Department of Justice

Consultation on proposals for inclusion in a Victims & Witnesses of Crime Bill

Response from the Commissioner Designate for Victims of Crime for Northern Ireland

February 2025

1. General Comments

1.1 The Commissioner Designate welcomes the opportunity to provide input into this consultation on proposals to include in the Victims & Witnesses Bill. She welcomes the opportunity to shape how the office should be established in legislation and what powers and duties should be considered both for the statutory Commissioner role but also for the various criminal justice agencies /organisations that the office with engage with.

1.2 The introduction of this Bill provides a fantastic opportunity for elected representatives as well as this Government to demonstrate their commitment to victims of crime. Victims have conveyed their frustration and disbelief at how they have been treated by the criminal justice system to this office since it was established just over two years ago. Seeing this Bill coming to fruition will provide some solace and comfort to victims that progress is being made in certain areas and that their voice is being heard and acted upon.

1.3 The Commissioner Designate particularly welcomes the opportunity to provide insight and inform legislative proposals to address some of the well-documented issues regarding disclosure of victims' personal information in sexual offence cases.

Proposal One – Statutory Role for the Commissioner for Victims and Witnesses of Crime

2.1 Proposed scope and focus of the statutory Commissioner

Victims & Witnesses

2.1.1 The Commissioner Designate is supportive of the proposed scope to include witnesses within the remit of the office and to change the title of the role / office accordingly. It is important that the criminal justice system is able to meet the needs of all witnesses, both on the prosecution and defence sides, and recognise the vital role witnesses play in the pursuit of justice. The success of this should be monitored by this office using the Witness Charter for Northern Ireland in the same way as it will monitor performance against the Victim Charter.

Dedicated focus on vulnerable groups

2.1.2 The Commissioner Designate supports the need to maintain a focus on vulnerable groups. Overall systemic improvements are needed for all victims of crime however there are undoubtedly specific challenges for particular groups of victims which need dedicated resourcing to better understand and address unique needs. The statutory Commissioner should be able to, based on data and trends, identify additional groups so it is therefore sensible to build in flexibility in the legislation at the outset. It will also be important that the Terms of Reference, referred at 4.7 of the consultation proposal, are not so prescriptive that they prevent the statutory Commissioner from independently identifying priority areas of work and that the required resources are in place to enable this.

Remit wider than Justice

2.1.3 It is essential that the statutory role is able to promote and champion the interests of victims and witnesses of crime across various sectors and government departments as is the case with the Victims' Commissioner role in England and Wales.

This is based on the reality that the experiences and needs of many victims of crime extend beyond the remit of Justice. This is evidenced and borne out by engagement the Commissioner Designate has had directly and indirectly with victims of crime. Approximately 12% of all victims that have engaged with the Commissioner Designate's office over the past two and a half years have raised issues they have had with a statutory body outside the criminal justice system. These issues predominantly relate to health (including mental health), housing and education.

The consultation document, at section 4.9 states the intention for this to be foundational legislation that could be built upon in the next mandate, noting the pressures on the legislative programme within this mandate. The consultation proposes not to broaden the remit of the statutory role in this mandate and cites a need for further engagement with other NICS Departments on the possibility of a wider cross-departmental remit for the role.

The Commissioner Designate is concerned that if the broader remit of the statutory role is not included in primary legislation under this mandate, it may not be a priority in future mandates. Any legislation relating to victims and witnesses of crime should be robust enough and with a remit that addresses and spans all of their needs across government departments.

Efforts should be made to explore options that would include this provision in primary legislation, whether or not it is commenced at this time or at some future point.

The Commissioner Designate recommends therefore as a minimum that all departments would at the very least be required to cooperate with and respond to any issues or concerns raised by the Commissioner for Victims and Witnesses of Crime. This list could be added to in the future in secondary legislation or by regulation.

Alternatively, the key elements of health, education and housing could be included at this stage and additional areas for inclusion can be considered through future legislation/regulation. Other key areas that have been flagged with the Commissioner Designate are:

- Infrastructure – which has responsibility for ensuring development and maintenance of public realms as well as governance and regulation of transport and private hire vehicles and;
- Finance, which holds responsibility for oversight of civil law reform.

It is worth noting that the Scottish Government is currently progressing legislation to introduce a Victim and Witnesses Commissioner. Section 3 of the Scottish Victims, Witnesses and Justice Reform (Scotland) Bill[1] includes a provision to amend the Commissioner's function, by regulations, to include proceedings other than criminal proceedings. This is known as the civil function and aims to promote the rights and interests of persons involved in non-criminal proceedings.

Finally, one of the proposed duties for the statutory role states: *'the Commissioner shall keep under review the adequacy and effectiveness of law and practice relating to the rights of victims and witnesses.*' Law and practice relating to the rights of victims and witnesses spans multiple Departments and is not solely confined to the justice sphere. This makes it all the more important to ensure a broad remit for the statutory Commissioner which allows for a comprehensive approach to addressing the victims' and witnesses' needs.

[1] Victims, Witnesses, and Justice Reform (Scotland) Bill, Part 1; Section 3: Civil function, Scottish Government, April 2023.

2.2 Proposed duties and powers of the statutory Commissioner

2.2.1 The Commissioner Designate is supportive of the proposed duties and powers of the statutory Commissioner.

2.2.2 With regards to the proposed power '*to provide advice or information on any matter concerning the interests of victims and witnesses'*, the Commissioner Designate recognises the intention that the role be restricted from intervening in individual cases and as such this proposed power would not include providing advice directly to victims and witnesses. It may be helpful for this to be more clearly stated in the wording of this power to avoid any confusion.

