SECTION A

A: The introduction of provisions to clarify pre-trial independent legal representation for complainants in serious sexual offence cases.

1. **Do you think legislative provision is required to clarify independent legal representation for complainants at hearings of pre-trial applications?**

Yes.

Please provide your reasons.
The Gillen Review clearly highlighted the rationale for the introduction of publically funded legal representation for victims' pre-trial and the subsequent pilot of the Sexual Offence Legal Advisor (SOLA) scheme (run by Victim Support NI) has been a positive development which has been welcomed by victims engaging with our office. The full potential of this scheme however has yet to be realised due to several issues highlighted to us:

- Lack of awareness amongst victims of the existence of the scheme contributed in part due to low referral numbers from PSNI to the SOLA service;
- Inconsistent compliance with the Case Management Protocol which provides for the victim to be advised of an application to the court for access to their personal material so that they may object if they wish (which could then lead to engagement with the SOLA service);
- No specific legislation enabling a victim's legal advisor to address the court in relation to any hearings regarding the victim's ECHR Article 8 rights. Whilst there is an argument that judges *may* grant audience to a SOLA under existing powers, this does not appear to happen regularly.

The introduction of legislative provisions could therefore strengthen the role of independent legal representatives for victims which could help address these barriers.

2. **What are your views on introducing legislative measures to enable independent legal representation at specified pre-trial application hearings? Are there any potential consequences the Department would need to consider?**

The introduction of legislative measures to support the attendance of victim's legal advocates at key points pre-trial will help ensure clarity regarding the role and remit of the advocate as well as ensuring a consistent approach to the attendance of advocates is secured across all courts.

The Department should give due consideration to what case information should be shared with the victim's legal representative to inform their advice to their client and support their attendance at any subsequent hearing.

In recognising the need for victim's independent legal representation the Department must also ensure that there is procedural equality between the victim's representative and defence representative and that the equality of arms principle is maintained.

Given the relative infancy of this provision in NI, the Department should strive to ensure that any legislation is future proofed as much as possible. The legislation itself should be flexible and incorporate mechanisms that allows for adjustments and updates (such as potential future developments in pre-trial hearing structures) without the need for complete revisions.

3. The Department is interested to hear of additional suggestions you may have to help fulfil Gillen recommendation 40.

Recommendation 40 will only realise its true potential for victims if legal representation is accessible to all victims of sexual violence at their point of need and that the legal processes or hearings that impinge on a victims EHCR Article 8 rights robustly recognise and protect their right to exercise their views in this regard.

The '*A Second Assault'* report outlines the range of guidance governing the access to and disclosure of victims' third party material. Despite these guidelines, the approach to this issue is inconsistent across the criminal justice agencies and the Commissioner Designate is currently chairing a working group of key stakeholders to try and address this. It is clear however that in order for a victim to avail of the benefits of legal representation to support their EHCR Article 8 rights, they must be alert to the potential threat to these rights and as such the system must actively enable their ability to exercise the right to be heard on such issues.

It would be helpful therefore if legislation was introduced to help codify core disclosure principles and obligations relating to the victims' rights. This legislation could then be supported by more detailed procedures in guidance. This could include obligations for police to alert people to the availability of legal representatives addressing Recommendation 42 of the Gillen Review.

4. Are there any other pre-trial applications, not included in recommendation 40, that a complainant may seek to be represented at the hearing of that the Department may need to consider?

As per the point made under question 2, it is important that any legislation is future proofed as much as possible so it may be beneficial to embed the principle governing the structure whereby a victim's legal representative will have a right to attend a pre-trial hearing and specify the hearings in secondary legislation.

Our 'A Second Assault' report also highlights concern that a victim's right to apply for criminal injury compensation is being used as a weapon to question the credibility of

their testimony in the court. This issue was identified in the Gillen Review however despite recommendations for greater scrutiny of this issue, the report highlighted continued concerns. The Commissioner Designate believes that the most effective way to address this issue is to handle any submission of evidence regarding a victim's application for criminal injury compensation in a similar way as the introduction of previous sexual history. If this recommendation were to be adopted, there would be a resulting need for the victim to be represented by their own independent legal representative.

SECTION B

B: To enhance protection of complainants' personal information in pre-trial third party material disclosure applications. We welcome your suggestions for both legislative and non-legislative changes to the third party material disclosure process.

1. **Would you be in support of introducing legislation to afford more protection to pre-trial counselling notes of serious sexual offence victims (complainants) so that a counselling communication, which arises during treatment for harm suffered in connection with the allegation, would not be disclosed, produced or adduced in evidence?**

Yes,

Please share your reasons.

'A Second Assault: The impact of third party disclosure practice on victims of sexual abuse in Northern Ireland' highlights that:

> *'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'*

It outlines the importance of the therapeutic relationship and the vital role that confidentiality plays in the ability for the client and therapist to engage in a safe space which enables the client to help process the trauma. The fear of disclosure of these notes can place a victim on a 'heightened alert' and can in some occasions leave victims feeling forced to choose between justice and healthcare.

The Commissioner Designate's preferred position is for an absolute ban on access to counselling records however legal advice sought as part of the "A Second Assault" report indicated that such a position would be unlikely to withstand convention scrutiny.

We have been interested however to learn that such a restriction on access to counselling notes relating to an alleged sexual offence is in place in Tasmania, as highlighted by the Law Commission's report in this area. The Taoiseach in the

Republic of Ireland has also recently indicated the intent of their Justice Minister to also outlaw access to such records[1].

The Commissioner Designate remains of the view that the best way to remove any risk that victims may be deterred from seeking therapy or justice due to disclosure concerns is for an absolute ban on access and would support efforts to achieve this in a way that also appropriately balances the rights of the accused.

