Chief Victims Advisor
to Government

Research Report

From Bystander to Participant: Recognising and protecting victims by providing legal advice and legal representation

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*“The criminal justice system, which cannot function without victims, needs to adjust its perspective to see them as valued participants and to support them appropriately”.**

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Introduction

New Zealand has an adversarial criminal justice process and, like other countries with adversarial frameworks, has very low reporting rates and high attrition levels[1] in relation to sexual violence offences. The 2021 New Zealand Crime and Victims Survey (NZCVS) shows that only eight per cent of sexual violence offences are reported, a significantly lower rate than the already low overall reporting level of 25 per cent (Ministry of Justice, 2021, p. 10). Such low reporting rates are often imputed to victims' anticipation of negative experiences during the trial process, and this was acknowledged by the New Zealand Law Commission in 2015:

> *In summary, the research establishes that there are many reasons why people choose not to deal with acts of sexual violence in the criminal justice system, and many of them are directly attributable to the functioning of the trial process and the limited outcomes it delivers. It seems that victims do not report because they perceive (often accurately) that the criminal trial process will not serve them and their interests well. They may feel that they will not be believed and that the ordeal of giving evidence is not worth the perceived low likelihood of a guilty verdict.* (Law Commission, 2015, p. 27)

This 'crisis of confidence' in the criminal justice system for victims was confirmed by a survey carried out by the New Zealand Chief Victims Advisor to Government in 2019 which found that victims do not feel listened to, or supported by, the criminal justice system. Indeed, not only does the criminal justice system fail to make victims feel safe, but some victims stated that it caused further harm by re-victimising them. Whereas the accused has the right to legal representation throughout the process, the victim has no such protection. Moreover, due to the adversarial nature of the criminal justice system, victims are effectively reduced to being witnesses (or bystanders) in their own case (Chief Victims Advisor to Government, 2019).

Because New Zealand does not currently provide victims' the right to legal advice or independent legal representation[2] (ILR), the Chief Victims Advisor to Government commissioned this literature review to explore victims' rights to legal advice and legal representation in other countries with similar adversarial systems. The rights to ILR, where provided, are usually exclusive to sexual violence victims because, due to the personal nature of the crime, they are often the only witness and thus must endure increased scrutiny from defence counsel. This report firstly provides an overview of the how the role of 'victim' is positioned within the adversarial criminal justice system, followed by a review of the provision of legal advice services for victims. The core of the report explores ILR for victims and is organised by country: the Republic of Ireland, Northern Ireland, Scotland, England & Wales, Australia, Canada, and the United States. This is followed by an overall summary/analysis and a conclusion.

The Role of the Victim in Adversarial Criminal Justice Processes

Despite a strong victims' rights discourse having developed over the last decade, the debate continues about whether ILR for victims can fit into adversarial frameworks characterised by the contest between the defence counsel and the prosecutor, through which the victim's roles is limited to witness for the prosecution (Killean, 2021, p. 175). All the countries covered in this

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[*] Victims Commissioner for England and Wales, in Gordon & Gordon, 2020, p. 2

[1] Attrition is the proportion of reported sexual violence victimisations that do not progress through the criminal justice system to a conviction. (https://www.justice.govt.nz/assets/Documents/Publications/j3srdz-Sexual-violence-victimisations-attrition-and-progression-QA-v1.0.pdf)

[2] I have used the term independent legal representation (ILR) throughout this report for consistency although some reports that are featured, for example the Gillen Review, use 'separate legal representation' (SLR).

review have adversarial criminal justice processes and all are debating whether to introduce or expand the provision of ILR for victims of sexual violence to improve their experiences of the criminal justice system. Across all these jurisdictions, sexual violence reporting rates are consistently low, and the attrition levels of reported cases are high. Although the reasons for this are multiple and complex, they are often attributed to victims' anticipation of negative treatment by the justice system. Accordingly, these countries have low prosecution and conviction rates for sexual assault, among the lowest for all violent crimes, which in effect, allows most perpetrators to act with impunity. The unwillingness of sexual violence victims to engage with the criminal justice system is very likely due to the prohibitively high psychological and emotional costs to them.