2.2.3 The final bullet point in Section 4.12 under powers states that the statutory Commissioner will have the power *'to do anything, apart from borrowing money, which they consider is (a) appropriate for facilitating: or (b) incidental or conducive to the exercises of its functions'*. The Commissioner Designate is in agreement about the office not being permitted to borrow money, however wishes to note the importance of the office being permitted to fund initiatives by applying for appropriate grant funding.

2.3 Periodical formal review of the effectiveness and operation of the Victim Charter

2.3.1 The Commissioner Designate welcomes the proposed ongoing power to monitor compliance with the Victim and Witness Charters. This is likely to inform the content of the annual reports and will no doubt be informed by information gleaned from criminal justice agencies and the engagement undertaken with victims and support providers throughout the year.

2.3.2 The requirement to undertake a more in-depth review of the effectiveness of the Charters provides the opportunity for a more systematic analysis of the suitability of the existing Charters, identifying areas where the Charter may be falling short and informing recommendations for government on potential new or strengthened rights or entitlements for victims and witnesses.

2.4 Restrictions

2.4.1 The document clearly sets out the intention that the role will be limited to high level thematic issues as opposed to exercising any function in relation to individual cases. It is understood however that this restriction would not prevent the Commissioner from exercising their power to make representation concerning the interests of victims and witnesses by bringing or intervening in judicial proceedings such as a Judicial Review, where there is a clear thematic issue of concern or where the Commission could helpfully assist the court in evidencing such issues.

2.5 Privilege for publications

2.5.1 The Commissioner Designate supports the proposal that relevant publications would be exempt from challenge under the law of defamation, however, would encourage the Department to consider expanding this exemption to cover statements made by the Commissioner or their staff.

2.5.2 Granting absolute or protected privilege as appropriate is essential in ensuring that the Commissioner can fulfil their role independently, transparently and without fear of legal retaliation. Without such privilege there could be a perceived chilling effect in their ability to rigorously scrutinise or highlight failings which could undermine their effectiveness in promoting victims' interests.

2.6 Miscellaneous Provisions

2.6.1 The Minister is proposing (see sect 4.17) '*that provisions should be included to give the Department of Justice the power to amend the duties and powers of the Commissioner and to amend the list of specified criminal justice organisations by regulation'*. This proposal is supported as it allows scope for the remit to be amended within the justice sphere in the future without the need for additional primary legislation. This should however also include organisations and Departments outside of the justice sphere and incorporate the civil function in a similar way to the Scottish approach outlined earlier in this response.

2.6.2 The Commissioner Designate recognises the need for flexibility to be built into primary legislation to enable quicker updates and reducing the need for unnecessary parliamentary time. It is understood that any such amendments by regulations would still remain subject to Assembly scrutiny before sign off. Such accountability helps ensure changes

remain within the scope of the parent provision and brings transparency and confidence to the process.

2.6.3 A provision that ensures the statutory Commissioner role is not left vacant for any longer than a specified time period should be considered under this section.

2.7 Role in Domestic Homicide Reviews

2.7.1 Domestic Homicide Reviews (DHR) play an important role in terms of identifying learning and improvements that can be made by statutory agencies in the aftermath of such tragic circumstances. While reviews can play a crucial role, effective implementation is critical to ensuring any mistakes or oversights by statutory bodies are not repeated in the future.

In England and Wales, a DHR mechanism was put in place in 2011. Following a decade of conducting reviews at a regional level, it became apparent that little was known nationally about whether the recommendations were being implemented effectively.

In light of this, a key commitment in the UK Government's Tacking Domestic Abuse Plan resulted in the Domestic Abuse Commissioner establishing a domestic homicides and suicides oversight mechanism. The scope of reviews was also widened to reflect the broader nature of deaths linked to domestic abuse and are now termed Domestic Abuse related Death Reviews.

Following the establishment of the oversight mechanism, the Commissioner publishes annual reports setting out key findings from domestic abuse related death reviews. This includes recommendations for local agencies and national government to better learn lessons and prevent future deaths.

Learning from this experience, the Commissioner Designate believes its role should be focused on quality assurance and providing independent oversight to monitor implementation of review recommendations (the second proposed option) rather than managing the whole process and taking on the Senior Oversight Forum (SOF) Chair role.

2.7.2 This would make more practical sense given the statutory Commissioner will not have responsibility for any operational delivery relating to recommendations and can maintain that separation and independence

from the relevant agencies. Consideration should also be given as to the relevant links that such an oversight role may have with the Adult Protection Board for NI.

2.7.3 Adequate resourcing will need to be in place to enable this function to be performed effectively. Additionally, this function needs to be reflected in the duties of statutory bodies.

2.8 Proposed duties on criminal justice organisations re the Commission

2.8.1 The Commissioner Designate is supportive of the proposed duties on criminal justice organisations. Within the consultation document (Sect 4.30), two duties the Minister is proposing on relevant criminal justice organisations are '*to respond to any report making recommendations by the Commissioner within 56 days of publication*' and '*A relevant criminal justice organisation which receives a request must respond to that request so far as reasonably practicable*'. These should also be added under proposed powers for the statutory Commissioner section. This would provide a belt and braces approach to ensure the office has the leverage to fulfil its function. Such a power should also extend to all government departments if the remit of the role is accepted as extending beyond justice agencies.

2.8.2 It is not clear from the document what sanctions if any would be in place if an agency failed to comply with these duties therefore it may be helpful for the Department to consider at the outset whether there is any need for an enforcement power to be included in legislation. This point also reads across the Proposal Two of the consultation which requires criminal justice organisations to publish evidence of Victim Charter compliance.

2.8.3 It should be noted that the Office of the Police Ombudsman Northern Ireland (OPONI) is absent from the list of criminal justice organisations at Annex A. OPONI are responsible for dealing with complaints from victims of crime relating to their experience with the PSNI and therefore the Commissioner Designate believesit should be included in the list of organisations within scope.

