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.' Personal records of the victim such as social services records, medical notes, counselling records etc. may be obtained by police on foot of a warrant/production order. They are, however, more regularly obtained by police with the 'consent' of the victim early on in the investigation. They may also be obtained directly from a third party after making their own assessment of obligations under the Data Protection Act 2018 and the UK General Data Protection Regulation. Once provided to the police, the records will form part of the investigation file.

As part of their investigation the police will ask the victim to detail relevant third party details such as their GP, hospitals attended, Health and Social Care practitioners and any mental health professionals they may have engaged with. Practice Direction 2/2019 – "Case Management in the Crown Court including protocols for vulnerable witnesses and defendants" issued by the LCJ's office states:

> *6.9 Where the police are seeking access to third party material held by any of the above persons, the officer should explain why this is so. The officer should also explain the following:*

> *(i) That the complainant is not required to consent to release of the material but, if they do not and there is a prosecution, the defence may later apply for access to it and the court may order disclosure if necessary;*

> *(ii) If material is released to the police it will initially be shared with the PPS only;*

> *(iii) In the event of a prosecution, the prosecutor will apply the disclosure test to the material. This will mean that only those parts of the material as may reasonably be considered capable of undermining the prosecution case or assisting the defence case will fall to be disclosed to the defence;*

> *(iv) In reaching any disclosure decisions the complainant's privacy rights will be taken into consideration.*
> *6.10 The complainant should be invited to sign a form of consent which will explain the purpose for which the material is sought and how it will be handled upon receipt.* [16]

Any personal data generated or acquired as part of the investigation process should be limited to that which is sufficient for the progression of the investigation and which might be 'reasonably believed to be relevant'. What is reasonable in each case will depend on the particular circumstances and is decided by the investigating officers.[17]

Some personal records may need to be obtained and shared with the defendant in order to test the truth of the complainant's case (e.g. in the course of police questioning as part of a PACE interview). However, the requirement is clear – only records which are relevant to the facts and obtained through reasonable lines of inquiry. Victims must also be informed and involved in the process, which should be proportionate.

The reality: how victims third party material is being accessed and used

Feedback from victims and stakeholders indicates a trend whereby third party material, including therapy notes, are routinely sought at initial investigation stages. This is habitually done without any clear explanation as to the reasonable line of inquiry being pursued or any curtailment surrounding a) the volume of information being sought or b) the timeframe in which disclosure of information is required.

Victims report examples whereby all their GP records have been sought by the court when the sexual assault allegation only related to the previous year.

A report undertaken by the Information Commissioner Office (ICO) for the UK in 2022 found that police forces, including the PSNI, collect a broad range of intimate personal information about victims of sexual violence, not just from victims themselves but also from other 'third party' sources. This information could include a download of their mobile phone records, a trawl through historic social services and medical records and on occasion information dating back to childhood. [18] The report found that the volume of material being sought was **unnecessary and disproportionate.**

The ICO report raised concerns about the police practice of relying on a victim's consent as the lawful basis for obtaining and processing third party material. It also raised flags concerning the limited ability of an individual to give free and informed consent at the point of trauma, the power imbalance between the police and the victim and the absence of the ability in any real sense for a victim to subsequently withdraw their consent at a later point. The ICO made a series of recommendations including the following:

> *'The National Police Chiefs' Council must mandate to all police force/service(s) throughout the UK that they must cease using statements or forms indicating general consent to obtain third party materials (also Information Commissioner's Opinion | 31 May 2022 10 known as Stafford statements – England and Wales).*
> *Data protection is not a barrier to fair and lawful sharing and acquisition, but data minimisation is key. Any personal data obtained relating to a victim must be adequate, relevant, not excessive and pertinent to an investigation'.* [19]

The reported practice of police asking the victim to consent to the release of records from third parties is also causing additional frustrations in the process. In order to comply with their responsibilities under UK GDPR law, some third parties, such as GPs or therapy providers, in the absence of any court order have adopted a policy to only release the records to the individual directly. This is potentially due to a misunderstanding of the regulations or the adoption of an overly cautious approach. Victims are then required to collect their records and pass these on to police or prosecutors only to then have concerns raised by the PPS that this may open up lines of cross-examination regarding whether the victim has read over, copied or potentially altered the notes in some way.

[16] Case Management in the Crown Court including protocols for vulnerable witnesses and defendants - Practice Direction No. 2/2019 PD2 of 2019_1.pdf (judiciaryni.uk)

[17] The Criminal Procedure and Investigations Act 1996 (Code of Practice) (Northern Ireland) Order 1997 (legislation.gov.uk)

[18] Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations - ICO opinion-whos-under-investigation-20220531.pdf page 5

[19] Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations - ICO opinion-whos-under-investigation-20220531.pdf page 5

The prosecution stage

The theory: The law and guidance governing the use of third party material in sexual offence cases

Any information secured by the police as part of their investigation should be shared with the prosecution who, in cases where there is a decision to prosecute, should review all material to determine whether it meets the 'disclosure test'. If anything is found in such a category, it will be disclosed to the defence and potentially the accused in the case.

Pursuant to S.3 Criminal Procedures and Investigation Act 1996, the PPS must:

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused; or
(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

An obligation of continued disclosure requires the prosecution to continually keep under review all material pertaining to the case and disclose to the defence where appropriate.

We have been unable to find any guidance which indicates whether victims should be notified by PPS of what third party personal material they believe meets the disclosure test and will therefore be shared with the defence. It is our understanding that the PPS do not currently share details of the disclosure made due to concern that this could be perceived as witness coaching. However in some cases a general description of the disclosure made to the defence will be provided.

The reality: how victims third party material is being accessed and used

There is currently no requirement in the Criminal Procedures and Investigation Act 1996 that obliges the prosecution to notify the victim of the detail of any material they believe meets the test for disclosure to the defence. In fact, prosecutors have concerns regarding such notification for fear that it could be seen as coaching or 'tipping off' the victim to areas they may encounter in cross examination.

Victims have a right to be informed about the collection and use of their personal data under UK GDPR. However, there are exemptions which can be relied upon which could mean the prosecution do not have to notify the victim of the detail of any material they believe meets the test for disclosure to the defence. The Commissioner Designate would like to see greater clarity for victims on what detail they can reasonably expect to receive from PPS regarding the level of personal data about them which meets the disclosure test.

One victim who spoke to the Commissioner Designate outlined her concerns that her detailed mental health records were deemed by the PPS to meet the disclosure test to be shared with defence. The PPS refused to provide further information as to which details met the disclosure test and advised the victim against seeking a copy of her own personal records in case this was used against her in court. The uncertainty over which parts of her records would be shared and fear that the accused could potentially read notes that had been captured regarding her private thoughts and experiences that were shared with mental health professionals, led the victim to withdraw support for the prosecution and the case was dropped:

> 'The most important people in my life, and even my abuser, could hear all this information without me knowing the details of what was shared...this lack of information about my notes led me to withdraw support for the prosecution.'