In adversarial systems, crimes are seen as an attack on the state rather than the victim. Thus, the purpose of proceedings is to enable the state to inflict punishment and affirm the rule of law rather than to put right the victim's wrong, thus reducing the victim's role to that of bystander. The defendant is at the centre of the court process with their defence counsel who contends with the prosecution. The jury is there to decide the verdict and the judge ensures that the trial is fair and lawful (Craig, 2018; Dame Vera Baird QC, Victims' Commisioner for England & Wales, foreword, Gordon & Gordon, 2020, pp. 2–3). The adversarial system therefore necessarily excludes victims from actively participating in both the investigation and prosecution of the crime (Nurse, 2020, p. 53). The prosecutor's duty to the state sometimes conflicts with the interests of the victim which places victims in a "complex and ambiguous position … at the nexus between the state's interests and their own" (Iliadis, 2020b, p. 130). They are often disappointed to find that what they regard as 'their case', is officially the 'state's case', and the prosecutor, who they had perceived as being 'their lawyer' does not act in their interest (Iliadis, 2020b).

Research has shown that prosecutors can be reluctant to protect witnesses from character attacks due to concerns about the jury's potential perception that they are attempting to hide something. Studies have also demonstrated that prosecutors have even "allowed character attacks in the belief that a distressed complainant may invoke greater sympathy from the jury" (Killean, 2021, p. 176). Further, court judges cannot be relied on to prevent any intrusive or inappropriate questioning as they need to be perceived as objective to avoid appeals and have other interests to consider such as the accused's fair trial rights. Thus, victims continually feel disempowered, excluded and unsupported. Further, such treatment can re-traumatise them and potentially cause secondary victimisation (Iliadis, 2020c; Killean, 2021; Kirchengast et al., 2019; Kirchengast, 2021).

Although few systems remain exclusively inquisitorial or adversarial, nearly every country in Europe, with a primarily inquisitorial criminal justice process, allows some form of independent legal representation for sexual violence victims (Braun, 2019; Killean, 2021; McDonald & Souness, 2011). Indeed, the late Lord Steyn, with the approval of the other members of the UK's House of Lords in 2001, suggested looking beyond the duality of the adversarial contest in order to include the consideration of victims' interests. He asserted:

> *The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.* (Lord Steyn, 2001 cited in Gordon & Gordon, 2020, p. 19)

Providing Legal Advice for Victims

This section explores the provision of legal advice for victims external to the court environment. Such services provide lawyers to advise but not to represent victims. The section starts by summarising two victim legal advice pilots; Sexual Offences Legal Advisors (SOLAs) which was recently introduced in Northern Ireland, and Sexual Violence Complainants' Advocates (SVCAs) which operated in Northumbria, England, between September 2018 and December 2019. An overview of the Victim Legal Advice Service (VLAS) an innovative legal advice model, designed to be part of a wider integrated victim services model in Victoria, Australia follows and finally, an outline of legal advice services in Canada.

Sexual Offences Legal Advisors (SOLAs) Scheme – Pilot, Northern Ireland

In April 2021, partially fulfilling one of the Gillen Review's[3] key recommendations[4], Northern Ireland's Justice Minister, Naomi Long, announced the launch of the Sexual Offences Legal Advisors (SOLAs) pilot scheme to provide publicly funded independent legal advice to sexual violence victims. Fully qualified SOLAs are available via Victim Support NI, in both its Belfast and Foyle hubs. Focussing particularly on the privacy rights of complainants with respect to the disclosure of medical records or previous sexual history, SOLAs can provide uncapped independent legal advice in serious sexual offence cases up to the start of the trial. The two-year pilot scheme is limited to adult complainants only, however, it will inform the development of a similar scheme for child complainants as well as a future mainstream service (BBC, 2021; Irish Legal News, 2021; Northern Ireland Department of Justice, 2021; Victim Support, 2021). Although the Justice Minister claimed that Northern Ireland was the first region to provide such a service to sexual violence victims, there have been similar pilots, albeit on smaller scales, such as the SVCA scheme pilot in Northumbria, England.

The Sexual Violence Complainants' Advocates (SVCAs) Scheme – pilot, England

In 2018 Dame Vera Baird QC[5] (the current Victims' Commissioner for England and Wales and the former Police and Crime Commissioner for Northumbria (PCCN)), developed The Sexual Violence Complainants' Advocates (SVCAs) pilot scheme to engage local solicitors to provide legal advice and support to rape complainants in Northumbria (north-east England) over 18 years of age. This pilot was driven by concern about the excessive access to and disclosure of complainants' personal data, including digital downloads and third-party materials. The support primarily related to complainants' European Convention of Human Rights (ECHR) Article 8[6] rights to privacy, although there was also scope for general information to be provided about the legal process and attendance at Achieve Best Evidence (ABE) interview. This scheme operated from September 2018 until December 2019 when the pilot ended, however support continued until March 2020 to ensure that the support was not stopped part-way through a case (Smith & Daly, 2020).