2.9 Financial Implications

2.9.1 It is noted that estimated budgets are currently indicative. Any decision regarding the proposed role with regards to DHRs will impact on this.

2.9.2 The Commissioner Designate role is currently based at Knockview Buildings, Stormont. The suitability of such a venue in terms of accessibility and perceived independence from the Department are both factors which will be a consideration for any future statutory Commissioner.

Proposal Two – Criminal justice organisations to provide or publish statistical victim information, including evidence of Victim Charter compliance

3.1 Compliance with the Victim & Witness Charters by service providers

3.1.1 The Commissioner Designate supports a duty on service providers to be enshrined in legislation. This will help to improve data collection and review compliance with the Charters, so that the performance of criminal justice agencies/organisations is being monitored and used to drive any necessary improvements. Agencies would also need to demonstrate compliance with the Witness Charter if the role is extended as this currently isn't the case.

3.1.2 A similar approach should be taken to the one adopted in England and Wales and could include the provisions set out below:

- Criminal justice bodies to collect compliance information on the services they provide under the Charters, underpinned by regulations setting out what information must be collected and shared and in what form. This will include direct feedback from victims to hear about and learn from their experiences.
- Criminal justice bodies to share information on their Charter compliance with one another and the statutory Commission as part of the wider duty to keep their compliance with the Charter under review.
- The statutory Commissioner to keep compliance with the Charter under review by participating in joint reviews of compliance information with criminal justice bodies. This will allow the statutory Commission to generate collective insights into how compliance is working and to resolve issues collectively.

- Charter compliance information to be published so that there is cross-system transparency for how the criminal justice system delivers for victims.

3.1.3 As noted at point 2.8.2, it would be helpful that consideration is given as to what potential sanctions would be in place if agencies failed to comply with their statutory duty in this respect.

Proposal Three – Pre-trial Independent Legal Representation

4.1 Legislative provision for independent legal representation for victims of serious sexual offences

4.1.1 The Commissioner Designate strongly supports the proposal to allow for independent legal representation for victims of serious sexual crime. This is a longstanding recommendation from the Gillen Review and one that has only been partially implemented with the introduction of Sexual Offences Legal Advisors (SOLAs) in Northern Ireland. It is the view of the Commissioner Designate that it is long past time that the remaining component of Gillen Recommendation 40 is implemented to enable victims to exercise the right to appear in court to object to the introduction of their previous sexual history, object to disclosure of private material to the accused's defence team or to ensure such material is restricted to the minimum necessary. The proposals outlined within the consultation document would, if implemented, give effect to these remaining outstanding components of the Gillen recommendation.

4.1.2 The SOLA service has proven itself to be a lifeline for victims of serious sexual offences as they engage with often lengthy and traumatising justice processes. Victims who have availed of SOLA support have told the Commissioner Designate time and again that the legal advice and assistance provided to them was invaluable, including in cases where third party material (TPM) disclosure is being sought or applications for previous sexual history to be admitted are raised.

4.1.3 Victims also continue to tell us that the support offered by the SOLA service should go further, and the desire to have independent legal representation continues to be frequently raised by victims of sexual and domestic abuse-related crime in meetings with the Commissioner Designate.

4.1.4 The extension of the SOLA role would complement the new statutory framework for TPM disclosure in the event that this is introduced via the Victims & Witnesses of Crime Bill. Victims of crime will require independent legal representation who have right of audience in a pre-trial hearing in cases where they may be objecting to an applicant's request for access to TPM, so it is logical that this would be introduced alongside legislative changes to the TPM disclosure regime.

4.1.5 As pointed out in the Gillen review, independent legal representation for victims of crime is not a new concept and Northern Ireland may be considered something of an outlier in not giving right of audience for legal representatives of victims of serious sexual crime. Legal representation at various stages of the justice process is common in civil law jurisdictions, is integrated in quasi-adversarial systems in Scandinavian countries, and is present in some form in multiple regions of Australia and Canada, India, the Republic of Ireland, Namibia, Scotland, and certain US states. It has been recommended that independent legal representation is introduced in the United Kingdom in successive reviews including the Stern Review, the report by then-Victims' Commissioner for England Dame Vera Baird, and by academics examining procedural inadequacies in sexual offences trials in Northern Irish and across the UK.[2] These recommendations have taken place within the broader context of victim Article 8 rights being increasingly recognised within criminal justice processes by the ECHR,[3] within the EU Victims' Rights Directive,[4] and in the Istanbul Convention.[5]

4.1.6 Providing independent legal representation to victims in the circumstances outlined would also serve the purpose of recognising the harm done to victims of crime as individuals, and enable our adversarial process to better reflect that reality as well as safeguarding the rights of victims within the trial process.

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2 Iliadis, Smith & Doak, *'Independent separate legal representation for rape complainants in adversarial systems: lessons from Northern Ireland'*, Journal of Law and Society, Volume 48, Issue 2, June 2021, Pages 250-272.

3 In ECHR: Y v Slovenia the court stated that *"A person's right to defend himself [sic] does not provide for an unlimited right to use any defence arguments. … While the defence had to be allowed a certain leeway to challenge the applicant's credibility, cross examination should not be used as a means of intimidating or humiliating witnesses."*

4 Directive - 2012/29 - EN - EUR-Lex provides at (38) that *"Persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships [or] victims of gender-based violence … should be provided with specialist support and legal protection."*

5 CETS 210 - Council of Europe Convention on preventing and combating violence against women and domestic violence

4.2 Funding of independent legal representation

4.2.1 To satisfy the requirement of equality of arms at trial, the independent legal representation offered to victims in these circumstances must be either at the same standard as the other parties represented, or have the resources to employ a professional to carry out the required role. At present, the SOLA service consists only of qualified solicitors. For the equality of arms requirement to be met, resources and process must be in place to instruct barristers to represent victims at pre-trial hearings where the occasion necessitates it.

