Introduction

Good morning to you all and welcome to our 2023 Annual Conference. I know that everyone here will be thinking this morning about the events that took place on Thursday not far from here. I know you will appreciate that there are constraints on what I can say. We did think however that it was important to go ahead with today's event and we are glad that so many of you have been able to make it. We have participants from the Bar, State Solicitors, my Office as well as from the Garda Síochána, other investigative and state agencies, Government departments and civil society. I would also like to welcome the Attorney General here this morning as well as former Directors of Public Prosecution, Claire Loftus and James Hamilton.

In this speech this morning I am going to touch first on some of the conference themes and then speak more generally about some strategic challenges facing us as prosecutors at the moment and how we might approach those challenges.

One of the reasons why this event is so important for my Office is that it is really the main chance we have all year to meet with so many colleagues from across the system to reflect together on some of the challenges and opportunities facing us in our work. Given the intensity of the activity levels in the courts at the moment, it has never been more important that we build in time to take stock of the big picture and to try and look at the work we undertake together through a strategic lens.

Digital Data

So turning first to mobile phones. If I was to identify one innovation over the past decade or so that has changed the nature of what we do in the criminal justice system, it is the development of the smartphone. As we all know here most cases now involve evidence from smartphones or other digital devices. It is both a tool in itself for criminal activity and a source of voluminous potentially relevant evidence and information than can be either corroborative or exculpatory.

The proliferation of digital data has utterly transformed the volume and nature of material that is gathered at investigative stage; that must be assessed when deciding whether to prosecute; reviewed at the disclosure and then ultimately presented at the trial stage. Some cases as we know multiple mobile phones containing hundreds of thousands of potentially relevant messages as well as call records, photographs, videos, social media messages or location data of relevance. This gives rise to practical, technical, legal and policy questions across the system about how to deal with this volume of data. I am delighted that Sean Guerin SC is going to talk to us today about the current state of play in relation to some of the legal issues involved.

At a practical level it is important that we create a common understanding about who is responsible for doing what – in particular as between investigators, and the prosecution service. Over the past year we have been working with the Garda Síochána to embed improved practices around the communication of mobile phone data. We have also been working with the Gardaí to identify the most appropriate technical solutions to support the interrogation of this data.

The proliferation of digital data has led to a need to balance privacy and data protection rights, with the public interest in the prosecution of criminal offences and indeed fair trial rights. There are, as we know, a number of stages in the process where these sometimes competing rights fall to be considered – at the stage of preservation of data; at the time of searching for and seizing evidence; and at the disclosure and then the trial stages.

Digital Data – Preservation of Data

There are important issues of principle involved. In very general terms the more specific Investigators and Prosecutors can be in relation to the preservation, seizure and disclosure of data, then the better we can protect the privacy rights of an accused person, a victim or a third party. But of course in a world where we are dealing with millions of records, there are real practical difficulties in being specific about what is potentially relevant. That challenge is particularly acute where a crime may not even have been committed or come to light yet. This was at the crux of a number of data retention judgments in the Courts of Justice of the EU including the Irish case of *Dwyer v. Commissioner of An Garda Síochána* where the EU Court of Justice found that indiscriminate retention of data was in breach of the Charter of Fundamental Rights but that it may be permissible in certain circumstances to request that data be retained in respect of particular suspects or locations. As we know Ireland had argued that Investigators will not generally be aware before a serious crime comes to light that it is necessary to track a person's phone movements.

Digital Data – Search and Seizure Stage

In the context of the second stage I mentioned – search and seizure, the Courts have also been considering the level of specificity required when investigators are seeking authorisation to search and seize. Most recently, in *DPP v. Quirke,* the Supreme Court has identified a distinction between physical places and the digital space in this regard.

This digital age has given rise to an evolving legal landscape and there is no doubting the complexity of the issues involved. In the meantime, over the last number of years, while these cases make their way through the courts, lengthy arguments relating to the admissibility of mobile phone evidence and other digital data have been a feature of many trials. From a human rights perspective, it is crucial that there is certainty for Investigators that the powers they exercise accord with national and European law and that they can know the precise parameters of those powers – for example, when it is appropriate to use a search warrant or when should a production order be used; how specific it is necessary to be in that search warrant; or how to deal with material in respect of which privilege is being asserted.

I am aware of the important work happening at a policy level to address these issues. We have had the Communication Retention of Data (Amendment) Act 2022 to respond to the European Court of Justice rulings, including in the *Dwyer* case, on data retention. I know that work is also underway to address some of the broader issues with the drafting of the Garda Síochána (Powers) Bill. At an EU level the E-Evidence Regulation and Directive which will be effective from February 2026 will give rise to a new European Production Order and European Preservation Order and will provide harmonized rules on the gathering of electronic evidence.