Adult victim of alleged historical sexual abuse by a family member

The Court Stage

The theory: The law and guidance governing the use of third party material in sexual offence cases

The defendant in a trial has the statutory right to apply for the production of a witness or a document and it is for the court to decide whether that application should be granted. The application procedure is contained in a combination of the Judicature (NI) Act 1978 and the Crown Court Rules (Rules 69-73). It should be noted that the principles applicable to third party disclosure applications of a victim's medical or counselling records were considered by the Crown Court in R v Hume [2006] NIJB 147. [20] This case confirmed that the third party application procedure can be used to order disclosure where it is necessary in order for the Defendant to obtain a fair trial. The power to order production is available where the Court is satisfied that the witness's oral testimony or the document/thing in their possession is "likely to be material evidence" [S.51A(1)(a), 1978 Act].

The statutory application process involves the following stages:-

i) The application must be made in writing to the Court and must be supported by an affidavit. It must specify the documents to be produced and the grounds for believing that they are likely to be "material evidence" [S.51A, 1978 Act; Rule 70 (2) and (3)].

ii) The application must be served upon the person in possession of the documents and that person must be afforded the opportunity of indicating whether or not they wish to make representations (orally or in writing) in response to the application [Rule 70 (4) and (5)].

iii) If the person indicates that they wish to be heard on the application, the Court must fix a hearing, which takes place in private (i.e. in a closed Court but with the defence and prosecution present) [Rule 70 (6) and (7)]. The trial judge may give such directions as are considered appropriate for the hearing of the application. The person to be subject of the proposed summons may be represented at the hearing [S.51A (8) 1978 Act].

The reality: how victims third party material is being accessed and used

Feedback to the Commissioner Designate's office indicates:

That disclosure applications are being made late in the process necessitating additional delay or adjournments to the trial date. This practice is expressly cautioned against in Point 6.4 of the practice direction.

Third party material sought from victim support agencies are routinely broad and all-encompassing and often do not stipulate a timeframe governing the agency's potential engagement with the victim or the alleged crime that the order relates to. This raises concerns about whether due consideration has been given to; the ECHR Article 8 rights of the victim, Article 5 of the UK GDPR particularly Principle (c): Data Minimisation or compliance with Point 6.12 of the Practice Direction. The standard text in all examples provided to the Commissioner Designate's office reads:

'all files, non-redacted notes, statements, memoranda, communications, correspondence and records and all other documents howsoever described in the possession, custody, control or power of [third party] relating to [complainant]'

iv) A Court may only issue a summons for production if it is satisfied that the documents are "likely to be material evidence" and that it is "in the interests of justice" that production is ordered.

In addition, the LCJ has also issued the Crown Court Case Management Practice Direction 2019 [21] which includes provisions governing the steps that should be taken by police and prosecution when seeking access to third party material.

Under this direction:

- Third party disclosure applications must be made promptly and well in advance of any scheduled trial dates so that trial dates are not vacated by reason of later applications. [Point 6.4]

- The court will only order the disclosure of such material as is necessary to enable a fair trial to take place and that, in deciding whether to order the release of the material, the court will take into account the complainant's rights under article 8 of the ECHR (the right to respect for private and family life). [Point 6.12 (ii)]

- The defence should lodge and serve their application for third party material no later than ten working days from arraignment (if it is to be dealt with by a High Court judge) or in all other cases no later than then working days prior to the arraignment. [Point 6.14]

- Third parties should be informed of the time and date of the third party application by the applicant. The applicant should send a copy of the notice and supporting affidavit to the PPS and the PPS should take steps to ensure that the complainant is notified of the application and to advise them of their entitlement to make representations. [Point 6.16]

- Third party disclosure application shall be heard at the arraignment or as soon thereafter as the court directs. [Point 6.17]

- The order, if made, will then issue with a court return date, which will be at least seven clear working days after the making of the third party disclosure order. [Point 6.18]

Victims are not routinely alerted by PPS when third party applications are being made to the court, thereby removing their ability to make representations and contravening Point 6.16 of the Practice Direction. PPS have advised that they are not consistently notified by defence of such applications and are not therefore in a position to notify the victim.

Victim support agencies who routinely receive these requests report having been given no notice of the original application or opportunity to be represented at oral hearings which removes any potential for them to have exercised their rights under point 2 and 3 of the 1978 Act Rule 70 (4) and (5) as well as Point 6.16 of the Practice Direction.

In some cases, insufficient time is being given to respond to these orders with two victim support agencies reporting court orders seeking a court return date within hours of the order being received. This contravenes the seven clear working days as outlined at Point 6.18 of the Practice Direction.

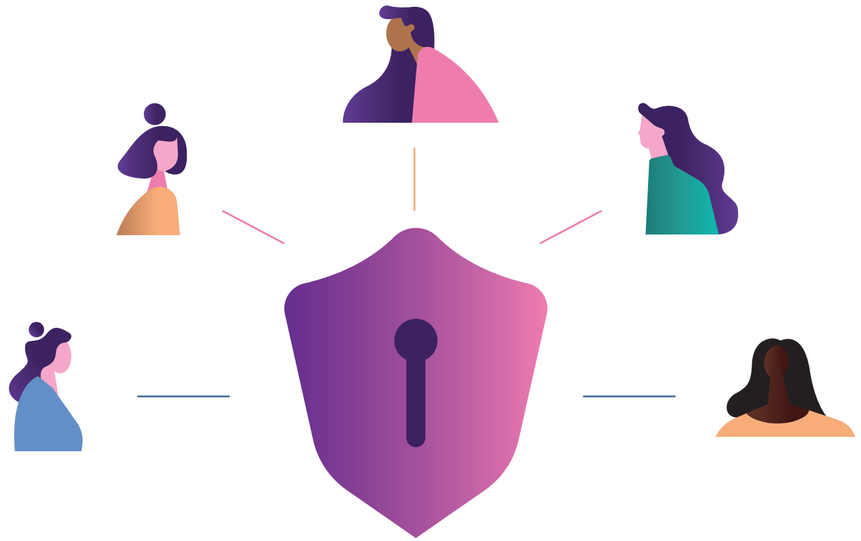
An overview of what should happen in theory and what victims are experiencing in reality is included at Appendix 1.

[20] Crown Court Judgement - The Queen V Martin Hume - Neutral Citation No (judiciaryni.uk)

[21] Case Management in the Crown Court including protocols for vulnerable witnesses and defendants - Practice Direction No. 2/2019 - PD2 of 2019_1.pdf (judiciaryni.uk)

Obligations on the handling of material disclosed in the process

The Case Management in the Crown Court Practice Direction 2019 clearly outlines what victims should be told by police and how applications for third party material should be handled by prosecution and defence. However, the Commissioner Designate's office has been unable to find any guidance issued to defence practitioners regarding the use and handling of any material that is shared with them and the accused, by way of the disclosure process. Whilst all agencies must handle any material received in line with data protection legislation, the Commissioner Designate would like to see clear instructions issued to defence practitioners as part of the disclosure process, reminding them and their clients of their obligations regarding the use and dissemination of all such material. Efforts should be taken to ensure there is a warning included in conjunction with any disclosure about the dissemination or misuse of the material. There should also be clear guidance for court staff as to how any ordered redaction process should be undertaken.