4.3 Further issues for consideration

Questions about application for Criminal Injuries Compensation (CIC)

4.3.1 The Commissioner Designate is aware that questions relating to whether a victim has applied for Criminal Injuries Compensation are often asked in cross-examination, particularly in sexual offences trials. This issue has been raised by multiple victims of rape and sexual crime who have shared their experiences of the justice system with the Commissioner, and has been documented by other victims and in court observer research.[6] The benefit and thrust of these questions appear to rely on their own set of 'twin myths' – that if a victim has applied for compensation they are making false accusations for financial gain, and if they haven't then the allegation must be false as they mustn't have sufficient confidence in their claims to seek compensation for what has occurred. The value of such questions, and indeed their desired effect, undoubtedly relies on the unconscious bias and belief in rape myths held by our society.

4.3.2 Raising the question of Criminal Injuries Compensation, something that victims of violent crime are entitled to apply for and which is rarely questioned at trial for non-sexual or domestic abuse-related offences, can trigger any number of myths or prejudices. This includes the better known 'twin myths' – that most (mainly female) rape victims are promiscuous and likely therefore to have consented to sex, and also of low morals, so therefore not a credible person who should be believed – and the myth that women are 'gold-diggers' who make false allegations for financial gain.

[6] See Kennedy, '*Bearing Witness: Report of the Northern Ireland Court Observer Panel 2018-19',* Victim Support NI, 2021.

4.3.3 Given the established trend of this line of questioning, and its tendency to rely on unconscious bias and societally-held rape myths, the Commissioner Designate recommends that questions about Criminal Injuries Compensation should be subject to the same regulatory process as questions about Previous Sexual History with the merits of inclusion being adjudicated at a pre-trial hearing. This would bolster Gillen Review Recommendation 13 that questions about CIC should be scrutinised by the Judiciary at Ground Rules Hearings and cross-examination should only be permitted where there is evidence to support its introduction. It would be a logical step to include questions about CIC within the remit of independent legal representatives for victims as this falls within the scope of Article 8 rights and victim should be able to avail of a legal representative to object to disclosure of this material in the same way.

Future Proofing

4.3.4 As outlined below, the Commissioner Designate recommends that the law around TPM disclosure is extended to all victims of crime, on the basis that every victim should enjoy the right to privacy of confidential records insofar as it does not infringe upon an accused's right to a fair trial. It therefore follows that the provisions within the Victims & Witnesses of Crime Bill should be future-proofed to allow for independent legal representation for any victim who wishes to object to disclosure of TPM. Whilst such applications do not arise as frequently in non-sexual offences cases, those victims should be able to avail of publicly-funded legal representation to protect their Article 8 rights if required.

4.3.5 The Commissioner Designate encourages the Department of Justice to also make provision in law for an appeal mechanism in cases where TPM access is ordered and the decision is deemed to be incorrect or unfair. Such provision helps safeguard victims' rights and helps promote fairness.

4.3.6 A flexible, future-proofing approach should be applied to this provision more generally to incorporate mechanisms which allows for adjustments and updates (such as potential future developments in pre-trial hearing structures) without the need for complete revisions in primary legislation.

Victim awareness of entitlement to representation

4.3.7 As the statutory entitlement to independent legal representations for victims would be a new initiative, there is a substantial risk that not all eligible victims will be informed of their entitlement in a timely fashion. This issue has previously arisen on a number of occasions, such as victims being inadequately informed of existing Victim Charter entitlements, failures of justice agencies to refer victims to support services, and failures by solicitors to alert domestic abuse victims to entitlements such as the Domestic Abuse Waiver. These examples point to the need for a clear, unambiguous obligation to be placed upon a specific agency to inform victims of serious sexual offences that they are entitled to independent legal representation and provide a referral or signposting pathway at the appropriate stage. As victims would benefit from support at the earliest possible stage, the most logical referral pathway might be from the PSNI. Further steps would be required from the police to ensure that referrals are being made, given that current referral levels of victims from PSNI to the existing SOLA service remain low.

Need to establish information sharing parameters

4.3.8 If a victim is to be entitled to legal representation, it would likely be necessary for that representative to be informed of certain details of the case to enable them to carry out their role robustly. It is therefore necessary to establish specific parameters of what files, evidence and information should be shared with victim legal representatives, along with timeframes to avoid delay. It would also be essential to establish timeframes for informing victims' legal representatives of intention to make TPM or previous sexual history applications so that representatives have the requisite time to consider and object to applications if need be.

Towards Gillen Recommendation 41

4.3.9 The Gillen Review acknowledges that work needs to be undertaken to scope out whether there is a case for extending legal representation for victims during examination-in-chief and cross-examination at the trial itself. This recommendation has been echoed by academic analysis of the Northern Irish system[7]. In their examination of independent separate legal representation in

[7] *Supra* at note 1.

adversarial systems, Iliadis, Smith & Doak have recommended a 'Gillen Plus' model of separate legal representation, *"whereby the representative could intervene not only in relation to sexual history and medical and counselling records, but also in relation to other sensitive material, such as digital and school records, or where leave is sought to introduce evidence of the complainant's previous 'bad character'."* They further argue that *"the power to make representations on behalf of the complainant should continue into the trial phase to ensure that their rights and interests are protected in the event that late applications are made."* Iliadis, Smith & Doak also expressed concern about how a victim's Article 8 interests would be represented in instances where late sexual history applications were made or questions were asked during trial that departed from pre-trial ground rules, stating:

"[W]e remain concerned that [the Gillen recommendations] do not go far enough to provide a sufficiently robust check on late sexual history applications, as counsel must be able to respond to the complainant's evidence as it emerges in trial. As such, access to SLR should not be confined to pre-trial hearings. Representatives should be able to protect complainants' rights and interests by objecting to specific questions, especially in light of research evidence indicating that advocacy practice often departs from formal evidential and procedural rules, as well as from specific judicial instructions/guidance issued in the pre-trial phase."