The SVCAs project was initially funded with three key aims:

1) *To offer legally informed advice and support for sexual violence complainants undergoing ABE interview.*

[3] The Gillen Review is discussed further under ILR – Northern Ireland

[4] The Gillen Review recommended: 'A measure of publicly funded independent legal representation should be offered to complainants from the outset up to but not including the trial' (Gillen, 2019, p. 29, key recommendation no.3)

[5] The SVCA pilot was continued under the current PCCN, Kim McGuinness.

[6] European Convention on Human Rights, Article 8: The right to respect for your private and family life, home and correspondence. Outlined in the European Convention of Human Rights and introduced to UK law by the Human Rights Act 1998.

2) *To ensure legally compliant access to the complainants' personal data, assisting them to negotiate fully informed consent and making representations on behalf of complainants where necessary to prevent irrelevant or excessive material being accessed.*

3) *To provide legal advice on sexual history applications, assisting the prosecution by ensuring they are fully appraised of the complainants' interests" (Smith & Daly, 2020, p. 12)*.

Unfortunately, the third aim was excluded from the pilot, before it went 'live', due to challenges by key stakeholders including the Crown Prosecution Service (CPS) North-East who did not believe the legal mechanisms were sufficient for SVCAs to be privy to Section 41 hearings[7] (Smith & Daly, 2020). It appears that this issue is related to fears that the prosecution, by informing the SVCA about material being disclosed to the accused, might contravene rules about coaching victims. This concern was expressed by a CPS Manager participating in the evaluation:

> *Solicitors are responsible to their professional body, and they must put the, the good of their clients first. So, the first, the first stumbling block is, if I tell something to an SVCA it's like me telling something to a defence solicitor, they are duty bound through their professional status to tell their client. It became apparent right from the start that they might ask us things that would contravene the rules around coaching victims and witnesses and therefore, we couldn't, we couldn't tell them stuff they wanted to know because we knew they had a duty to their client, that the client would know and that would jeopardise the case.* (CPS Manager 1, Smith & Daly, 2020, p. 31)

However, the researcher/evaluators of the pilot, noting the link between ECHR Article 8 rights and sexual history, recommended that:

> *sexual history should be re-introduced to any national adoption of the SVCA scheme to avoid England and Wales falling behind international standards … To continue excluding Section 41 applications … places SVCAs in a bizarre position of supporting complainants to invoke their right to privacy, except when it concerns one of the most private parts of a person's life.* (Smith & Daly, 2020, p. 36)

If the third aim had been included in the pilot it would not have been the first time for legal representation to be offered to complainants in relation to applications to adduce sexual history in "so-called 'pure' adversarial jurisdictions" (Smith & Daly, 2020, p. 36). Indeed, as will be discussed in this report, the Republic of Ireland, Canada, and the US have legal advocacy schemes available to victims of sexual violence. Further, as discussed earlier, Northern Ireland launched a pilot scheme in April this year (2021) to provide publicly funded independent legal advice to victims of sexual offence focussing particularly on the privacy rights of complainants with respect to the disclosure of medical records or previous sexual history.

It was key stakeholders including the CPS who challenged and prevented the inclusion of the third aim about sexual history applications. The majority of Smith and Daly's participants who were working within the SVCAs programme agreed that the SVCAs scheme merely required applying well-established law appropriately as there was already a sufficiently developed legal framework in existence, Smith and Daly (2020) outline the legal basis for providing (limited) legal advocacy to rape complainants in England and Wales:

[7] "Section 41 of the Youth Justice and Criminal Evidence Act 1999. Sets out trial restrictions on evidence or questions relating to a complainant's sexual behaviour except in under certain limited circumstances. An application to include questions about sexual behaviour must be made by the defence to the court, under the rules outlined in Section 41" (Smith & Daly, 2020, p. 10).