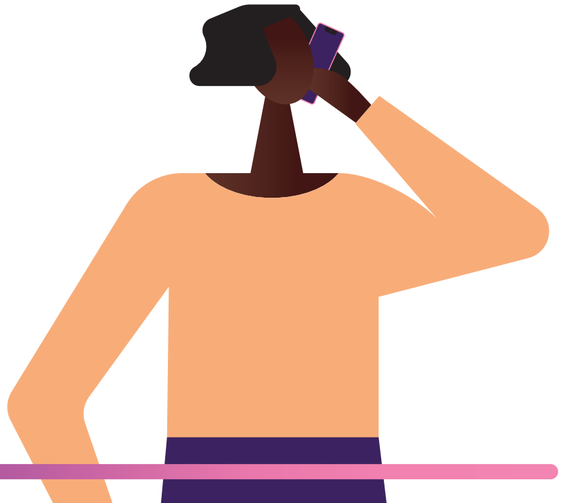
Case Studies

The following case studies provide a sample of the range of disclosure issues that have been brought to the Commissioner Designate's attention. For the purpose of anonymisation, all victims within the case studies will be referred to as "Cathy".

1 Cathy was called as a prosecution witness in a case against her former work colleague. Cathy had concerns about harassment from this individual and was nervous about seeing them again in court so requested special measures. The defence sought access to any counselling or GP notes relating to Cathy. Cathy had originally refused to give consent for access to her GP records, however felt pressured by her employer to consent to the release of these notes and was assured only the Judge would see these. Cathy was subsequently advised that copies of her GP notes had been passed to the defence and that the accused also had sight of these. Attempts had been made to redact the notes however it was still possible to read these notes through the black pen. Cathy was not notified of an application to disclose these notes to the defence so was not able to avail of her right to raise objections to such disclosure.

2 Cathy reported historical child sexual abuse which happened throughout her childhood. The impact of this trauma had led Cathy to engage with mental health services from a young age and had resulted in several suicide attempts and admittance to psychiatric hospitals. All of Cathy's mental health records were disclosed to the defence as part of the case, however, issues arose with documents being sought from different psychiatrists and incomplete records being shared with the courts. When the case first went to trial, it was discovered that some notes were missing, which led to the trial collapsing and causing further delays with a re-trial. There appeared to be no clear review process or quality checks undertaken in the handling of this sensitive data.

3 Cathy came forward to police when she was in her 50's to report historical sexual abuse that occurred when she was a child. She had very positive engagement with the police, however cannot recall giving consent to or being advised of any release of third party material about her. Cathy was subsequently taken aback when she was challenged by the defence barrister at court who used the record of a call that Cathy made to Lifeline (NI's crisis response helpline) to dispute her assertion that she had not disclosed the abuse to anyone before reporting to the police. Cathy was also questioned regarding an application she had made for criminal injury compensation. Cathy was made aware of the compensation scheme by Victim Support NI and was supported to complete this before the two year deadline expired. Cathy felt ill-prepared for the possibility that either of these issues could arise at court and felt that they were used to undermine her on the stand.



It is clear that any attempt to access the personal information of an individual which was shared under an expectation of confidentiality will amount to an interference with the ECHR Article 8 rights of the victim and their UK GDPR rights and is likely to cause distress and alarm. Without a clear understanding of the process or opportunity to review the information being disclosed, victims are left on the back foot, unclear about what information has been shared and lacking any opportunity to either challenge its disclosure (as per the Practice Direction PD2/2019) or its accuracy as per UK GDPR (Article (5)(1)(d)).

The introduction of Sexual Offence Legal Advisors (SOLAs) as part of the Gillen Review recommendations affords victims the right to free and independent legal advice to both understand and exercise their right to object to the disclosure of their private material. It was hoped that the introduction of these roles would help to reduce secondary trauma and attrition in sexual violence cases. Initial feedback from victims and stakeholders has been positive and there has been high levels of victim engagement with the service. The failure to notify victims of their rights to access such support or advise them of third party applications prevents them from availing of this service when it can be of the most benefit. Further work is needed to promote this service and fully embed best practice between the SOLA service and the PSNI, PPS and NICTS. Legislative change is also required to further define the role of the SOLA providing them with a right to audience in court.

Reccomendation #1

The Commissioner Designate **calls on** key criminal justice agencies, the Bar of NI, Judiciary and Other relevant stakeholders to explore non-legislative practice changes, guidance and training. the aim of this is to improve adherence to law and policy regarding the handling and disclosure of third party material **as a matter of urgency**.

This work should include consideration whether victims can be provided with details on the information that the PPS intend to share with defence, in line with disclosure test guidelines.

Reccomendation #2

The Commissioner Designate recommends that the PSNI, PPS and SOLA service should work together on the referral process to ensure that victims are made aware of the sola service at the earliest opportunity and the victims' rights to make representations regarding the disclosure of their personal information.

Reccomendation #3

The Commissioner Designate **calls on** the judiciary to fully implement the Gillen recommendation to ensure that any applications to access or introduce evidence relating to criminal injuries compensation is duly scrutinised before the trial.

Criminal Injury Compensation and the need for restrictions

Any victim of a violent crime who sustained physical or psychological harm may make a claim for compensation under the Criminal Injuries Compensation Scheme 2009 [22], usually up to two years after the incident date. Prompt application to the scheme is encouraged and the Department of Justice fund Victim Support NI to support eligible victims who would like assistance to apply. The time limit governing applications to this scheme combined with the length of time these cases take to reach court generally means that where a victim has chosen to apply to the scheme, this will have happened before the trial completes.

Victims who engaged with the Commissioner Designate's office have highlighted that requests for third party material regularly includes access to applications made by victims for compensation. The only use that appears to be made of such information is by the defence in cross-examination to imply that the allegation has been made in pursuit of financial gain. One victim who met with the Commissioner Designate highlighted that she had been unaware of the compensation process which had been instigated by her Victim Support NI case worker, only to be later questioned on her motivations for reporting the crime when under cross-examination by the defence.

This practice leaves victims of crime in an unenviable position – they can submit their claim, as they are entitled to, within the two years of the incident, but risk that this could be used against them at court. Alternatively they can wait until the completion of the court case (often many years later) to apply, but risk their application being denied due to it being out of time. The government both in NI and other jurisdictions in the UK have introduced such schemes to afford victims financial support and recognition for the harm they have endured. This entitlement to apply for compensation is enshrined in the NI Victim Charter [23], however victims who do apply are having this entitlement used against them in subsequent legal proceedings.

Whilst the ECHR Article 6 rights of the accused means that any probative value contained in a compensation application should be heard in the court, the NI experience raises concern that its use is instead driven by a desire to play into myths and prejudices that a 'genuine' victim of rape would not seek financial redress. It is of particular concern to the Commissioner Designate that this issue continues to plague the experiences of sexual violence victims despite Sir John Gillen's recommendation in 2019:

> **'The Judiciary should carefully scrutinise at preliminary or Ground Rule Hearings, the admissibility of cross-examination on the subject of criminal compensation claims made by complainants. In particular cross-examination on the subject of Criminal Injuries Compensation should only be permitted where there is evidence to support its introduction.' [24]**

[22] THE NORTHERN IRELAND CRIMINAL INJURIES COMPENSATION (AMENDMENT 2020) Scheme (2009) (justice-ni.gov.uk)
Victim Charter | Department of Justice (justice-ni.gov.uk)

[23] Victim Charter | Department of Justice (justice-ni.gov.uk)

[24] Gillen Review - Report into the law and procedures in serious sexual offences in Northern Ireland - gillen-report-recommendations.pdf (justice-ni.gov.uk) Recommendation 13

SECTION

02

Healthcare or Justice? The competing needs of a victim of sexual violence

Most people are affected in some way by a traumatic event in their lifetime. Whilst every victim's response will be individual to them, many victims of serious crime, including sexual violence, will feel confused, distressed and fearful. Engaging in counselling or other therapeutic support can assist a victim to work through trauma and often provides a valuable support for victims who are enduring an agonising wait for a trial to reach court. The provision of pre-trial therapy for adult and child witnesses received significant attention in England, in the aftermath of the tragic death of Frances Andrade in 2013. Frances was a key prosecution witness in the criminal trial, and later conviction of her former music teacher and his wife while she was a young pupil. Police advised Frances not to receive therapy until after the trial in case it affected her evidence. Frances took a fatal overdose a day after the accused began his evidence.

