Thank you Commissioners of the Law Reform Commission, members of the Judiciary, ladies and gentlemen I am pleased to have been asked to launch the Law Reform Commission's report: Disclosure & Discovery in Criminal Cases. I am particularly interested in this topic as over the 21 years since I became a prosecutor I have considered the issue of disclosure from a range of perspectives and have had a lot of practical experience dealing with cases, whether very large or very small, prosecuted both summarily and on indictment.

I have had the benefit of reading the report and could speak at length on the many important points touched on. However I have confined myself to a few key issues. As you will hear I don't necessarily agree with all of the recommendations or the analysis upon which some of those recommendations are based. I agree that there are areas where practice and procedure can be improved upon, although I would differ with the Commission's view as to how best such improvements should be achieved.

However it is quite clear that the LRC has lived up to its *raison d'etre* to canvass a broad range of views and to provide policy makers with options if they wish to reform the particular area of law or procedure involved.

I am pleased to note that the Commission states in this report that current arrangements for disclosure generally work well. This view accords with my own experience. Disclosure is core to the work of any prosecutor and I can assure you of my Office's total commitment to the disclosure process. Not only to ensure a fair trial for the accused but it is also a professional ethical obligation for prosecution lawyers under our guidelines, and one that we take very seriously.

As you know the duty extends beyond the trial to the conclusion of any subsequent appeal proceedings, and even beyond the final disposal of a case. While problems of disclosure have arisen in the past they have generally involved information that came to the attention of the prosecution very late in the process or even after conviction, rather than information being withheld inadvertently or otherwise when in the possession or knowledge of the prosecution.

Our published prosecutor's guidelines are underpinned by practical internal procedures on Disclosure under which all cases are required to be handled by my office and the lawyers representing the prosecution. We have done a great deal of work in recent years to ensure that disclosure takes place at an early stage in the criminal process. We provide this disclosure regardless of whether it is requested or not.

Non–disclosure in my view is not a significant issue preventing criminal trials proceeding, other than sexual cases which I will refer to later. Generally speaking disclosure requests are dealt with quickly and in the event that there are issues in relation to whether it should

be disclosed or not a Relevancy Hearing can be heard before the Court. However a regime as recommended whereby disclosure would be made at the latest with the service of the Book of evidence in the District court is I think unduly onerous on the prosecution.

The report proposes the introduction of a rigid statutory structure. This 'rigidity' is worth noting in the context of the example from England & Wales, where their statutory disclosure provisions were very recently amended, not by statutory reform, but by the Attorney General's Guidelines on Disclosure (last published 3 December 2013).

These Guidelines, similar in many ways to our Guidelines for Prosecutors, offer an example of the type of flexibility I believe is highly desirable in such an area of procedural law subject as it is to changes wrought by technological and other advances. A statutory scheme by its nature lacks the ability to readily respond to a changing landscape.

Indeed recent experience has shown that in very large cases the only way to deal with voluminous disclosure is electronically. We have developed an expertise in managing such voluminous material and I would not want a statutory regime to impede the most efficient approach at any given time.

As far as the District Court is concerned I have reservations about the approach proposed by the Commission. Having worked in the District courts for over 7 years I am well aware of the vast amount of criminal business that is disposed of every day of the week by very busy Judges.

For example, as I read section 6 of the draft Bill the prosecutor would have to serve on the defence at the same time as the accused is charged with an offence in a scheduled form all relevant disclosure, subject to the possibility of the case not requiring disclosure on very vague criteria set out in sub-section (2). I do not believe this to be workable. This will necessarily involve District Court judges arbitrating the question as to whether the section has been complied with.

This Report recommends a statutory scheme that follows to a large extent the equivalent operative English legislation in relation to disclosure, but only in relation to the responsibilities of the *Prosecution*, without the concomitant responsibilities that the English Act imposes on the defence. Failing to require the defence to really engage with the issues, particularly the issue of relevance, risks the inappropriate use of scarce investigative and prosecutorial resources to trawl for extensive and potentially irrelevant material. Further, and this is a point I will return to later, this will in my opinion have the potential of unnecessarily impinging on the Article 8 ECHR privacy rights of large numbers of non-party actors, as well as miring the disclosure process in expensive and extensive pre-trial relevancy hearings.

Almost all commentators acknowledge that it is all but impossible to give a general definition of 'relevance' without regard to the individual circumstances of a case. Where relevance is concerned therefore we the prosecution will always err on the side of caution.

Determining relevance in the absence of mechanisms which narrow the scope of the issues would not only place an onerous duty on investigative/prosecution agencies, but ultimately on the Judiciary .This would constitute a very onerous burden for the judiciary. At present disclosure issues are generally dealt with between the parties without any formal hearing before the court.