- *The Data Protection Act 2018 strengthens complainants' privacy rights and outlines robust procedures around private data that gives an obvious role for legal representation.*
- *There are clear precedents in family courts and mental capacity cases for lawyers to represent clients without appraising them of all evidence, solving the concerns about coaching [this was the basis of the argument to exclude sexual history applications].*
- *Complainants have a right to be informed of the general nature of the defence case, as well as any successful sexual history and/or disclosure applications.*
- *International comparisons suggest there is no difficulty in providing complainants with legal representation on medical records, counselling notes, and/or sexual history evidence.* (Smith & Daly, 2020, p. 6)

Smith and Daly (2020) also argue that non-legal independent sexual violence advisors (ISVAs) are best placed to support victims through their ABE interview, rather than the SVCAs, if the SVCA can view the recording before consent to access data is requested. This would avoid allegations of 'witness-coaching' and prevent the complainant having to retell (and relive) events repeatedly (2020, p. 37).

The independent evaluation of the SVCA scheme had two phases: Phase One in April 2020 comprised an international scoping exercise of advocacy models in adversarial and quasi-adversarial jurisdictions; and Phase Two analysed the SVCAs scheme pilot itself, drawing on survey and interview data from 26 practitioners and 592 survivor-complainants, SVCAs case files, and police MG5 forms.

Phase Two of the evaluation set out to answer three core research questions:

- Is there sufficient rationale to justify the existence of legal advocacy?
- How was the SVCAs scheme implemented?
- What impacts did the SVCAs scheme have?

The rationale for the SVCAs Scheme

Smith and Daly's (2020) findings demonstrated that legal advocacy is justified as requests for rape complainants' private data were excessive and this adversely impacted on survivor-complainants' wellbeing in terms of some delaying counselling in fear of their therapeutic notes being accessed by the defence. In fact, some complainants commented that their experience of the criminal justice system was equal or worse than the rape itself. Indeed, among the victims that withdrew their complaint (n= 34), approximately 20 percent rated data requests as important or very important in their decision-making. The authors' analysis of the SVCAs case files showed that:

- *Some police officers believed there was no need to seek consent from complainants about accessing their data*
- *The police 'consent' forms initially sought agreement for wide-reaching access to, and disclosure of, unlimited data from over 40 organisations*
- *Referral forms demonstrated police frustration with CPS requests for indiscriminate data collection from third parties and digital devices.* (Smith & Daly, 2020, p. 5)

Further, their research showed that complainants often did not understand what they had 'consented' to when signing police forms. Criminal justice system practitioners also acknowledged that complainants' privacy rights had been ignored or side-lined before the SVCAs project (Smith & Daly, 2020).

The implementation of the SVCAs scheme

The advocates were all highly skilled legally qualified solicitors with decades of experience in family/ criminal law and working with vulnerable witnesses. However, to ensure consistency, they all received additional training on sexual offences, including disclosure guidance. Referrals were made by police and support services. Some referrals were made too early given that the complainants later decided not to proceed. The intention of referring early was to give victims information about the criminal justice system. The SVCAs spent an average of 155 minutes at a cost of £725 per case and the range of advice and support that the SVCAs offered included:

- advice on data requests (n=38),
- attendance at ABE interview (n=20)
- intervention on data requests (n=18)
- defence disclosure applications (n=8)
- Victims Right to Review[8] (VRR) (n=7)

Additionally, there were inconsistent findings around inter-agency communication: most police participants found the SVCAs helpful and collaborative, but a few perceived SVCAs intervention as interference (Smith & Daly, 2020, pp. 6–7).

The impacts of the SVCAs scheme

SVCAs increased efficiency overall and complainants gave very positive feedback about the scheme. Further, all the participants were clear that the SVCAs scheme had no impact on the accused's right to a fair trial. The expected heavier workloads on police officers did not materialise, in fact the SVCAs scheme freed up police resources by reducing the amount of material being accessed. However, there were some examples of extensive delays waiting for the extraction and analysis of mobile phone data. Other impacts included:

- *Individual cases benefitted from more considered and relevant evidence requests*
    - *SVCAs challenged data requests in at least 22 cases (47%). Of these, 12 outcomes are known and 67% (n=8) saw the request withdrawn or amended to a reduced timeframe or scope.*
    - *2 of 5 VRRs were successful – there is limited data on VRRs, but this is higher than the success rate in the Victim Commissioner's Office (2020) report of complainants without SVCAs support*
- *Excessive requests for third-party evidence were reduced, even when SVCAs weren't involved.*
    - *Interview data showed overwhelming consensus that the SVCAs project changed organisational cultures, significantly reducing police and CPS requests for indiscriminate evidence-gathering …*
    - *SVCAs worked with Northumbria Police and the PCCN to create best practice consent forms.*[9]
    - *This reduction in data requests was perceived as making investigations more efficient*. (Smith & Daly, 2020, pp. 7–8)

[8] Victims' Right to Review (VRR) prosecutorial decisions not to proceed with the case.