4.3.10 The Department may wish to consider whether a limited role should be built into the current legislation for independent legal representatives at trial stage to fulfil these functions, and at the very least future-proof legislation so as not to prohibit its later introduction if the evidence supports such a reform. Key to this is putting adequate monitoring mechanisms in place to assess how the new provisions for independent legal representation work in practice and whether a case is established for the extension of that role.

<u>Ensuring practice follows process</u>

4.3.11 Whilst placing independent legal representation on a statutory footing will go some way towards better protecting the rights and interests of victims, cultural change requires practice as well as law to evolve. Therefore it is important that such a law change is accompanied by sufficient training and education to ensure that the systems in place are being adhered to as they should be. This should include clear policy and practice guidance for all relevant professionals, which supersedes any more limited Court Rules and unifies

policy guidance in this area in line with the new primary legislation. Monitoring the roll-out of independent legal representatives for victims, including by seeking the views of victims themselves, will also be crucial to gauging the success of recommendation 40 and what would be a procedural and cultural shift.

4.3.12 The Commissioner Designate is aware that NI specific research into how previous sexual history is raised and challenged during sexual offences trials is nearing completion. This research may also usefully inform the proposed legislative changes being considered as part of the Victims and Witnesses Bill.

Proposal Four – Third Party Material disclosure applications

5.1 Overview

5.1.1 The Commissioner Designate strongly supports proposals to reform the laws and rules on access to, and disclosure of, TPM. Using a statutory application form would ensure consistency of approach in seeking TPM disclosure, afford greater clarity and specificity for both third parties over what information has been sought and for victims considering whether they have any objections to disclosure, and better assist judges in their deliberation of whether to seek production of a record or disclosure to the defence.

5.1.1 The Commissioner Designate respects that the Article 6 right of the accused is absolute, and that reform must be made cautiously and responsibly so as to ensure that the right to a fair trial remains protected. It is the view of the Commissioner Designate, however, that **the delicate balance between a defendant's right to a fair trial and the privacy rights of victims of crime is not being achieved under current legislative arrangements**, and that there is space to improve the protection of a victim's rights without detriment to an accused's Article 6 rights.

5.1.2 There is ample evidence that the disclosure of material where an individual had a prior expectation of confidentiality can increase the distress and harm felt by victims of crime. This is particularly true of medical and counselling records. It is essential, therefore, that the evolution of law and policy development in this area is informed and guided by trauma-informed research. In almost every other setting, an individual's consent must be provided before a disclosure of such confidential materials would be made. The current law and policy framework around TPM disclosure must be looked at through this lens.

5.1.3 It is in keeping with commitments under the draft Programme for Government (PfG) to make legislative and policy change to make the justice system more trauma-informed. Meeting this objective will necessitate embedding trauma-informed thinking not only in front line service delivery but also in legal and policy development. Trauma-informed approaches emphasise empowering survivors and giving them control over their experience. Trauma-informed practices are built on safety and trust. Disclosing sensitive personal information, against a victim's wishes, not only undermines their agency but

can cause further re-trauma. The Commissioner Designate believes that building greater protections into legislation can help minimise this trauma whilst in no way compromising the accused's right to a fair trial.

5.1.4 The Commissioner Designate is of the view that legal reforms should apply not only to serious sexual crime cases, but also all other crime types as **the law should protect privacy rights of all victims.** Tightened rules around TPM disclosure should apply not only to counselling notes and medical notes, but to other personal or confidential materials such as school records and social services records.

5.1.5 Codifying the boundaries around disclosure in legislation and accompanying regulations will help align practice guidance and rules governing disclosure and clarify the duties on all professionals working in the criminal justice sphere. This will ensure that all stakeholders are clear on their role and responsibilities and guarantee greater consistency and compliance, upholding the rights of both victim and defendant throughout the justice process.

5.1.6 Any legal change must be accompanied by robust judicial case management to ensure the law is applied correctly. The law should govern how TPM disclosure is handled at all stages of the justice process, from investigation through to the conclusion of court proceedings.

5.1.7 This is not a new or novel issue. It has been acknowledged in multiple other common and civil law jurisdictions that TPM disclosure practices amounted to a violation of victim privacy rights and were an impediment to justice, resulting in multiple models of reform which this jurisdiction can draw upon for its own programme of reform.

5.2 Impact of current disclosure practice: What victims have told us

"The rule of law requires that those who commit criminal acts should be brought to justice. Its enforcement is impaired if the system which the law provides for bringing such cases to trial does not protect the essential witnesses from unnecessary humiliation or distress."[8]

5.2.1 The severe impact of current practice around TPM disclosure was first highlighted to the Commissioner Designate by a young woman who she met

[8] R v A (No 2) [2001] UKHL 25, [2002] 1 AC 45 at [91]-[92] (Lord Hope).

with to discuss the gruelling justice process the young woman had just endured. 'Cathy', not her real name, had been groomed, abused, and seriously sexually assaulted between the ages of 14 and 17 by an adult male perpetrator. At the time, 'Cathy' had been under the supposed care and protection of the Northern Ireland Health & Social Care system and statutory agencies were aware of her experiences. One of the most striking aspects of Cathy's story is that she postponed getting any counselling or therapy to help her heal from the years of abuse and trauma for fear that her counselling notes might be accessed by legal professionals and used in court. Cathy waited five years for the case to reach court and the offender to plead Guilty to six counts of sexual assault.