The report specifically references with implicit approval (at 1.16 Page 14) the right of the defence to the tactical advantage of surprise. As I said in a dissenting statement to the Fennelly Commission in 2003: "The right of the defence to ambush the prosecution cannot be regarded as a constitutional imperative". In that dissent I pointed out that other jurisdictions which recognized the accused's fundamental right to a fair trial had found it possible to impose certain disclosure requirements upon the defence, for example notice in relation to special defences. I posed the question: 'what provision of the Constitution of Ireland would prevent such a rule were it thought desirable?'

I agree with the Commission that a legislative mechanism to deal with disclosure of relevant material in the possession of non-parties is desirable. As Keane CJ stated in the H(D) V Judge Groarke reported in 2002 3 IR 522, the fact that discovery in the form provided for in the rules for civil litigation is not available in criminal proceedings **"**does not have as a necessary consequence an erosion of the fair procedures to which defendants are entitled".

The current position whereby the Prosecution has the responsibility without the authority in relation to relevant material in the possession of non-parties, causes considerable difficulties for my Office. As the LRC report acknowledges, we have sought to overcome these difficulties with a range of mechanisms, including the development of Memoranda of Understanding with a number of relevant non-parties. However, notwithstanding the success of these efforts, I would agree we need a procedure to deal effectively with this issue.

I would however have a different view than the Commission in respect of a number of aspects of the proposed scheme.

In this jurisdiction, as difficult and as unpalatable as this may be for a complainant to hear, a person's right to privacy can only be respected in so far as that right does not conflict with an accused's right to a fair trial.

The Commission has stated that "in sexual offence cases involving children, concern has been expressed about how the current disclosure process deals with therapeutic and counselling records, including whether disclosure of these records is actually relevant to a trial and whether disclosure may adversely affect a child's recovery".

However the same yardstick applies to cases involving adults as those involving children. Such material is either relevant, or it is not. If it is relevant, but disclosure is deemed not in the best interests of the child, the choice is stark. Either disclose and take that risk or discontinue the prosecution. And in the public interest we would take into account this potential impact in deciding whether to proceed further with the prosecution or indeed initiate a prosecution at all. However no third party procedure can purport to effectively reclassify material that is relevant as something else.

We are of course not alone in grappling with this *tension* between an accused's Article 6 (fair trial) rights and complainants' Article 8 (privacy) rights. The report borrows strongly from the Canadian solution to this dilemma of conflicting rights although acknowledging that this solution continues to give rise to some difficulties in practice.

I would just say in relation to this proposed solution that my admittedly limited understanding of the Canadian constitutional model is that it affords a level of balancing of rights that is simply not compatible with our Constitution.

Canada has nevertheless as I understand it struggled to achieve this hoped for 'balance', with the accused's' "right of to make a full answer and defence" to the charge trumping in many instances complainants'/witnesses' privacy rights where relevant material is concerned. I acknowledge that this tension is not easily discernible from a reading of the code's provisions.

I should add that the Canadian code and indeed the draft suggested Irish provision makes clear that a Judge would have to deliberate on all disputes over relevance and privacy rights. While this does happen at present it is a relatively infrequent occurrence. A provision granting a greater expectation of privacy will inevitably result in many more such instances.

The proposal to grant *locus standi* and separate legal representation (i.e. participation rights) to a potentially large pool of non-parties (record *keepers* and record owners) has the potential not only to make hearings costly and protracted, but more fundamentally, poses a potential threat to a very core concept of our criminal process, that it is a bi-partite system.

In that regard I would just refer to the LRC's own 'Report on Rape and allied offences' of 1988 but I am not going to go into that here.

I would just venture to suggest that the danger is not simply that the balance could favour the prosecution, but the defendant could face not just *dual* representation hostile to their interests, but multi-party representation hostile to their interests, and potentially the interests of the prosecution as well. The proposal as drafted extends to "the complainant, a third party or any person affected by the making of a disclosure order".

I would argue that in the context of sexual cases at least (and other issues potentially arise in other categories of case) *locus standi* ought to be limited to the person about whom the record relates (who in law 'owns' the information within the record) and not afforded to potentially innumerable record *holder(s)*. Indeed this approach seems to be supported by the judgement of Fennelly J in the Supreme Court case of *PG V DPP* 2007 3IR when he stated that a therapist's duty of confidentiality is owed to his client. If the client agrees to the disclosure for the purposes of the prosecution then: 'it is difficult to envisage any responsible professional person continuing to detain them'.

And that is the dilemma we sometimes face where a complainant wants us to have counselling or other notes but the therapist or agency they attended do not want to release them. The MOUs with individual service providers such as DRCC have helped to alleviate many of these situations including scope to highlight privacy concerns. Again I do not want to address the special issues that arise with children which are more complex. However if their guardians are consenting then it is hard to see why decisions relating to children should be taken in a different way in this sphere than in any other.

In conclusion I thank the LRC for giving this important and extensive topic their consideration. The criminal justice system has benefited from the focus of many LRC reports on a diverse range of topics across their successive work programmes. I have no doubt that this report will be the spark for keen debate in the coming months.

Thank you for your attention.