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## Privilege, third party disclosure, and mandatory recording of offences

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# Privilege, Third Party Disclosure and Mandatory Reporting of Offences

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# Introduction

- The communications must originate in a confidence that they will not be disclosed
- This element of confidentiality must be essential to the full and satisfactory maintenance of the relation
- The relation must be one which in the opinion of the community ought to be sedulously fostered
- The injury which would ensue to the relation by the disclosure must be greater than the benefit thereby gained for the correct disposal of the litigation

# Privilege Against Self-incrimination

- A. Right not to give evidence at trial
  - B. Right to silence
  - C. Privilege against self-incrimination
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- In *Blunt v. Park Lane Hotel* (1942) 2KB 253 Goddard LJ said: No-one is bound to answer any question if the answer would:
    - In the opinion of the judge, have a
    - tendency to expose him to
    - any criminal charge, penalty or forfeiture which the judge regards as
    - reasonably likely to be preferred or sued for

# Without prejudice privilege

- A privilege may also be granted in respect of communications in furtherance of a settlement. As Keane J noted in *Greencore Group v Murphy* [1995] 3IR 250, ‘parties should be encouraged as far as possible to settle their disputes without recourse to litigation and should not be discouraged by the knowledge that anything that is said in the course of negotiations may be used in the course of proceedings.’

# Journalistic Privilege

- Re Kevin O’Kelly (1974) 108 ILTR 97
- “Journalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of expressed confidence does not create a privilege against disclosure”
- Burke v Central Independent Television [1994] 2 IR 75.
- People (DPP) v Catherine Nevin [2003] 3 IR 321
- Mahon v Keena and others [2009] IESC 64

# Others

- Informant privilege
- Parliamentary privilege
- Article 15.12 reads: 'All Official reports and publications of the Oireachtas or of either house thereof and utterances made in either house wherever published shall be privileged.'
- Ahern v Judge Mahon and others [2008] IEHC 119
- Lawyer/Client privilege
- State Privilege

- Canon 983 § The sacramental seal is inviolable. Accordingly it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion
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- Canon 984 § any knowledge obtained by the confessor during a confession cannot be used at any time later to the detriment of the penitent.

- EH v. JR [1981] ILRM 125
- Johnston v Church of Scientology [2001] 1 IR 682

# The distinction between confidentiality and privileged communication

- doctor and patient, Brady V Haughton [2006] 1 IR 1
- Banker and client Cooper Flynn v RTE [2000] 3 IR 344
- Accountant and client
- Probation officer and probationer

- In Canada and Australia, in sexual offence cases, the general tendency has been to assume that counselling records should remain confidential, and to require defendants to satisfy the relevant court that they need access to them in order to secure a fair trial.

# As Such

- Given the public interest in the admission of all relevant evidence, the interests of justice will often require disclosure of confidential communications
- Courts will however seeks to ameliorate effects – redaction
- When ordered to do so by the court, you will have to disclose
- Even if privileged in the future, client waiver of confidentiality
  
- Only take notes that a counsellor needs for the counselling
- Be aware that at the time of writing your notes that they could be subpoenaed and viewed by “other audiences”.
- Relationship is a confidential one, and there is a public interest in preserving this  
Cooper Flynn v RTE

- Re Kevin O'Kelly [1974] 108 ILTR 97
- 'The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognised privilege.'

# Third Party Disclosure of Counselling Records in Criminal Trials

- **Third Party Disclosure (TPD)** refers to the situation where information does not lie in the hands of the prosecution/the State but in the hands of third parties (e.g. counsellors, social workers, schools).

# Third Party Disclosure

- **The Problem:** Normal rules of disclosure don't apply in this situation.
- Prosecution must disclose material to the defence **BUT** has no obligation to disclose material which is not held by the prosecution.

# General Prosecution Duty to Disclose

- Prosecution has a statutory duty to provide the defence with a 'book of evidence': **section 4B of the Criminal Procedure Act 1967 (as amended)**.
- Prosecution also has a common law duty '...to make available all relevant information...in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes to do so': *People (DPP) v Tuite* (1983) 2 Frewen 175.

# Case Study: Sexual Offence Trials

- General prosecution duty to disclose does not stretch to seeking out and handing over material **in hands of third parties**.
- This has been the subject of controversy in sexual offence trials in particular.
- Material such as counselling records are regularly sought by the defence in order to obtain information that discredits complainant's allegation.



# Attempts to Obtain TPD in Criminal Trials in Ireland

- Defence counsel have tried various mechanisms to gain access to this type of information but all have failed so far.
- 1. Supreme Court has confirmed that the **civil process** of third-party discovery does not apply in criminal trials:
  - *DPP v Sweeney* [2002] 1 ILRM 532.
  - *H(D) v Groarke* [2002] 3 IR 522.



# Attempts to Obtain TPD in Criminal Trials in Ireland

2. Civil **subpoena** procedure (i.e. Summoning a record-holder to court to bring documents) has also been held not to be available:
  - ***F v DPP*** [2008] IEHC 272.