[9] The previous 'Stafford' form gave 'blanket' access

Following the evaluation, Smith and Daly (2020) strongly recommended that the SVCAs scheme be rolled out nationally given the positive impact it had, and how it improved organisational culture in relation to the investigation and prosecution of rape cases. Indeed, criminologists, Dr Olivia Smith, and Ellen Daly, (the evaluators) as well as Kim McGuinness, the PCCN, are campaigning for a national system of legal advocacy for sexual offence victims.[10]

The difference between SVCAs and ISVAs roles

Two CPS managers and a police manager asked whether the sexual violence complainants' advocates (SVCAs) role could be carried out by non-legal advocates, such as independent sexual violence advisors (ISVAs), if they had enhanced training around disclosure rules. However, Smith and Daley (2020) contend that the roles are 'fundamentally different': SVCAs provide advice around very specific legal questions, whereas ISVAs provide a single point of contact, providing emotional and practical support. ISVAs accompany the victims on their journeys, empowering them and helping them to articulate their concerns about the criminal justice process so that the ISVA can provide relevant impartial information (Hester & Lilley, 2018). Further, it is not practical as it would require an overhaul of the ISVAs model, including significant additional training requirements, to a service already struggling to meet existing demand due to chronic under-funding (Smith & Daly, 2020, p. 67).

Proposals for a National Scheme of Legal Advocates

Demonstrating that when the economic impact of the status quo is considered, the implementation costs are justified, Smith and Daly (2020) outline their proposed structure for a national approach to legal advocacy which they estimate would cost approximately £3.9 million annually in England and Wales (2020, p. 69). It is summarised as follows:

- *A dedicated, salaried role carried out by someone who is legally qualified and experienced at practicing law involving sensitive evidence.*
- *Training for the role should incorporate knowledge and experience from police, CPS prosecutors, defence lawyers, human rights lawyers, and third sector specialist services.*
- *The remit should cover all serious sexual offences, including child sexual offences.*
- *Referrals should be on an 'opt-out' rather than 'opt-in' basis, but only at the point of requests for digital or third-party materials, or upon application to adduce sexual history evidence*. (Smith & Daly, 2020, p. 8)

Despite the positive impact made by the SVCAs scheme and support from the Victims' Commissioner for England and Wales, Dame Vera Baird QC who initiated the scheme[11], the pilot ended in March 2020 without plans for a national roll-out. The current Police and Crime Commissioner for Northumbria , Kim McGuinness is calling for the UK Government to roll-out the SVCAs scheme UK-wide to improve sexual violence victims' experience of the justice system (Police & Crime Commissioner for Northumbria, 2020). Furthermore, criminologists Dr Olivia Smith and Ellen Daly (the evaluators of the Northumbrian SVCAs scheme pilot), together with Rape Justice Activist, Bonny Turner, using the collective title 'Lawyers for Rape

[10] https://www.empac.org.uk/research-on-sexual-offence-victims-experiences-of-criminal-justice-system/ https://northumbria-pcc.gov.uk/roll-scheme-just-3-9m-improve-system-sexual-violence-abuse-victims-says-police-commissioner-kim-mcguinness/

[11] She also recently (2021) recommended free legal representation in respect of any decisions made by legal professionals that threaten complainants' ECHR Article 8 Right to Privacy.

Justice'[12] started a 'change.org' petition to Robert Buckland QC the then UK Justice Secretary,[13] in a campaign for victims of sexual violence in England and Wales to have access to free independent lawyers.[14]

Victim Legal Advice Service (VLAS) model, Victoria, Australia

Victoria's Victim Services, Support and Reform (VSSR) commissioned the Centre for Innovative Justice (CIJ) at RMIT University to review and redesign their victim services. They wanted a new service model that is "aligned to, and keeps pace with, contemporary knowledge and leading practice in victim support" (Centre for Innovative Justice, 2020, p. 10).