In the subsequent serious case review into Frances' death, Professor Hilary Brown recognised the range of agencies that let Frances down. She noted that '*the police and CPS should promote, (not merely not dissuade) victims from seeking timely counselling' and recommended that 'steps should be taken to ensure that mental ill-health is not seen a barrier to participating in and/or receiving justice*'. [25]

Historically, there has been some unease within the criminal justice system that pre-trial therapy is problematic and, unless carefully controlled, may lead to 'coaching' of the witness by unwittingly helping the client to rehearse and go over their evidence prior to its actual presentation in court. Alternatively, there is an engrained narrative that the therapy will 'contaminate' the evidence: that the client's own recollections of sexual assault might be influenced by the therapist's use of inappropriate or leading questions. [26] This concern has resulted in some victims who have engaged with the Commissioner Designate being discouraged by police officers or therapists from accessing therapy until after the case was over. This advice could result in victims living with deeply distressing psychological symptoms through, what we know to be, a lengthy court process and deprives victims vital support during what can often be a gruelling court process.

The Achieving Best Evidence Guide 2012 for NI is clear that prosecuting bodies have no authority to prevent a victim from receiving therapy but cautions that police and prosecution should be advised so that consideration can be given as to any potential impact. The guide is also clear that any notes taken as part of the therapeutic intervention may be disclosable to the court:

The rules of disclosure place certain responsibilities on the investigator, prosecutor and also third parties, that is to say individuals or bodies who are not part of the prosecution. Therapists will generally be third parties for this purpose. Those responsibilities mean that all material that may be relevant to the issues disputed in the case must be preserved. [27]

[25] Brown H. The death of Mrs A: a serious case review. Surrey: Surrey County Council Safeguarding Adults Board; 2014 - https://www.surreysab.org.uk/wp-content/uploads/2020/09/FINAL-Mrs-A-full-report-26.03.14.doc-Website-Accessibility-update-September-2020.pdf

[26] Jenkins P. Pre-trial therapy. Therapy Today 2013; 24(4): 15–17 - Pre-trial therapy (bacp.co.uk)

[27] DoJ/Criminal Justice System NI - Achieving Best Evidence in Criminal Proceedings - Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy (2012) - achieving-best-evidence-a-practioner-guide.pdf (justice-ni.gov.uk) Pg. 308

This fear induced in the victim by the potential disclosure of notes taken during counselling sessions is having a chilling effect on their willingness to report sexual violence or engage in the system. This fear is further compounded by the fact that disclosure rules apply to all mental health interventions, even those that occurred before the alleged crime. This is particularly traumatic for victims who have had prior mental health issues in their life and/or those who are reporting historical sexual abuse.

'They already had years of records about me, from being in care...being in hospital. I didn't want to give them more for him to be able to see' [victim of rape who postponed therapy for 5 years until after the court case].

In February 2022, the PPS released a draft policy paper on the prosecution of sexual offences. The policy recognises that victims can be reluctant to have counselling during the criminal process for fear that their notes and records may be requested by defence representatives. The policy further states that whilst these notes and records may be requested, this should not deter victims from attending counselling. The contradiction is obvious: the policy simultaneously recognises that survivors' access to therapy is vital, yet in practice, counselling notes remain subject to disclosure.

The ICO report [28] and feedback from victim support agencies in NI also suggests that victims feel under pressure to consent to the access of their personal data to ensure that a criminal prosecution goes ahead. One victim notes:

'I didn't really understand the process and thought I had to agree [to disclosure of third party records] ....I was worried from the outset' [adult who reported child sexual abuse].

If consent is not given then a case may be discontinued. The PPS draft policy states:

'The victim is not required to consent to the release of the material but, if they do not consent and there is a prosecution, the defence may later apply to the court for access to it. If consent is not forthcoming, then this may be a relevant factor in deciding whether the Test for Prosecution is met.' [29]

Whilst this statement no longer features in the final PPS policy which has been recently published, its existence in the previous draft speaks to the potential views held within the system and the subsequent belief by victims that failure to consent may lead to a decision not to prosecute.

Furthermore, the use of therapeutic notes as evidence and their suitability for use in a criminal trial remains controversial. The purpose of therapy is to explore emotions, not to investigate facts. To the criminal justice system, a victim's account is evidence and as such must be objective. The Crown Prosecution Service (CPS) guidance for providers of pre-trial therapy in England and Wales acknowledges that:

"Therapy is not an investigative process and that, as such, there is no expectation that a therapist should take verbatim notes in relation to victim disclosures of potential criminality for the benefit of criminal justice agencies. The limitations of note taking during therapy should be considered by prosecutors when assessing the impact of any apparent inconsistencies"

Analysis undertaken by the Law Commission in England & Wales as part of their recent consultation on the prosecution of sexual violence cases, highlights concerns that the pursuit of a victim's personal records may be used as a way to undermine the credibility of the victim and perpetuate and exploit myths about the character and morality of what the public often expect from an ideal victim.

[28] Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations - ICO opinion-whos-under-investigation-20220531.pdf

[29] PPS Policy for Prosecuting Sexual Offences February 2022 – draft for consultation - Policy for Prosecuting Sexual Offences (ppsni.gov.uk) Pg. 16

'...Such material "can be used to direct jurors' attention away from the alleged incident and place undue focus on issues such as mental illness or drug use which may prejudice the complainant in the eyes of the jury". There is a likelihood that jurors will "attach exaggerated significance to psychiatric evidence" and "this is likely to have an irrational, distorting influence on juror decision-making to the prejudice of the ... complainant and the fact-finding process".' [30]

The consultation report notes a problem with attempting to use counselling notes as evidence of the unreliability of the victim given that they have *'come into existence in circumstances of trauma and for purposes not concerned with the logic of a criminal trial.'*

Clinical notes of counsellors are not records of facts, but a professional interpretation within the context of the counselling process of the patient's emotional responses to what has occurred. They are not signed off by the victim as amounting to a true record of the conversation that took place between the victim and the counsellor and indeed verbatim notes are rarely taken down.

Given the recognition of the incompatibility between feelings that are expressed in a confidential, private therapy session, the lack of validation that the notes are an accurate representation of the discussion and the requirement for objective evidence in a criminal trial, it raises the question as to why therapy notes are used at all.

Ensuring a Safe Space - Professional and Ethical Dilemmas for the Therapist

Confidentiality is the cornerstone of therapeutic work, it is a protective boundary that enables therapists to build a trusting relationship with their client and provide the client with a safe space to process their trauma. However, in practice therapists supporting sexual violence victims are being left to make decisions that could jeopardise the confidential, trusting, and private relationship with victims that is essential to their work. This is particularly evident in the case of note taking. For therapists, note taking is a crucial part of providing a safe, high quality service tailored to each client's specific needs. Therapists can often work with several clients at the same time across a number of sessions and in these instances notes act as a practical and therapeutic aid. Where a client has experienced sexual violence however these notes are frequently requested by the police or courts. Therapists are aware of the potentially damaging effect that their session notes can have on a client's case and may as a result keep limited accounts of their sessions including only facts of how the client presented and the topic discussed.