# Attempts to Obtain TPD in Criminal Trials in Ireland

3. It has also been held that trial judges are not **free to devise their own solutions** to allow for TPD in criminal trials:
  - ***HSE v White*** [2009] IEHC 242.
  - **NOTE:** This is a High Court case- still possible Supreme Court might hold that this type of procedure is allowable **BUT** unclear how this would sit with potential claim of privi



# The Current Situation in Ireland

- Very unclear.
- Current rules are **problematic** from perspective of defendants and complainants in criminal trials.
- Constitutional and European Convention on Human Rights protect rights of defendants (Article 38.1 and Article 6, respectively) and complainants (Article 40.1 and Article 8, respectively).

# Memoranda of Understanding

- Initiative to ameliorate problems in the area.
- MoU signed between DPP and various agencies which may hold personal records of complainants (e.g. HSE, Child and Family Agency, One in Four, Dublin Rape Crisis Centre).
- Disclosure should only be made with **informed consent** of person to whom the material relates.

# Memoranda of Understanding

- Prior to disclosure that the accused or his or her legal representative agree to the following:
  - i. The material will be retained in the custody of the legal representatives (Solicitor & Counsel) at all times;
  - ii. The material be copied and used as necessary by the solicitor and/or Counsel [only] for the purposes of the trial;
  - iii. The material be accessed or used by any accused or witness only under the supervision of the said solicitor and/or counsel;
  - iv. No accused or witness will be permitted to take copies of this material into their sole custody outside the supervision of the said solicitor and/or counsel unless directed by Order of the Court and on prior notice to the Office of DPP
  - v. At the conclusion of all criminal proceedings, (including any appeal) the disclosed material (including all copies) will be returned to the Office of the DPP for secure archive storage.

# Criminal Law (Sexual Offences) Act 2017

- This section of the Act is not yet commenced.
- The Act amends the **Criminal Evidence Act 1992** to include for regulation of third party records in certain trials.

# Some Key Definitions in the Bill

- **‘Counselling record’**: ‘...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  
‘Competent person’ means a person who has undertaken training or study or has experience relevant to the process of counselling



# Some Key Definitions in the Bill

- **‘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).’
- **‘Competent Person’**: means a person who has undertaken training or study or has experience relevant to the process of counselling.



- The prosecution must notify the defendant if a 'counselling record' exists but must not disclose the content of the record without obtaining the leave of the court via the new disclosure regime.
- If the defence wants to access the record, a 'disclosure application' must be made in writing to the court.

# Application Process

- Where the defence seeks access to the record, a disclosure **application must be made in writing** to the court detailing:
  - (a) particulars which identify the record; and
  - (b) the reasons grounding the application, including grounds relied on to establish that the record is likely to be relevant to an issue at trial.

# Application Process

- Where the accused intends to make a disclosure application, the record-holder, the complainant and any other person to whom the accused believes the record relates must be notified of the intention to make the application.
- The court may also order that the application be notified to any other person to whom it believed the record may relate.

# NOTE:

- The disclosure process applies **to the prosecution as well as the defence.**
- Where a disclosure application is not made by the accused 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.
- The same notification and hearing process applies whether the application is made by the prosecution or the defence.

# Disclosure Application: Procedure

- Court must hold a **hearing** to determine whether the content of the relevant record should be disclosed to the accused.
- The record-holder must produce the record for examination by the court.
- Record-holder, complainant and any other person to whom the record relates is entitled to appear and be heard at this hearing.

# Disclosure Application: Procedure

- Hearing must be in private and should take place before the trial (but may take place after the trial has commenced if court deems that this is necessary in the interests of justice).
- **Legal Aid** will be available for complainants or witnesses involved in the disclosure application.

**The Bill provides a list of factors which the court will take into account when deciding whether the record should be disclosed to the accused:**

- The public interest in encouraging the reporting of sexual offences;
- The public interest in encouraging complainants of sexual offences to seek counselling;
- The effect of the determination on the integrity of the trial process.

- 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;

# Disclosure: Procedure

- The court must 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’**.
- The trial judge must provide reasons for his/her decision to grant or refuse disclosure and may attach any conditions necessary to the disclosure.

# Disclosure: Attachment of Conditions

- The Bill provides a list of potential conditions which may be attached to disclosure including:
- **redaction** of the record;
- disclosure of a copy of the record, not the original;
- that legal representative of accused **not disclose** content of record to anyone except with the leave of the court;
- that record be viewed only at **court offices....**

# Disclosure: Attachment of Conditions

- ...that no copies or only a limited number of copies of the record may be made;
- that information concerning the address, telephone number or place of employment of any person named in the relevant record be redacted from the record;
- that the record be returned to the person who owns/controls the record.



# Waiver of Provisions

- Complainant may waive the application of these rules if s/he decides not to object to disclosure of the record.