Thus, CIJ (2020) developed a new cohesive and integrated service model to serve as the lynchpin of the Victim Support System. Their Integrated Victim Services Model actively navigates victims of crime through both the criminal justice and the wider support service system. They propose a tiered approach to provide more intensive support to those who need it via the Victim Support and Recovery Program (VSRP) and a lower intensity/lower cost telephone-based service for victims with a greater capacity to self-manage via the Victim Support Centre (VSC).

CIJ (2020) identified through their research that victims of crime required comprehensive legal advice and so included a Victim Legal Advice Service (VLAS) as part of their integrated service model. After examining the current situation in Victoria, in terms of the lack of a dedicated legal service for victims, as well as reviewing relevant literature, they concluded:

> *Considerable evidence indicates that victims of crime experience a variety of legal needs, both criminal and civil, and that responding early to legal issues can prevent escalation. At the same time, a legal service for victims of crime should be sufficiently specialised - both in terms of knowledge of the legal issues faced by victims of crime, and application of trauma-informed approaches to the practice of law. A dedicated legal service for victims of crime has the potential to respond to a range of issues which exacerbate the impacts of crime and prevent recovery, and to position Victoria as a leader and innovator in victim support.* (Centre for Innovative Justice, 2020, p. 150)

Replicating the core Victim Support Centre (VSC) (lower intensity telephone-based service)/Victim Support and Recovery Program (VSRP) (more intensive support) model, CIJ (2020) propose a publicly funded Victim Legal Advice Service (VLAS). The VLAS lawyers would be co-located with VSC staff for the phone-based legal advice service which would be complemented by satellite legal services based at VSRPs for more intensive legal face-to-face support. Referrals would come through from VSC staff.

Centralised phone-based service

This proposed service would holistically consider the legal needs of victims who have been referred through the VSC/VSRP channel following a comprehensive risk assessment. VLAS lawyers will provide a specialised legal advice service over the phone or by teleconference. As clients may have multiple legal needs in terms of child protection, family violence, family law, employment, tenancy, social security, and criminal procedure matters, but are unaware of their extent, it is important that VLAS lawyers are able to identify such unmet legal needs by 'issues spotting'. The lawyers can then assist the client to understand their legal options. In addition to providing legal advice, the VLAS lawyers will recognise that "for some clients,

[12] https://lawyers4rapejustice.org/
[13] Robert Buckland was replaced by Dominic Raab in a cabinet reshuffle on 15 September 2021
[14] https://www.change.org/u/Lawyers4RapeJustice

early intervention to address legal needs can prevent escalation and minimise the risk of future contact with the criminal justice system as offenders or repeat victims" (Centre for Innovative Justice, 2020, p. 154).

Satellite co-locations

This face-to-face holistic legal advice service will be reserved for clients who need intensive support to address their legal needs. CIJ (2020) also note the potential to expand the VLAS to specifically address recommendations made through separate reviews, by the Victorian Law Reform Commission (VLRC), Coronial Council, and Sentencing Advisory Council by providing:

- *legal advice and assistance in relation to substantive legal entitlements connected with the criminal trial process for victims of violent indictable crimes;*
- *legal advice to families engaged in the coronial process; and*
- *comprehensive legal advice to victims of crime on their options for compensation* (Centre for Innovative Justice, 2020, p. 155)

Acknowledging the current lack of legal advice provision for victims, the Victorian Victims of Crime Commissioner (2021) recommended that:

> *The Victorian Government should establish a publicly funded victims' legal advice service that:*
>
> - *provides tailored legal information and advice delivered by specialist legal professionals using a trauma-informed and culturally safe approach*
> - *is well publicised and immediately 'visible' to members of the community as the pathway to specialist victims' advice*
> - *has accessible entry-points across Victoria, including regional areas.* (Victims Commissioner, 2021, p. 36)

Legal advice services - Canada

Ontario has a programme offering up to four hours of free legal advice, by phone or 'video chat' to victims of sexual offences over 16 years old any time after the incident, regardless of how much time has passed. However, this does not extend to legal representation in court[15]. Eligible victims receive a voucher for two hours of legal advice, however if they require more time, they can request another two hours. They are also given a list of lawyers to choose from. Advice could cover topics like reporting to the police, going through the criminal court process or deciding to start a lawsuit.[16] Bellehumeur (2020) who was on the panel of lawyers providing advice, found that "clients highly value the advice provided but often have needs well beyond its scope[17]" (p. 2, footnote 3). This programme was piloted in June 2016 and implemented permanently in March 2018.[18]