[30] Evidence in Sexual Offence Prosecutions - Law Commission Pg. 83-84

The Impact on the Therapeutic Relationship

The fear of disclosure and how their notes may be used can lead to victims feeling on 'heightened alert' during support sessions which rely upon the creation of a trusted and safe environment. Support agencies in NI have reported that their clients will often ask during initial assessments if their therapy records could be 'used against them.' Clients will also ask if they can check the notes from previous sessions to review what they have said.

'I didn't feel like I could be as open as I should have been when I was at my lowest...I held stuff back that I should have talked about' [adult victim of sexual assault].

The impact of this on an individual's life cannot be underestimated. One victim, who shared her experience with the Commissioner Designate, has eloquently outlined the impact that disclosure had on her recovery. Her experience can be found at Appendix 2.

Instead of focusing on recovery and processing their experience during therapy sessions, victims are remaining vigilant as to how their words could be used against them in court. Worse still, victims and survivors are avoiding therapy altogether in order to pursue justice. Victims are effectively forced to make a choice between their healthcare and justice. [31]

[31] Keep Counselling Confidential | Rape Crisis England & Wales

SECTION 03

The Legal Framework for Disclosure – A Case for Change

During a criminal prosecution, there are several competing interests at play: the defendant's fair trial rights; the state's interests in prosecution; and the victim's rights to privacy. Confidentiality in the records belongs to the individual, not a treating medical practitioner (See e.g. Ashworth Hospital Authority v MGN [2002] 1 WLR 2033, at para 63) [32]. An order requiring disclosure will therefore only comply with ECHR Article 8 if it pursues a legitimate aim, is in accordance with law and is proportionate. Undoubtedly, the disclosure of relevant material is an essential part of a fair trial and must be handled fairly, effectively and justly by all parties.

'The court will only order the disclosure of such material as is necessary to enable a fair trial to take place and that, in deciding whether to order the release of the material, the court will take into account the complainant's rights under article 8 of the ECHR (the right to respect for private and family life)'. [33]

The Commissioner Designate believes that we need to strengthen legislation to ensure that victims of crime have greater protection over their personal information where they have a reasonable expectation of privacy. Since the current procedures governing disclosure are prescribed by primary legislation, substantive reform of those procedures or the principles governing disclosure will require the introduction of new legislation by the NI Assembly.

[32] Judgements – Ashworth Security Hospital vs MGN Ltd - House of Lords - Ashworth Security Hospital v MGN Limited (parliament.uk)

[33] Case Management in the Crown Court including protocols for vulnerable witnesses and defendants - Practice Direction No. 2/2019 - Case Management in the Crown court inlcuding Protocols for Vulnerable Witnesses and Defendants_0.pdf (judiciaryni.uk)

Strengthening the Law Surrounding Third Party Material

Comparative Jurisdictions

Northern Ireland is not unique in its examination of this issue. The disclosure of third party material has also been cause for concern for victims' rights advocates in England & Wales. The UK's ICO report led to the Attorney General for the UK and the CPS issuing updated guidelines on the disclosure process. The British Psychological Society (BPS), the National Counselling Society (NCS), Royal College of Psychiatrists, and the UK Council for Psychotherapy (UKCP) have called for a rethink of the current guidelines amidst fears of the "unnecessary use of private medical information at the expense of survivors."

The Law Commission in England & Wales also considered this issue in their consultation [34] to reform how evidence is used in sexual offence trials and have considered the approaches adopted in Ireland, New South Wales, Tasmania and Canada. A summary of this analysis is outlined below, however, further information can be found in the Law Commission's report.

Ireland

The Criminal Law (Sexual Offences) Act 2017 inserted a new section into the Criminal Evidence Act 1992 which introduced a procedure, whereby the defendant must apply to the trial court for the disclosure of counselling records. This means that in cases where the victim is unwilling for their notes to be shared, the final decision on disclosure will be made by a Judge who has heard from all the relevant parties and who has taken account of the balancing interests at play. The legislation outlines the range of factors that the court should consider before granting disclosure to the accused including, the extent to which disclosure is necessary, the probative value of the record and the likelihood of harm to the complainant that disclosure may cause. The specific text outlined in the Act can be found at Appendix 3.

The Department of Justice in Ireland published "A Review into the Protections for Vulnerable Witnesses in the investigation and prosecution of sexual offences" in 2020. The working group, established as part of the review, found:

"that 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 applications with due regard to the competing rights and interests at stake." [35]

It should be noted that the updated Section 19A of the Criminal Evidence Act 1992 applies solely to the counselling records of sexual offence complainants. The working group noted that medical records can also include information in respect of which there is a reasonable expectation of privacy and recommended that any future law reform should consider whether the disclosure of medical records should also have similar protections.

[34] Evidence in Sexual Offence Prosecutions - Law Commission

[35] Review of Protections for vulnerable witnesses in the investigation and prosecution of sexual offences (2020) - Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences - cc917997-ad32-4238-9468-29a6bccd76c1.pdf (www.gov.ie) Pg. 79

Comparative Jurisdictions

New South Wales

Like many Australian States, New South Wales (NSW) provide a presumption of non-disclosure of counselling records. Research in Australia had shown the widespread use of counselling records by the defence to search for inconsistencies in early reports, highlight discrepancies in complainants' versions of what they said had happened to them, and would often be used to humiliate and undermine the witness's credibility on the witness stand.

In 1997, NSW became the first jurisdiction in Australia to protect the confidentiality of sexual assault victims' counselling records in the criminal trial process with the passing of the Evidence Amendment (Confidential Communications) Act 1997 (NSW) [36]. The protection is referred to as the Sexual Assault Communications Privilege (SACP) [37] and details can be found at **Appendix 4**. Further reforms in December 2010 strengthened the privilege by enhancing victims' participation by:

- Establishing a new right for victims (or their lawyer) to assert the privilege in court;
- Requiring parties to ask permission (leave) from the court before issuing a subpoena;
- Expanding the factors a court must consider before granting leave to disclose records;
- Allowing the court to consider a 'confidential harm statement'; and
- Expanding the range of sexual assault victims who can claim the privilege.

In introducing the amendments in 2010, the Attorney General for New South Wales, the Hon. John Hatzistergos, affirmed that 'these reasons are still significant 13 years on' and summarised the purpose of the privilege as follows:

"The sexual assault communications privilege is designed to limit the disclosure of protected confidences at the earliest point possible: for a complainant who has gone to a counsellor to discuss the sexual assault, it is little comfort to him or her if the documents are not to be adduced [used] in evidence at the trial if they have already unnecessarily been disclosed to the defence by an order of the court. The privilege is not just designed to prevent the unnecessary adduction of evidence of protected confidences before a jury but is designed to prevent the inappropriate subpoena of such confidences in the first place, and then the inappropriate granting of access to them." [38]

The privilege protects a broad range of confidential information including:

- Counselling notes;
- Medical notes;
- Mental health records;
- Drug and alcohol records;
- Financial counsellor records;
- Letters and referrals between health professionals;
- Emails from a school counsellor to a parent or teacher;
- Social worker reports held by Centrelink or Department of Housing.