More broadly, in undertaking the review into this issue, the Commissioner Designate found that there is a broad range of material being sought during a criminal investigation over which a victim should expect a reasonable level of privacy e.g. GP and educational records. Any strengthening of legislative safeguards over privacy therefore should stretch beyond just counselling records.

2. **Would you support the introduction of a statutory form for the defence to complete when making an application for disclosure of information held by third parties? The form would include strict parameters, such as dates, for the information being requested.**

Yes

Please share your reasons.

It is likely that tightened parameters governing PSNI's exploration of third party material[2] as part of the investigation may lead to an increase in the number of applications made by defence for the disclosure of third party material. It is therefore vital that the application process for third party material at the court stage is robustly governed.

The Commissioner Designate's Disclosure Compliance Working Group has identified potential confusion and inconsistency regarding the operational requirements of the Case Management Protocol which could ultimately lead to victim's being unaware of an application to access their private information has been made.

This potential increase in applications and confusion regarding the process could be effectively addressed through the introduction of a standardised form to be completed by defence when submitting an application.

This form could include the specific information being sought, any time parameters surrounding the material sought, the extent to which the information is necessary for the defendant to fully answer the charge and the probative value of the role.

Such information could helpfully inform the decision by the victim as to whether they have any objections and aid the Judge in their determination on whether a court order should be issued.

---

[1] An tOrd Gnó - Order of Business – Dáil Éireann (33rd Dáil) – Tuesday, 2 Jul 2024 – Houses of the Oireachtas

[2] In line with NPCC guidance following ICO report and increased protections in UK Victims and Prisoners Bill 2024

Feedback from third parties and legal professionals as part of the 'A Second Assault' report indicated that a lack of specificity on issues such as timeframes leads to a significant amount of irrelevant material being shared with the courts. This is not only an unnecessary intrusion into a victim's life but also adds unnecessary delay and effort as Judges must go through all material to determine whether any of it meets the disclosure test.

3. **Do you think the applicant should be required to detail how the information requested would have substantial probative value, to show that alternative documents or evidence are not available, and that the public interest in preserving the confidentiality of, for example, counselling communications, is outweighed by the public interest in admitting such material into evidence?**

Yes

Please share your views and reasons.

'A Second Assault' report highlighted the chilling impact that access to private information can have on a victim's willingness to access therapeutic support or engage with a criminal investigation and trial. Similar concerns have been identified across our neighbouring jurisdictions with Ireland intending to introduce a ban on access to counselling records and England and Wales introducing new restrictions on access to third party material in the recent Victims and Prisoners Bill

The Commissioner Designate recognises that in determining what information should be sought and shared the Judge must finely balance the rights of the accused and the victim in the case. To aid this decision making it seems prudent for the applicant to outline in their application what leads them to believe that the intrusion on an individual's privacy and personal dignity is necessary to secure the proper administration of justice.

This explanation as to why the material is deemed relevant and why the detail cannot be obtained another way will help to not only inform the Judge, but also will help the victim themselves to make an informed decision as to whether they wish to make representations to object.

The legislative provision governing third party material in existence in Canada and Australian jurisdictions as examined by the Law Commission's consultation report[3] and subsequent proposals evidences the merits of such an approach and potential blueprint for us to learn from.

[3] Law Commission Consultation Report - Law Commission Documents Template

5. **Do you think that there should be a legislative requirement on defence to put the victim (complainant) on notice that an application for their personal information is being made? If so, what are your thoughts on how and when could this be done?**

Yes

Please share your response and reasons.

This right to be on notice exists currently within the current practice direction, "*Protocol for Third Party Disclosure in Prosecutions of Sexual Offences or Serious Assaults*"[4] however is not being consistently complied with. Legislation therefore would help strengthen this right and form part of the core disclosure principles suggested at Section A, Question 3 above.

It is clear from the Commissioner Designate's Disclosure Compliance group, that there may be an element of confusion in the responsibilities of and actions to be taken by the relevant parties at various points. The introduction of a legislative requirement which requires the victim to be put on notice will help cement this obligation as well as providing an opportunity to revise the process which needs to be followed.

The current practice direction could be viewed as ambiguous regarding the how the actions/timings for each agency/stakeholder should be conducted.

6. In the interim, it may be useful if this practice direction was updated with a table that clearly laid out which agency/stakeholder was responsible for which action and the timeframe if should be conducted within. **In cases where a victim (complainant) wishes to object to their personal records being shared with the defence, should the final decision on disclosure be made by a judge who has heard from all relevant parties and who has taken account of the balancing interests at play?**

Yes

Please share your reasons.

The role of the impartial Judge is crucial in ensuring a fair trial and proper administration of justice protecting the rights of all parties involved. Their legal training and understanding of the case places them in the most informed position to weight up all appropriate factors.

The Commissioner Designate recognises that this task does place a considerable burden on our judiciary and believes that this recognition lends further support for the requirement on any party seeking access to third party material through the courts to clearly outline and articulate why it is necessary. The Commissioner Designate is also supportive of the introduction of appropriate technological tools to assist in

[4] Protocol for Third Party Disclosure in Prosecutions of Sexual Offences or Serious Assaults.pdf (judiciaryni.uk)

process in a similar way that such technology has been adopted by police forces to assist them in their investigation and disclosure obligations.

7. Do you have any other suggestions to make?

Protections in legislation should have broader application beyond just counselling records and also include counselling records captured at any point in the victims' life and in relation to any issue. We must also ensure that any additional protections in law are applicable across all crime types to ensure that any strengthening of victims' rights has maximum impact.

This is especially important where the victim is or has been a 'looked after' child and the 'state' will have a disproportionately larger amount of information than other citizens. Their right to privacy is any equally important and just because additional information is readily available, it does not mean it should be easily accessible.