5.2.2 The Commissioner Designate has since talked to many other 'Cathys' (male and female), each of whom has their own harrowing story of how the current disclosure rules profoundly affected their recovery from the heinous sexual attacks and abuse they were subjected to. Some explained how they postponed or opted not to get medical or therapeutic support to help recover from the trauma of sexual crime, others felt they had to self-censor what they disclosed during therapeutic or medical treatment, others again withdrew from the case to avoid experiencing their most intimate thoughts and feelings being pored over by police, lawyers, judges or possibly their abuser.

5.2.3 The Commissioner Designate accepts that the majority of TPM accessed by the courts is only reviewed by judges and does not pass the test to be passed on to defence teams. **The very act however of a record being produced to the court for judicial scrutiny is in and of itself a violation of privacy which can cause immense distress. Any such proposed violation of privacy should be subject to boundaries of likely relevance, necessity and proportionality which are clearly codified in the law.**

5.2.4 The Commissioner Designate's report, *'A Second Assault'*[9], which explores the impact of current TPM disclosure practice on victims and the justice process, found that disclosure practices continue to be a significant source of trauma and violation. The report found that:

[9] CVOCNI, *'A Second Assault: The impact of third party disclosure practice on victims of sexual abuse in Northern Ireland'*, November 2023, available at CVOCNI - A 'Second Assault' Report_V6.pdf

- Many victims felt pressured to 'consent' to police requesting counselling notes, medical records, or phone/online messages from third parties, or not recalling having given consent;
- Many victims felt pressured to consent to access of their private records or messages for fear their case would not continue otherwise;
- Many victims were not informed that their private information had been passed on to judges, prosecutors or defence counsel, or were informed but were not told which specific information had and hadn't been shared;
- Some victims explained how they were dissuaded from seeking counselling or mental health support in case they were seen as being coached, their records were used against them, or that their evidence may not be as compelling or credible if they didn't remain in a traumatised state.

5.2.5 One person described how:

"'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."

Another shared:

"I've not been able to do therapy until this year [seven years after the attack]. They said I needed to remain traumatised to recall what happened."

5.2.6 Through their stories, multiple victims demonstrated to us how significant procedural issues continue to arise regarding how TPM disclosure is handled in the justice process. Examples include:

- Information being requested and shared beyond that which is relevant, necessary or proportionate;
- Prosecutors being unwilling to notify victims about specific detail of material shared in case it is framed as them 'coaching' or 'tipping off' victims;
- TPM sought from victim support agencies routinely being broad and all-encompassing, often not stipulating 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 Practice Direction 2/2019[10];

- Victims not being informed by the Public Prosecution Service (PPS) when third party applications are being made to the court, thereby removing their ability to make representations and contravening Point 6.16 of Practice Direction 2/2019;
- Applications being made and granted in some courts without time for objections to be made or considered, including in some cases applications being granted on the same day;
- Frequent and late applications for TPM disclosure being made, contributing to significant further delay within the system.

5.2.7 A victim told us:

"There were times I was in court bi-weekly for months on end. Every time I attended an NHS psych appointment those notes were sought. Every time it hindered the case going forward."

5.2.8 These experiences echo the findings of the Law Commission's 2023 examination of how evidence in sexual offences prosecutions are handled[11]. The report noted that particularly in sexual offences cases, the combination of adversarial criminal trials, disclosure of intensely personal but not always relevant materials, and the pervasiveness of rape myths, is often a relied-upon defence formula which serves to deeply re-traumatise victims.

"Complainants often fear – with good reason – that, even where those records are not relevant, deeply personal material will be revealed and used against them to traumatic effect and to secure an acquittal. As a result, some complainants will not proceed, or therapy may be compromised or not sought."[12]

5.2.9 This is all the more concerning when one considers that evidence of a victim's mental ill-health is often used as a means to discredit them, in spite of the fact that it is people with mental health vulnerabilities that are more likely to be victims of assault, sexual assault, and repeat victimisation.[13]

[10] Case Management in the Crown Court including Protocols for Vulnerable Witnesses and Defendants Practice Direction No. 2/2019 - PD2 of 2019_1.pdf
[11] Law Commission, '*Consultation Paper 259: Evidence in Sexual Offences Prosecutions',* 23 May 2023, available at Law Commission Documents Template
[12] Law Commission, *ibid*.
[13] See Law Commission, *ibid*; also B Pettit et al, '*At risk, yet dismissed: The criminal victimisation of people with mental health problems* (2013)'.

5.2.10 Victims of crime should not have to choose between healthcare and justice. They should not have to restrain or censor themselves in therapeutic or medical settings for fear that their words may be sought, accessed, and used to humiliate and impugn their character in a court setting regardless of that material's relevance to the case at hand. The act of reporting a crime, sexual or otherwise, should not give way to an expectation that the victim must waive their right to privacy, wellbeing, dignity and life simply to achieve justice and to help keep the public safe. For this reason, the reforms proposed by the Department are essential to ensure that the fundamental rights of victims are being adequately protected by our justice system.

5.3 Existing practice

5.3.1 The Commissioner Designate chaired a Disclosure Compliance Working Group consisting of relevant stakeholders between March 2024 and February 2025, to examine pragmatic improvements which might be made in existing policy and practice, short of legislative change.

5.3.2 The Commissioner Designate welcomes the work progressed by police forces across the UK to implement the Information Commissioner's Office (ICO) recommendation that consent is no longer used as a basis for seeking TPM disclosure. As PSNI roll out their revised procedures in this regard, we are likely to see an increase in the number of applications for TPM disclosure at pre-trial or trial stage from Defence Counsel. It is therefore essential that the rules governing court access to such material codified in law to ensure that any such disclosure request has been clearly and transparently assessed as being relevant, necessary and proportionate and that victims and third parties have been given sufficient time to make objections to such disclosure if they wish to do so.

5.3.3 Whilst much constructive work has been done by the group, and a process has been established to capture the data indicating current practice in this area, the Commissioner Designate is clear that legislative change will be required to make the necessary reforms to truly redress the balance between victim privacy rights and reasonable scrutiny of relevant third party information.