Digital Data - Disclosure Stage

There was a third stage which I mentioned above – the disclosure stage. As part of our disclosure obligations, it is necessary sometimes to assess intensely personal information contained in counselling, medical and social work records and indeed on those already mentioned mobile phones. As a prosecution service we need to exercise real discipline in assessing whether such records are actually relevant because unless they are relevant then it cannot be justifiable to disclose them given their sensitivity.

Given the sensitivity and privacy of some of the material there is much to be said for judicial oversight of sensitive disclosure. Since 2018 section 19A of the Criminal Evidence Act 1992 puts in place a process for judicial oversight in respect of the disclosure of counselling records as well as providing for separate legal

representation for the victim at any such court application. The O'Malley Report on the Protection of Vulnerable Witnesses, which the Office of the DPP participated in, recommended that a similar provision be put in place for medical records. There are also other categories of sensitive data where a similar judicial oversight process could be usefully employed.

Finally, given the changing landscape whereby the volume and nature of the data to be reviewed and disclosed presents significant challenges for both the prosecution and the defence, it is time I think to consider whether there is a more effective means to identify relevant documents for disclosure. The people in this room, many of whom have deep operational experience and the benefit of both a prosecution and defence perspective, are best placed to assess what will work – for example the introduction of a requirement to provide a defence statement or whether there is another way to introduce an enforceable requirement on all parties to engage at an early stage about relevancy. Given the evolution of data and the impact on prosecutions, it is evident that current procedures have been overtaken by the digital age. It is incumbent on us to move the debate forward on this matter and this is something that my Office will be seeking to do in 2024.

Victims of Crime

Moving now to our session later in the morning. If smart phones represent the number one game-changer in the criminal justice landscape in recent years, a close second has to be the Criminal Justice (Victims of Crime) Act 2017. Much of what the Act seeks to achieve is a better opportunity for victims to participate meaningfully in the process. This Victims Act of course implemented the EU Victims Directive and that Directive has since been evaluated, resulting in a EU Commission proposal this year to start work on the revision of the Victims Rights Directive aimed at ensuring more support for the effective participation of victims in criminal proceedings.

I wanted to have a discussion today about this issue of participation and how this sits in our adversarial common law system alongside fair trial rights. We wanted to tease out also to what extent we, as prosecutors, are now seeking to achieve parallel goals – we are prosecuting a case to achieve a just outcome and in parallel with this we are seeking to ensure that witnesses and victims have appropriate supports to enable them to give their best evidence during the process. In practical terms this may mean a fresh look at how victims can be supported during cross examination to ensure that they fully understand a question and that the questioning is fair and relevant. It also means I think that we should be strongly advocating for special measures where we think that they may be appropriate.

In considering how to frame this discussion today we deliberately extended our focus beyond the victim to also include the perspective of accused persons. This is important because as prosecutors we are not only interested in ensuring that victims' views are fully represented, but also that the accused's rights are vindicated and that any verdict is a just one.

For a range of reasons, accused person do not often give evidence in court. The opportunity for suspects to provide an explanation in the Garda Station is therefore crucial. It is important to consider in particular the rights of a vulnerable suspect and support their efforts to communicate their version of events if they want to. And there is no doubt that for some vulnerable suspects this requires assistance. One of the recommendations in the O'Malley report, was that intermediaries be made available in Garda Stations not only for vulnerable victims but also for vulnerable suspects. I would whole heartedly endorse that recommendation again this morning.

I want to thank in advance our four panellists for agreeing to participate in a discussion here with us this morning on some of these issues. We have Éilis Brennan SC, Tom O'Malley SC and Dr John Taggart from Queens University Belfast, as well as our own Noreen Landers, Head of our Sexual Offences Unit who will chair the discussion.

If smartphones and the Victims Act were two of the biggest game-changers of recent times, then it seems likely now that Artificial Intelligence and Cybercrime are set to be an increasing challenge for Investigators and Prosecutors over the coming years. Prosecution services and law enforcement all over the world are starting to contend with the risks and opportunities afforded by machine learning and by generative Artificial Intelligence. My Office has also been looking to educate itself further and today we have invited in Detective Sergeant Paul Johnstone to talk to us not just about AI, but about the skills that prosecutors and investigators are going to need going into this so-called 4th industrial age.