[36] NSW Evidence Amendment (Confidential Communications) Act 1997- act-1997-122 (nsw.gov.au)

[37] NSW Sexual Assault Communication Privilege - Sexual Assault Communication Privilege (nsw.gov.au)

[38] The Hon. John Hatzistergos, Second Reading Speech, Courts and Crimes Legislation Further Amendment Act 2010, NSW Parliament, 24 November 2011.

A victim of sexual assault can consent to the release of this information, but there are strict procedures for doing so and the victim must understand their rights in this regard.

At the early stage of a criminal case there is 'absolute privilege', which is effectively a prohibition on protected confidences being subpoenaed or used in evidence. At the later stage of a court case, the Judge or Magistrate can override the victim's confidentiality if there are compelling reasons.

A court can also consider a 'confidential harm statement' that describes the harm the victim is likely to suffer if the information is released or used. This statement needs to be in the form of an affidavit, and can be written by, or on behalf of, the victim.

Counsellors, service providers and other support agencies, may sometimes be asked by the victim or their lawyer to prepare a confidential harm statement. It is up to the Judge or Magistrate to decide whether it will accept and consider a statement. But the statement can only be seen by the victim, the victim's lawyer and the Judge or Magistrate. The prosecution, the defence and the accused cannot see it.

These protections apply post charge and there is nothing to prevent police requesting records prior to charge.

Tasmania

The Tasmanian model provides an absolute ban on the use of pre-trial therapy notes which means that, unless the victim consents, the introduction of any counselling communication as part of trial proceedings is prohibited. This rule only governs communication about harm caused by the alleged offence so does not in theory prevent the disclosure of the notes from prior counselling sessions which the victim may have underwent before the alleged crime. Details of the Act can be found in **Appendix 5**.

Canada

The prosecution must provide the defence with the list of material it holds. The defence must persuade the court that it should examine the records and if that threshold is met, the third party must provide the material to the court. It is for the Judge to decide what must be disclosed to the defence though applications cannot be made at preliminary proceedings. [39] The victim can invoke section 7 and 11 (d) of the Charter of Rights and Fundamental Freedoms and the Criminal Code ss 278 and Bill C-46 ss 278 to defend their privacy and equality rights and oppose defence applications for the disclosure of their personal records.

The threshold for disclosure requires the defence to set out the grounds for relevancy and the code outlines a range of factors which may be considered as insufficient grounds for disclosure. These are further detailed in **Appendix 6**.

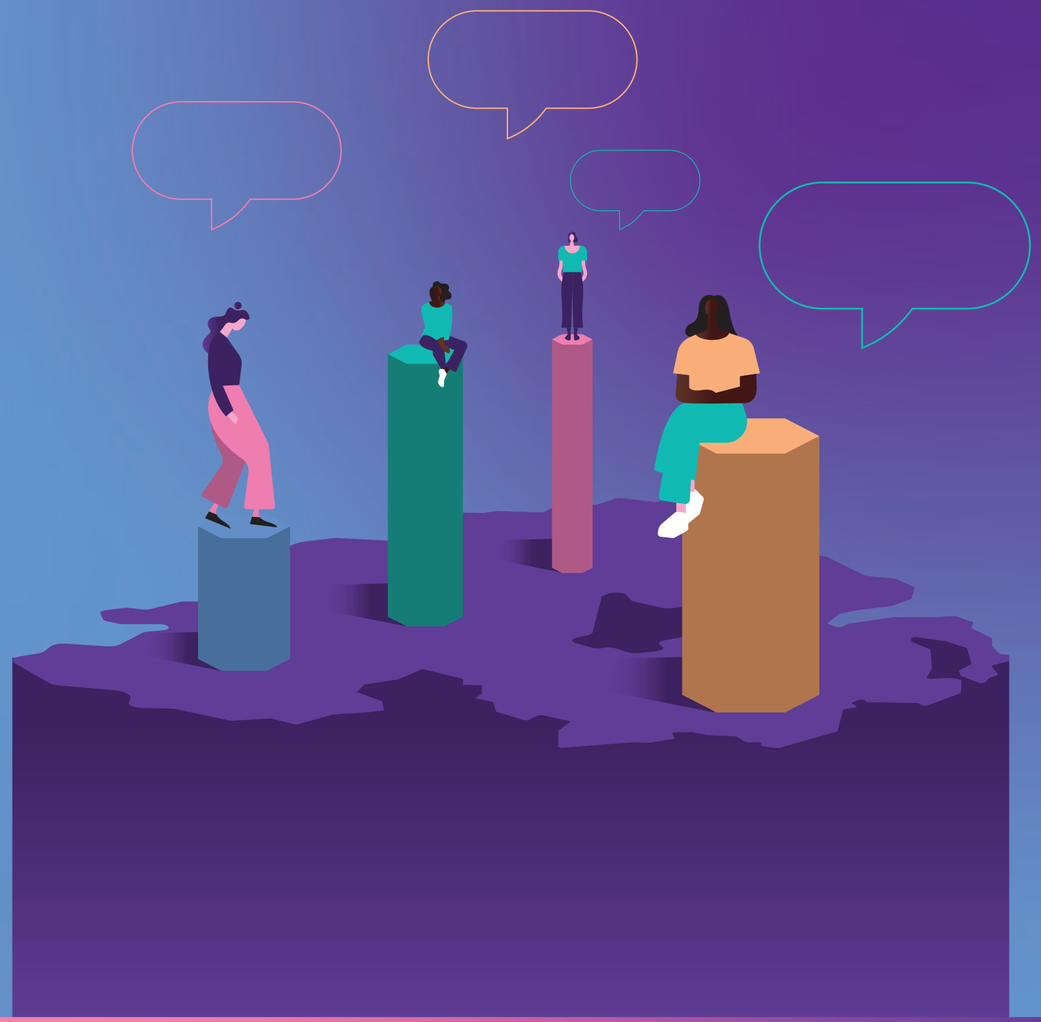
The Law Commission in England and Wales indicate their preference for the Canadian approach in their recent consultation. They note the potential artificial distinction that could be made between different types of records e.g. the same information could be recorded in someone's medical records and counselling records, **therefore they believe that the focus of the regime should centre on the expectation of privacy and not the type of record**.

The Commissioner Designate began this journey with a specific focus on the access to counselling records by the criminal justice system and the chill factor this created for victims of sexual assault in particular. In exploring this issue however, it is clear that there is a broad range of third party material being sought over which a victim should expect a reasonable level of privacy such as GP records, school records and mental health records. It is clear therefore that privacy concerns are greater than solely the practice governing therapy notes and as such any changes to the law or practice should apply to all such material.

[39] Criminal Code (Canada), s 278.3(2)

SECTION

04



Conclusion - A proposed Northern Ireland model

The current failure to adhere to existing law and guidance raises significant concerns about breaches of a victim's ECHR Article 8 privacy rights. A review of comparable jurisdictions has highlighted that this issue is not unique to NI or the UK, but in fact has been identified and addressed in many other common law countries through the introduction of increased safeguards in law, which better ensure the privacy rights of victims alongside the ECHR Article 6 rights of the accused.