5.3.4 A key challenge for the group was establishing systems within respective organisations that could provide reports on the numbers of times TPM is

sought, accessed and disclosed to Defence. Such data is necessary to demonstrate compliance in this area so the group have identified dip sampling and indicative reports which can assist with monitoring compliance. Given the volumes of TPM accessed by police in the course of their investigation, it is not possible to provide exact numbers however the numbers of applications received by the Northern Ireland Courts and Tribunal Service (NICTS) is more easily identified.

5.3.5 Provisional data highlighted to the Commissioner Designate indicates that the majority of such orders made are made in Crown Court cases with approximately 40% of cases (Total 410) in 2023 relating to sexual offence cases and 33% relating to 'combination offences' which may also include sexual offences. These figures highlight that whilst the issue of disclosure appears to arise more frequently in sexual offence cases, it does not pertain to this crime type.

5.3.6 The Commissioner Designate also understands that under the present system, 100% of applications for the courts to seek access to TPM are currently being granted. It is also accepted that very little, if any of such material accessed is eventually disclosed to the defence following judicial scrutiny. This raises concerns that there may be a tendency to order access to such material *de rigeur* in the absence of more substantial legal requirements around disclosure thresholds, as well as highlighting understandable concerns regarding the likely relevance of such material in the first place.

5.3.7 There is also a cost factor if our legal aid fee structure continues to be based on the number of pages of evidence. A new legal framework on disclosure may serve the dual purpose of not only ensuring the rights of both defendant and victim are upheld, but also that there is any potential financial incentivisation to request excessive amounts of evidential material is strictly managed.

5.3.8 The work of this group has highlighted tensions between the operational requirements of the Case Management Protocol under Practice Direction 2/2019 and the Crown Court rules which also govern the processes involved. The Commissioner Designate believes that by codifying this process in legislation we can achieve greater consistency in practice and strengthen the

safeguards improving the trust and confidence of victims in the justice process.

5.4 Balancing victim rights with the defendant's right to a fair trial and models of good practice

"It is difficult to justify, from a data protection perspective, the acquisition of vast quantities of material just because they exist. Investigator's requests to third parties need to be targeted and, to the greatest extent possible, specific."[14]

5.4.1 The Commissioner Designate recognises that the right to a fair trial for those accused of a crime is, and must be, absolute. However, it does not follow that achieving a fair trial requires any and all information about a victim to be disclosed.

5.4.2 As stated unequivocally in successive iterations of Attorney General Guidelines on Disclosure[15]:

"A fair trial does not require consideration of irrelevant material. It does not require irrelevant material to be obtained or reviewed. It should not involve spurious applications or arguments which aim to divert the trial process from examining the real issues before the court."

5.4.3 The Law Commission has gone further to say that although the right to a fair trial is absolute, it does not extend to the promotion of rape myths without evidential foundation. The consultation document is unequivocal in its statement that better protecting victim privacy rights does not *per se* threaten the right to a fair trial:

"It is beyond doubt that the right to a fair trial does not entitle a defendant to adduce irrelevant and prejudicial evidence merely in the hope that it would make an acquittal more likely. Moreover, just because a reform may reduce avenues open to a defendant to adduce or test evidence does not mean that the right to a fair trial will be undermined or negated."[16]

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[14] ICO, *'Who's Under Investigation: The processing of victims' personal data in rape and serious sexual offences investigations'*, 31 May 2022, available at commissioners-opinion-whos-under-investigation-20220531.pdf
[15] Attorney General for England & Wales, *Guidelines on Disclosure: For investigators, prosecutors and defence practitioners*, most recent version published 29th February 2024, effective from 29th May 2024, available at Attorney_General_s_Guidelines_on_Disclosure_-_2024.pdf
[16] Law Commission, *supra* note 14.

5.4.4 The ICO in its report *'Who's Under Investigation'*,[17] stresses that there is a legal requirement for a balance to be struck in seeking or considering disclosure of TPM:

"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."

5.4.5 It has further been established in European jurisprudence that victims do enjoy a right to privacy when it comes to medical and therapy-related data and information. This includes that "*protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life"* and falls under Article 8 rights.[18] The court has also recognised that confidentiality of medical records where possible is important to maintain public confidence in the medical and health professionals and encourage patients to be open and honest to enable them to receive proper treatment.

5.4.6 Indeed, in some cases, the protection of confidentiality to allow someone to avail of adequate treatment to recover from trauma is not only a matter of privacy but also one of right to life if that person is struggling with suicidal ideation or other serious mental illness that requires urgent medical intervention.

5.4.7 Based on the discourse on disclosure across other common law jurisdictions, it is the view of the Commissioner Designate that there is now an overwhelming evidential basis for law and policy change in this area to better protect victims. **Too much information is being requested, accessed and shared without proper consideration of relevance, necessity, proportionality, or the requirement to protect the Article 8 rights of victims.**

5.5 Recommendations

5.5.1 Counselling notes in particular should be regarded as a specific type of information that is handled carefully. A trusting, safe, confidential therapeutic relationship between victim and counsellor is vital to help a person process their trauma and recover. The fear of disclosure of these notes can place a

[17] ICO, '*Who's Under Investigation', supra* note 17.
[18] ECtHR in Mockutė v. Lithuania App No 66490/09

victim on a 'heightened alert' and on some occasions is clearly leaving victims feeling forced to choose between justice and healthcare. Whilst it is the Commissioner Designate's preference that sharing of counselling notes be prohibited outright under the new disclosure regime, in line with the Tasmanian approach, she recognises that a blanket ban may fall foul of Article 6 of the European Convention on Human Rights (ECHR) and / or the Human Rights Act (HRA).

