Disclosure of Counselling Records in Sexual Offence Trials

Dr Susan Leahy, Centre for Crime, Justice & Victim Studies

UNIVERSITY OF LIMERICK
OLLSCOIL LUIMNIGH

Overview of Presentation

- The use of counselling records in rape trials.
- Irish legislation in the area
- Outstanding issues and proposals for reform.

The core theme for my reflections today: privacy and dignity for complainants.

"privacy is like oxygen: it is a pervasive, consistent need at every step of recovery and within the context of the legal system, if a victim is without privacy, all other remedies are moot".

Seidman & Vickers, "The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform" (2004–-2005) 38 Suffolk University Law Review 467, 473.

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Counselling records in rape trials: Context

- Complainant's right to privacy (and healing) versus defendant's right to a fair trial- delicate balance.

- Significant numbers of complainants now engaging in counselling (perhaps over a significant period of time if historic case).

- 'Swearing contest' nature of trials- all evidence is of heightened importance.

Regulation of Disclosure of Counselling Records: s 19A Criminal Evidence Act 1992 (as inserted by s 39 Criminal Law (Sexual Offences) Act 2017).

- **'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’:** a person who has undertaken training or study or has experience relevant to the process of counselling’.

- **‘Counselling’** means listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration).’

- In the new scheme, the prosecution will have to 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.

- **This written application must state:**
- (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.

- 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.

- Judge will hold a **hearing** to determine whether record should be disclosed.

- 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.

- 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.

- **Judge has a list of factors to consider when deciding whether to grant disclosure:**

a) the extent to which the record is necessary for the accused to defend the charges against him;

b) the probative value of the record;

c) the reasonable expectation of privacy with respect to the record;

d) the potential prejudice to the right to privacy of any person to whom the record relates;

e) the public interest in encouraging the reporting of sexual offences;

f) the public interest in encouraging complainants of sexual offences to seek counselling;

g) the effect of the determination on the integrity of the trial process;

h) the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm.

- The 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 (e.g. no copies, redaction,

- **NOTE:** Client can waive application of the provisions of the 2017 Act and allow for records to be disclosed without going through this procedure.

Issues with new scheme:

- Many complainants waive the applicability of the scheme- informed consent regime necessary.

- Extension of scheme should be considered- medical records (O'Malley review; 'personal records' (Canadian Criminal Code))

- We need to consider whether counselling records should be part of trials:
  - *"A counsellor is only marginally concerned with the facts and the detail of what happened. The focus of counselling is the client's state of mind … As such the counsellor's notes should not be regarded as a reliable record of the matters at issue in a sexual assault trial. The counsellor is working at an entirely different level. The record contains the counsellor's perceptions coupled with a therapeutic analysis."*
    - Temkin (2002)

Conclusion

- More work needed in this area.

- Need to consider the issue of ‘relevance’- especially with the levels of data now available given advances in technology (digital records/communications data).