Alberta[19] and Nova Scotia[20] have similar legal advice schemes for sexual offence victims as that offered in Ontario, although in Nova Scotia victims are only entitled to two hours free legal

[15] https://www.ontario.ca/page/independent-legal-advice-sexual-assault-victims
[16] https://www.lasallepolice.ca/independent-legal-advice-for-survivors-of-sexual-assault-program
[17] Unfortunately, she did not provide any further information as this was just a footnote in an article arguing for ILR to be implemented in Canada
[18] https://owjn.org/2016/07/legal-advice-for-survivors-of-sexual-assault-pilot-program/
[19] https://www.lawcentralalberta.ca/en/independent-legal-advice-survivors-sexual-violence
[20] https://novascotia.ca/sexualassaultlegaladvice/

advice. However, enhanced services may be rolled out across Canada soon as their Department of Justice 'Budget 2021' is proposing to provide $85.3 million over five years, starting 2021-22 to provide free legal advice (and legal representation) for sexual violence victims.

Independent Legal Representation for Victims

The Republic of Ireland

Despite Ireland's conservative history of law reform in the area of victims' rights, they were the first country within an adversarial criminal law system to introduce independent legal representation (ILR) for victims in 2001, albeit limited to defending applications to introduce previous sexual history evidence in sexual violence trials (Iliadis, 2020c).

In 1987, initial proposals to introduce free ILR for sexual assault victims in Ireland were rejected by the Irish Law Reform Commission (ILRC). The rejections were mainly based on two main arguments:

- "that it would be 'constitutionally suspect' if proceedings for sexual offences were conducted upon 'fundamentally different principles from those applied in all other criminal proceedings'" (ILRC, 1987, cited in Iliadis, 2020c, p. 418).
- That it would result in 'dual representation' for the victim, and "be 'hostile to the interests of the accused' and jeopardize their right to a fair criminal trial" (ILRC, 1987, cited in Iliadis, 2020c, p. 419).

A modified version of the proposal restricting the ILR to cross-examination of victims on their previous sexual history was also rejected on the basis that the implementation would require a substantial change in criminal procedure and would not be necessary in practice as "judges have a duty to protect all witnesses from unfair cross-examination by counsel […] they do not need counsel appearing for witnesses to remind them of it" (ILRC, 1987, cited in Iliadis, 2020c, p. 419).

Over a decade later, drawing on comparative research into European countries' inquisitorial system legal procedures which provide assistance, representation or support for sexual violence victims (Bacik et al., 1998, p. xvii), ILR for victims in Ireland was again proposed. This time, a limited pre-trial form of ILR for sexual violence victims (Iliadis, 2020a, p. 97) was introduced:

> *Section 34 of the Sex Offenders Act 2001 (IRL) … inserted a new section (4A) into the Criminal Law (Rape) Act 1981 that allows sexual assault victims to access state-funded legal representation to oppose a defendant's application to introduce a victim's sexual history evidence in court*. (Iliadis, 2020a, p. 97)

In addition to legally recognising the trauma experienced by sexual assault victims when giving evidence under cross-examination and reducing potential secondary victimisation, this reform was significant and controversial because it marked "the first attempt within an adversarial criminal law jurisdiction to grant sexual assault victims the right to have ILR in this context" (Iliadis, 2020c, p. 420).

The right to ILR only currently applies for victims of rape and 'aggravated sexual assault'. It does not extend to all sexual assault cases (O'Malley et al., 2020, para 6.10). However, one of the recommendations made by the O'Malley Review (2020)[21] commissioned by the Irish

[21] Working Group chaired by Tom O'Malley B.L., Senior Lecturer in Law

Minister for Justice and Equality to review the protections available for vulnerable witnesses in the investigation and prosecution of sexual offences, stated:

> *the provision for separate legal representation (and the associated right to legal aid) should extend to all trials for sexual assault offences. The experience of a victim as witness in a trial for sexual assault may be no less difficult or traumatic than in a trial for a rape or aggravated sexual assault offence.* (2020, para 6.10)

Further, until the introduction of s. 19A of the Criminal Law (Sexual Offences) Act 2017, which required the accused to apply to the trial court for disclosure of counselling records, such private records were not protected. Since statistics reveal that this protection is seldom used, the O'Malley review (2020) recommends that effective steps be taken to make victims aware of the existence of this legislation. It also recommends that consideration be given to extending such protection to cover the disclosure of medical records, and that "a formal code of practice should be established to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage" (O'Malley et al., 2020, p. 85).