This issue has been highlighted as a cause for concern at Westminster for some time. It has been discussed in both the House of Commons Home Affairs Committee, through their inquiry and subsequent report on the Investigation and Prosecution of Rape [40] from March 2022. The recent Law Commission review and consultation [41] which was requested by the UK Government has been published and views are being sought on the adoption of a disclosure regime akin to the Canadian model. Whilst the outcome of the Law Commission's consultation remains to be seen, it is clear that the Westminster government are keen to increase protections in this area with proposed amendments to be made to the current Victims and Prisoner's Bill which is progressing through Parliament.

The Commissioner Designate believes that, even if we improve our compliance with existing guidance, there remains insufficient safeguards to protect the privacy rights of victims engaging with our criminal justice system. Without such safeguards, she fears that for some victims the price to be paid in pursuing a justice outcome will remain too high.

Reccomendation #4

The Commissioner Designate recommends that NI should seek to introduce new legislation governing the access and disclosure of third party material which reflects the learning and best practice from other common law regions.

[40] Investigation and prosecution of rape (parliament.uk)

[41] Evidence in Sexual Offence Prosecutions - Law Commission

Appendix 1
Third Party Disclosure Journey

Police Should Advise

- What info they want & why they need access
- That the investigation is not dependent on consent for disclosure
- That defence may seek access at a later stage
- How data will be handled
- Only sections that meet the disclosure test will be shered with defence

Victims Report

- Having no memory of discussion with police
- Uncertainty regarding what they were signing
- Feeling pressured to consent in order for the investigation to proceed
- No referral for legal advice/SOLA service

PPS Should

- Review all material to see if it meets disclosure test notify victim of third party application
- Notify victim of third party application

Victims Report

- No notification of third party requests so cannot object
- PPS unwillingness to share disclosure material with the Victim

At Court

- Applications should be well in advance of trial
- Third parties & PPS should be notified of application hearing date
- PPS should notify victim of hearing date
- PPS should notify victim of right to make representation

Victims Report

- Cases adjourned on the morning of or days prior to trial date
- Victims unaware of third party hearings
- PPS unaware of third party applications

Throughout The Process

- Agencies continue to seek excessive amounts of irrelevant information
- Victims are unaware of their Article 8 rights and how to exercise them
- Agencies fail to follow the guidance on how third party material should be sought and processed

Appendix 2

Victim Personal Testimony

The following record, bravely shared by a victim of sexual violence, eloquently outlines the impact that the fear of disclosure can have on those in need of support whilst also supporting a criminal investigation.

'After the offense, I was unable to cope and reached out to a confidential counselling service to help navigate my inner turmoil and manage the situation I had been catapulted into, through no fault of my own. Counselling to me felt like a lift-jacket when I was close to drowning. I felt like it could be a private space that I could, with help, work through my deepest, darkest thoughts to try and minimise their impact on my daily activities. As the assault had left me with a complete mistrust of everyone, it took a lot for me to connect with my first counsellor, but I went in very open and raw. I was learning how to identify, develop, and use tools to help me cope with triggers. It took a lot of mental and physical preparation to manage the difficult emotions attached with the trauma and how they encroached into my personal relationships, which was discussed in depth during these sessions.

Counselling services make you aware that your notes are private, unless requested by court. At the beginning of my journey, court wasn't something I conceptualised. I don't believe I had the capacity to think ahead, as I was just focusing on making it through the day. It was not until I was sent to retrieve my own counselling notes for trial, did I realise that my deepest emotions, thoughts, and feelings were not private. Just like everything else he had infiltrated into, the accused, his defence and so many strangers had an insight into my deepest thoughts – my sense of self. This realisation shook me to my core. As the raw feelings flooded back, I lost all trust in those around me again. All the confidence I had begun to build since working with the therapist was shattered. I had sunk very low and voiced this in my counselling, so believed the defence would paint me as a weak, mentally imbalanced, or pathetic individual. The disclosure of notes, and exposure of my vulnerability, added to my overwhelming, palpable anxiety.

I became distant, pretending that I was okay and ultimately not engaging in counselling services that I so desperately needed. I was not afforded the luxury of using mental health services as I was conscious that any words I uttered were not just between myself and the counsellor. I felt like counsellors were just there to document what I was saying. It would be recorded, filed away, read by people who didn't know me and ready to be used against me. It felt invasive and as if it was thieving my opportunity to use therapy as a cathartic experience to discuss complex feelings that arise from an experience like this.

Counselling notes do not capture the anguish an individual feels. They are a small window to a depth of emotion. In the daytime I was fighting flashbacks, but at night-time I was awake, afraid to fall asleep and didn't know how to cope. Instead of learning how to help myself, I was breaking down to doctors and mental health nurses in the GP surgery and relying on medication to help heal my 'broken' brain, believing that was the only way I could feel better. Doctors could see the physical impact of how mentally drained I was, but every time they urged me to open-up to counsellors, I just couldn't. It led to me believing that even going to the doctors was useless, as they too were just documenting my decline. I believed the court would think I was so useless I couldn't be a witness and the case would collapse, so I stopped reaching out to anyone.

I developed unhealthy coping mechanisms, PTSD and self-destructive behaviours. Without therapeutic help, I ultimately ended up feeling either feeling numb, depressed, or dissociating, as I had no self-soothing coping mechanisms and didn't know how to manage my emotions in a constructive and effective way. Eventually I came to a crisis point, where I had to seek immediate help from the police and lifeline because I had nowhere else to turn. The shame and guilt came to a head, manifesting itself in very serious physical reactions and suicidal ideation, all because I didn't know how to deal with how I was feeling. Supressing this depth of emotion can cause long term effects, which I have eventually had to deal with and have been hospitalised for. All which I believe could have been avoided if I had a healthy way to deal with stress and professionals to openly talk to, without fear of repercussions.

Since then, I have worked very hard to build a good relationship with a new counsellor, but that was still restricted with my fear of disclosure. I tread the line between needing to speak, and fear of things being documented, very carefully.

I only discuss what is crucial for me at that time, and am racked with anxiety after sessions, agonising over things I have said. This has meant that a lot of my healing has been on my own, and it has been very, very lonely. No one has the right to abuse you. But just as importantly, no one has the right to see your most intimate thoughts and feelings that arise because of that abuse. It is a complete invasion of my privacy, so I believe that I and other victims have the right to privacy so that we can talk without fear or judgement, ask without anxiety, and navigate difficult emotions in a positive, private environment to recover from very traumatic events.'

Appendix 3
Irish Example

Section 39 of the 2017 Act reads as follows: - Disclosure of third-party records in certain trials

39. The Act of 1992 is amended by the insertion of the following section after section 19:

(1) In this section
'Act of 1995' means the Civil Legal Aid Act 1995;
'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.

(2) In criminal proceedings for a sexual offence the prosecutor shall notify the accused of the existence of any counselling record but shall not disclose the content of the record without the leave of the court given in accordance with this section.

(3) An accused who seeks disclosure of the content of a counselling record may make an application ('disclosure application'), in writing, to the court—
(a) providing particulars identifying the record sought, and
(b) stating the reasons grounding the application, including grounds relied on to establish that the record is likely to be relevant to an issue at trial.

(4) An accused who intends to make a disclosure application shall, not later than the beginning of such period as may be prescribed inrules of court, notify the person who has possession or control of the counselling record, the complainant, the prosecutor and any other person to whom the accused believes the counselling record relates of his or her intention to make the application.