# MANDATORY REPORTING

- **Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012**

It is an offence to withhold information on certain offences against children and vulnerable adults from the Garda Síochána.

# Offences Covered

- murder, assault, false imprisonment, rape, sexual assault and incest.
- An offence is committed when a person who knows or believes that such offences have been committed by another person against a child or vulnerable adult, fails without reasonable excuse to disclose that information to a member of the Garda Síochána

# Scope

- The offence exists even if the information acquired is about an offence which took place prior to the Act being enacted, and even if the child or vulnerable adult is no longer a child or vulnerable adult.

# Penalties

- Failure to report is punishable by fine and/or up to ten years imprisonment.
- [if maximum sentence for the [undisclosed ] offence is life, then not reporting it can merit a maximum of 10 years; 14 = 7; 10 = 5 ; all others 3]

# Defence

- Defence available where the child or vulnerable adult made the person acquiring the information aware of their wish for the Garda Síochána **not to be informed**, or when certain persons or certain professionals hold the reasonable view that the Garda Síochána should not be informed.

# Presumption

- it shall be presumed that if—
- the child is **under 14 years, or is a vulnerable person suffering mental disorder/ intellectual disability**
- they do not have the capacity to form a view as to whether the information should be disclosed to the Garda Síochána.
- PRESUMPTION MAY BE REBUTTED

# **IF NOT REBUTTED defences may be raised by an accused person**

- S4 (4) it shall be a defence for the accused person to show,
- (a) that a parent or guardian of the child or vulnerable person indicated, on behalf of the child or vulnerable person, that the information should not be disclosed to the Garda Síochána, and
- (b) that the accused person knew of and relied upon that view.

- The parent or guardian must show they had reasonable grounds for forming the view they did and, in so doing, he or she acted and is continuing to act bona fide in the best interests of that child or vulnerable person.
- (7) The defence shall not apply if the parent or guardian is a family member of the person who is known or believed to have committed the [unreported] offence.

it shall be a defence for the accused person (including parent or guardian) to show

- (a) that a member of a **designated profession** providing services to the child or vulnerable person concerned in respect of the harm caused as a result of the offence, made known his or her view, on behalf of that child or vulnerable person, that the information relating to the offence should not be disclosed to the Garda Síochána, and
- (b) that he or she (the accused person) knew of and relied upon that view.

# Accused as designated profession

- it shall be a defence for the accused person who is a member of a designated profession to show that—
- (a) he or she is a member of a designated profession who is providing services to the child or vulnerable person concerned in respect of harm caused to him or her as a result of the offence, and
- (b) he or she formed the view, in relation to that child or vulnerable person, that the information should not be disclosed to the Garda Síochána.

# that defence is established only if

- (a) the member of the designated profession had reasonable grounds for forming the view in relation to the child or vulnerable person
- for the purpose of protecting the health and well-being of that child or vulnerable person,
- and

# And in forming that view

- acted and continues to act in a manner, and
- applied and continues to apply the standards of practice and care,
- that can reasonably be expected of a member of that profession in forming such a view in the circumstances concerned.

# Same defence applies to an accused person who is a **prescribed person**

- = A person employed or otherwise engaged by a prescribed organisation providing services to the child or vulnerable person.
- Prescribed organisations to date are national Rape Crisis Centres, Pieta House, Southwest Counselling Centre

# Offences Against the State Act 1998

- Creates an offence where a person has information which he or she knows or believes might be of material assistance in—
  - (a) preventing the commission by another person of a serious offence, or
  - (b) securing the apprehension, prosecution or conviction of another person for a serious offence
- and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

# Children First Act 2015

- The legislation applies to those organisations engaged in 'relevant services' defined as:
- 'Any work or activity which is carried out by a person, a necessary and regular part of which consists mainly of the person having access to, or contact with, children including including:  
medical practitioners; registered nurses;  
teachers; social workers; gardai; psychologists;  
members of the clergy.

- Reporting is required:
- ‘where a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person, *that a child has been harmed, is being harmed or is at risk of being, he or she shall, as soon as practicable, report that knowledge, belief or suspicion* to the Child and Family Agency’ (TUSLA).
- (Harm means assault, ill-treatment, neglect or sexual abuse of a child).

# When not required?

- he or she knows or believes that a child who is aged 15 years or more but less than 17 years is engaged in **sexual activity**, and the other party to the sexual activity concerned is not more than 2 years older than the child concerned
- no **material difference in capacity** or maturity between the parties engaged in the sexual activity concerned, and the relationship between the parties engaged in the sexual activity concerned is not intimidatory or exploitative of either party,
- Where satisfied that a child is has not being harmed, is **not being harmed, or at risk of being harmed**,
- the child concerned has made known to the mandated person his or her view that the activity, or information relating to it, **should not be disclosed** and the mandated person relied upon that view.
- where the sole basis for the mandated person's knowledge, belief or suspicion is as a result of information he or she has acquired, received or become aware of
- - another mandated person,