Strategic Challenges, Reform and the Role of the Prosecution Services

All of these issues that we are touching on today relate to actions contained in our Office's Strategy Statement 2022–2024 and the annual plans that flow from that. Those of you who work with me in the Office of the DPP know that I tend to talk a lot about the implementation of our Strategy. This is because it was the result of extensive workshops with staff to identify what our main priorities are as we continue to evolve to our changing environment. For those of you not as familiar with our Strategy, if you do read it, what I hope you will recognise is a clear set of goals that will support us in delivering a fair independent and effective prosecution service on behalf of all the people of Ireland; a prosecution service that consists not only of the Office of the DPP, but also our prosecution barrister panel, our State Solicitors and An Garda Síochána who prosecute on our behalf in most District Court cases around the country. I hope you will also recognise a vision of a prosecution service that values expertise, high standards and a culture of learning, as well as a commitment to ensuring that we have the ICT and management systems in place to provide a world class prosecution service. Finally, I hope that you will recognise in our Strategy an ambition for the prosecution service to play a key role in bringing about improvements in the system by collaborating with other parts of the criminal justice system and with our EU and international colleagues.

Given the deep expertise that exists in the Irish prosecution service, and the independence of thought that comes from the mix of prosecution and defence background that is inbuilt into our system – there is a real potential for us in the prosecution service to play a leadership role, together with criminal defence practitioners, State agencies and civil society also represented here today, to ensure that our collective operational experience informs policy.

For example, I referred earlier to our collective knowledge about the current difficulties that arise with the existing disclosure regime. It is incumbent on us I think to identify the way forward rather than waiting for others to initiate this policy development.

Another collective challenge that we face at the moment is how best to reduce delays in progressing cases at all court levels. As prosecutors we see first-hand the distress that delays have on the victims and witnesses and we know also the impact that delays can have on accused persons. There is also the impact that delays have on the quality of the evidence that can be given in court.

The need for more judges has been acknowledged and earlier this year the Government committed to appointing 44 new judges before the end of 2024, subject to certain reforms taking place. This is a very welcome development which is designed to assist in addressing delays in the Criminal Justice System.

However, it is clear that even if all of these judges are appointed, their benefit will not be realised unless there is an increase in capacity across the criminal justice system to be able to service these new courts. This requires sustained resourcing but it also requires us to innovate and to organise ourselves better. To do this we need deeper collaboration between prosecution and defence lawyers the courts services, the judiciary, as well as actors from Probation, the Gardaí and the Prison Service. The Department of Justice has been assisting with this by supporting the Judicial Planning Working Group which is a forum to communicate about progress in relation to the implementation of the Report of the Working group on Judicial Numbers. We also see an important role for Court User groups to support good communication around any systemic obstacles to progressing cases.

It is our collective responsibility to ensure that judicial time, Counsel's time and indeed all of our time and effort is being well used. It is also our collective responsibility to ensure that there is as much certainty as possible in the system for victims, accused persons, witnesses and that we are focused on their experience as well as being focused on the efficient and effective running of the system.

There is no doubt that the level of activity in the courts at the moment is intense. The Central Criminal Court in particular has seen a significant increase in activity with the appointment of additional judges increasing from five to ten in recent years. As a result, there has been a very significant increase in Court sittings, trials and lists to be supported by the prosecution service and others.

The increase in the number of judges has served to shine a light on the need to increase capacity in other parts of our criminal justice system so that there are enough prosecutors, barristers, criminal defence practitioners.

I would like to acknowledge the increased funding of the prosecution service over the past number of years in response to increased demand led pressures across the system. I would also like to acknowledge the recent sanction to increase legal aid fees, including counsel fees, by 10% from 2024 as an important first step in the restoration of outstanding fee reductions. It is essential for the administration of justice that remuneration levels are sufficient to attract and retain people to work in criminal law.

I have spoken this morning a lot about the challenges we are all facing. I will finish however by also saying that it is also important also to take stock of the value of the work being done across the criminal justice system, and the importance of a well-functioning prosecution and defence service for the rule of law.

Before I do finish, I would like to take the opportunity to acknowledge the service of two our retiring State Solicitors, Donal Dunne was a State Solicitor for Co. Laois for 32 years before retiring in October and Geraldine Gillece, our State Solicitor for Kildare South and Wicklow North, who was appointed in the same month as Donal in 1991, retires formally next Friday 1 December. I would like to thank them both for their 32 years of public service

Finally, I want to thank all of you – the staff of my Office, all of our State Solicitors and the many independent counsel who represent the prosecution – for all of your commitment and hard work over the past year, as well as the other colleagues across the criminal justice system, many of whom are here today. My thanks to you all for your continued support and co-operation and for joining us today.