(5) Where no disclosure application has been made by the accused in respect of a counselling record under subsection (3) and the prosecutor believes that it is in the interests of justice that the record should be disclosed, the prosecutor may make a disclosure application in writing to the court.

(6) Where the prosecutor intends to make a disclosure application under subsection (5), he or she shall, not later than the beginning of such period as may be prescribed in rules of court, notify the person who has possession or control of the relevant record, the complainant, the accused and any other person to whom the prosecutor believes the counselling record relates of his or her intention to make the application.

(7) The court may, at any time, order that a disclosure application be notified to any person to whom it believes the counselling record may relate.

(8) The court shall hold a hearing to determine whether the content of the counselling record should be disclosed to the accused and the person who has possession or control of the counselling record shall produce the counselling record at the hearing for examination by the court.

(9) 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 referred to in subsection (8).

10) An determining, at the hearing referred to in subsection (8), whether the content of the counselling record should be disclosed to the accused under subsection (11), the court shall take the following factors, in particular, into account:
(a) the extent to which the record is necessary for the accused to defend the charges against him;
(b) the probative value of the record;
(c) the reasonable expectation of privacy with respect to the record;
(d) the potential prejudice to the right to privacy of any person to whom the record relates;
(e) the public interest in encouraging the reporting of sexual offences;
(f) the public interest in encouraging complainants of sexual offences to seek counselling;
(g) the 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.

(11) (a) Subject to paragraph (b) and subsection (12), after the hearing referred to in subsection (8), the court may order disclosure of the content of the counselling record to the accused and the prosecutor where it is in the interests of justice to do so.
(b) The court shall order disclosure of the content of the counselling record to the accused where there would be a real risk of an unfair trial in the absence of such disclosure.

(12) (a) Where an order is made pursuant to subsection (11), in the interests of justice and to protect the right to privacy of any person to whom the counselling record relates, the court may impose any condition it considers necessary on the disclosure of the record.
(b) Without prejudice to the generality of paragraph (a), one or more of the following conditions may be included in an order made pursuant to subsection (11)—
(i) that a part of the content of the counselling record be redacted,
(ii) that a copy of the counselling record and not the original be disclosed,
(iii) that the accused and any legal representative for the accused not disclose the content of the counselling record to any person without leave of the court,
(iv) that the counselling record be viewed only at the offices of the court,
(v) that no copies, or only a limited number of copies, of the counselling record, be made,
(vi) that information concerning the address, telephone number or place of employment of any person named in the counselling record be redacted from the record,
(vii) that the counselling record be returned to the person who owns or controls the said record,
(viii) that the counselling record is used solely for the purposes of the criminal proceedings for which the record has been disclosed.

(13) The court shall provide reasons for ordering, or refusing to order, disclosure of the content of a counselling record pursuant to subsection (12).

(14) (a) Subject to paragraph (b), a disclosure application shall be made before the commencement of the trial of the accused.
(b) Where, upon application by the accused, the court considers that the interests of justice require the making of a disclosure application after the commencement of the trial, the court may direct that such an application may be made.

(15) For the purposes of a hearing pursuant to subsection (8), 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.

(16) In addition to the meaning assigned to that expression by section 27 of the Act of 1995, 'legal aid' in that Act means representation by a solicitor or barrister, engaged by the Legal Aid Board under section 11 of that Act, on behalf of a complainant or witness in relation to a disclosure application that concerns the complainant or witness.

(17) 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.

Appendix 4

New South Wales – Sexual Abuse Communications Privilege (SACP)

Under SACP law, the later stages in a criminal court case are called 'criminal proceedings'. At this point (usually when the case has arrived in the District Court), the privilege becomes 'qualified'. This means that the Judge or Magistrate can override the victim's confidentiality if there are compelling reasons.

The SACP legislation sets a very high bar for the release of private therapeutic information. The court must weigh up the public interest in protecting a victim's confidentiality against the public interest in an accused person's right to a fair trial.
This balancing exercise is called 'the leave test'. The court uses this test at each point in the case where it must decide between confidentiality or disclosure.

Before a court will issue a subpoena or allow a protected confidence to be inspected or used in evidence, three questions must be considered:

1. Does the information have substantial probative value in the case?
2. Is the information not available from another source? (If the information can come from another source, which doesn't involve a confidential relationship, then it should come from there); and
3. Is the public interest in preserving confidentiality substantially outweighed by the public interest in admitting the information into evidence?

'Substantial probative value' has been given the meaning as "something that has a greater than significant chance of having a real bearing on an issue in the case." In other words, the information needs to have crucial evidentiary value, not just a mere chance of being important. For example, in sexual assault trials, the complainant's credibility is often a significant issue, so the question a judge may ask themselves could be - are the documents sought in the subpoena likely to affect the court or the jury's assessment of the complainant's credibility?

In applying the public interest test, the court must consider these factors:

- the need to encourage victims of sexual offences to seek counselling;
- the effectiveness of counselling is likely to be dependent on maintaining confidentiality;
- the public interest in ensuring that victims of sexual offences receive effective counselling;
- the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person;
- whether disclosure of the protected confidence is sought based on a discriminatory belief or bias;
- whether disclosure of the evidence is likely to infringe a reasonable expectation of privacy.

Appendix 5

Tasmanian Model

EVIDENCE ACT 2001 - SECT 127B

Communication to counsellor

(1) In this section – counselling communication means a communication made before, on or after the commencement of this Act in circumstances that give rise to a reasonable expectation of confidentiality or a duty of confidentiality if the communication is made;

(a) by a victim of a sexual offence to a counsellor in the course of counselling or treatment of the victim by the counsellor for any emotional or psychological harm suffered in connection with the offence; or
(b) to, or in relation to, that victim for the purposes of that counselling or treatment;

counsellor means a person –

(a) whose profession or work consists of or includes the provision of psychiatric or psychological therapy to victims of sexual offences; or
(b) who provides, for fee or other reward or on a voluntary basis, psychiatric or psychological therapy to victims of sexual offences for or at the direction of a body or organisation that provides such therapy to such victims;
victim includes alleged victim.

(2) For the purposes of the definition of "counselling communication", in determining whether a communication was made in circumstances that gave rise to a reasonable expectation of confidentiality or a duty of confidentiality it does not matter that the communication was made in the presence of a third party if the third party's presence was necessary to facilitate communication or further the counselling process.

(3) A counselling communication must not be disclosed in any criminal proceedings unless the victim has consented to the disclosure.

(4) A person must not be required, in or in connection with any criminal proceedings, to produce a document that records a counselling communication unless the victim has consented to the production of the document.

(5) Evidence of a counselling communication must not be adduced or admitted in any criminal proceedings unless the victim has consented to the adducing or admission of the evidence.

Note: This section does not appear in the Evidence Act 1995 of the Commonwealth.

Appendix 6

Criminal Code (Canada) Section 278.3

Insufficient grounds

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(a) that the record exists;
(b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
(c) that the record relates to the incident that is the subject-matter of the proceedings;
(d) that the record may disclose a prior inconsistent statement of the complainant or witness;
(e) that the record may relate to the credibility of the complainant or witness;
(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
(h) that the record relates to the sexual activity of the complainant with any person, including the accused;
(i) that the record relates to the presence or absence of a recent complaint;
(j) that the record relates to the complainant's sexual reputation; or
(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

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