5.5.2 Any consideration of a request for disclosure of this type of material should take account of the fact that counselling notes are not a corroborated, evidential records of fact. They are notes used by counsellors to assist in ongoing therapeutic support for their client. They are not signed off by the client, nor is the aim of any therapy session to speak only objective factual truths that might be prescient in a criminal trial. In most cases, therefore, it could be argued that such hearsay might have little evidential value and relevance to a criminal trial in many cases. As noted by academics and the Law Commission in its review of practice around TPM disclosure in GB courts, what victims may say in counselling is *"a form of dialogue that attempts to make sense of the sexual violence that does not fit legal models of guilt or innocence. … [It] reflects a non-legal conception of rape that describes feelings of violation and is not bound to the nature of the act."*[19] This dialogue can, and often does, include self-blame for a sexual assault as is natural for a victim coming to terms with their trauma. The danger of such dialogue being treated as factual account and included as evidence at trial is aptly highlighted by the Law Commission:

"If admitted into evidence then the myths that all complainants are lying and deluded are at risk of being exploited in an assessment of the complainant in the trial at hand."[20]

5.5.3 Rules and safeguards about access to TPM disclosure should also extend beyond counselling records, and include GP, medical, educational and health and social care records.

5.5.4 Underpinning the new legal regime should be an understanding of the importance of treatment and recovery for those who have suffered extreme

[19] L Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall Law Journal 251, 258-259
[20] Law Commission, *supra* note 14.

trauma. The CPS Guidance notes that "*The health and wellbeing of the complainant should always be the determinative factor in whether, when and with whom they seek pre-trial therapy. It is for the [complainant] to make decisions about therapy with their therapist, including what type of therapy is obtained and when that therapy is obtained. Criminal justice practitioners should play no role in the decision-making process".*[21] It is incumbent upon our legislators and policy-makers to ensure that this ethos becomes a reality for victims of serious crime seeking justice in Northern Ireland through these reforms.

The Canadian model

5.5.5 With the above points in mind, the Commissioner Designate supports the Minister's proposal to mirror the Canadian approach.

5.5.6 This model is notable in several respects. The TPM disclosure regime applies to *"any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature"*,[22] based on the rationale that all record types listed are private records with a reasonable expectation of confidentiality and therefore Article 8 is engaged in all cases.

5.5.7 The Canadian model also employs a two-stage process for disclosure of materials sought by the defence. First, the defence must successfully make the case to the court that there are sufficient grounds for a third party to disclose materials to the judge for review, on the grounds that the material is "likely relevant" to an issue at trial or to a witness's ability to testify and necessary in the interest of justice. **An application must be submitted in writing, outlining what the specific record being sought is and on what grounds the record can be established as being likely relevant and necessary to be disclosed**. If that hurdle is met, the second step is for the court to review the materials before deciding if they should be disclosed to the defence.

[21] CPS Legal Guidance: Pre-Trial Therapy (2022), "Fundamental Principles"
[22] Criminal Code (Canada), s 278.1.

5.5.8 **The model explicitly outlines how the threshold of relevance and necessity is to be met, clearly listing reasons that are not sufficient alone to establish relevance.** This threshold must be met to satisfy even the first stage of enabling judges to review the record, in recognition that victim privacy considerations should not only be applicable to defence counsel disclosure, but to disclosure to any part of the criminal justice process including the Judiciary. Codification of criteria for meeting the relevance threshold also ensures that vague assertions of relevance to witness credibility are not enough to trigger speculative requests or a 'fishing expedition' of a person's private records. The list is designed to specifically prevent what the Canadian Supreme Court describes as *"speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records"* from having undue influence on the trial process to the detriment of the search for truth in sexual offence cases.

5.5.9 The Canadian Code list of reasons that are insufficient solely or together to establish relevance are:

(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.

5.5.10 The Canadian model also outlines in statute the steps a judge must take when considering the twin questions of relevance and necessity, both when considering whether a record should be produced for the judge to review and when a judge is considering whether a record should be disclosed to defence. The Criminal Code states:

"In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;
(b) the probative value of the record;
(c) the nature and extent of the reasonable expectation of privacy with respect to the record;
(d) whether production of the record is based on a discriminatory belief or bias;
(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
(f) society's interest in encouraging the reporting of sexual offences;
(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
(h) the effect of the determination on the integrity of the trial process."

5.5.11 The Commissioner Designate is strongly supportive of the Canadian approach of codifying what is required to meet the relevance threshold, both for a judge to review a record and for it to be disclosed to either party. This 'structured discretion' approach is clear and effectively bars speculative requests without probative value which are not grounded in reasonable line of enquiry. In doing so, it also limits the potential for rape myths, stereotypes, generalisations and misconceptions to have undue influence during a trial, an issue that has been identified as problematic within our justice system in relation to sexual offence trials.

5.5.12 The Commissioner Designate also recommends that an element of the New South Wales approach[23] is incorporated into Northern Irish law. In considering whether counselling records should be disclosed, the court there must consider *"for the purposes of determining the public interest in preserving the confidentiality of [counselling records] and protecting [the complainant] from harm"*:

(a) the need to encourage victims of sexual offences to seek counselling;
(b) that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship;
(c) the public interest in ensuring that victims of sexual offences receive effective counselling;
(d) that the disclosure of the [counselling records] is likely to damage or undermine the relationship between the counsellor and the counselled person;
(e) whether the disclosure of the [counselling records] is sought on the basis of a discriminatory belief or bias;
(f) that the adducing of the evidence is likely to infringe a reasonable expectation of privacy.

This would be a valuable check and balance to ensure that the health, wellbeing, and life of a victim of serious sexual crime is not seriously compromised by unnecessary impingement upon their private, intimate counselling records, which detail their trauma and journey to recovery.

If you would like to discuss any of these points in further detail, please contact the office via:

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[23] See Criminal Procedure Act 1986 (NSW), s 299D