Iliadis (2020c) explored the extent to which section 34 improves victims' procedural justice experiences by allowing victims to prevent their sexual history evidence from being used in court. Drawing from interviews[22] conducted with five 'high-level' criminal justice professionals, legal stakeholders and victim support workers, she identified that ILR has "strong potential to address victims' procedural justice needs for voice [and] control" (p. 420). ILR can force the defence to justify their application to cross-examine the victim in relation to their sexual history and help the victim to better understand the defence counsel's rationale for the application. In opposing the defence counsel's legal arguments to defend the victim's interests, the legal representative is giving a voice to victims, who previously would have had very limited input into their case. This is likely to enhance the victim's sense of agency and autonomy, and therefore reduce the likelihood of trauma or re-victimisation. Other potential benefits of ILR as outlined in 'section 34' and the associated enhanced participatory rights include increasing victims' confidence during cross-examination which in turn could lead to improved reporting rates and attrition levels in sexual violence cases.

Iliadis (2020c) also identified some shortcomings relating to: the legislation in terms of delays in notice of intention to cross-examine on prior sexual history, the limited role of the legal representative, and a limitation of section 3 that potentially supports rape myths. Although the wording of the legislation states that notice of intention to make an application to cross-examine the victim should be given "before, or as soon as practicable after, the commencement of the trial",[23] in practice the defence often does not make the application until during the trial. This delay limits the time available for the victim to find sufficiently briefed legal counsel and diminishes the opportunity for meaningful consultation. Iliadis (2020c) notes that despite applications being made during the trial, the judge usually does issue the 'notice of intention'. Studies also reveal that the intention behind defence counsel's applications may be "to 'intimidate' the victim and 'discourage' them from continuing with the prosecution" (2020c, p. 424).

Leahy (2021) also noted that there is often insufficient time for consultation between the victim and their legal representative. This was also noted in the O'Malley Review (2020) which

[22] The interviews formed part of a broader study of victim-focused reforms across Australia (n = 13), England and Wales (n = 10) and Ireland (n = 3) in which 26 interviews were conducted with victim support workers (n = 9), criminal justice professionals (judges, prosecutors and lawyers – n = 10) and key policy and government stakeholders (n = 7). (Illiadis, 2020c, footnote 8, p.430)

[23] (Section 4A (2) as cited in Iliadis, 2020c, p. 423)

recommended that applications to adduce sexual history evidence be made at preliminary trial hearings. An additional recommendation states that "the Legal Aid Board should be immediately informed … to ensure that the victim is represented by counsel of a level of seniority similar to that of counsel representing the prosecution and defence" (O'Malley et al., 2020, p. 135).

Iliadis (2020c) questions the value of ILR as stated under 'section 34', given that it only applies to the application stage which, if then granted by the judge, still leaves the victim to endure cross-examination about their sexual history without legal representation. Iliadis (2020c) corroborates her misgivings by citing an Irish study which showed that "70% of applications to allow prior sexual history evidence were granted by the Central Criminal Court across a sample of 59 cases of rape and/or aggravated sexual assault" (Bacik et al., 2010 as cited in Iliadis, 2020c, p. 425). The O'Malley Review (2020) recommends that the right to ILR should be extended to include the cross-examination stage at the trial judge's discretion (O'Malley et al., 2020, p. 136). However, Iliadis (2020c) contends that this type of "judicial discretion leads to inconsistencies in victims' experiences with the criminal justice system … [and such] inconsistencies, are likely to contribute to attrition rates and dissatisfaction levels with the criminal justice process" (Iliadis, 2020c, p. 425). She cites an observation made by one of her participants who explained:

> *Sometimes the court asks the person [the legal representative] to wait for the questioning to see that it follows the spirit of what was agreed in the legal argument and sometimes, conversely, the judge will ask the legal representative to leave.* (Iliadis, 2020c, p. 425)

A limitation of section 3 of the Criminal Law (Rape) Act, is reflected in the statement, "no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience of a complainant with a person *other than that accused*" (Criminal Law (Rape) Act, section 3(1), as cited in Iliadis, 2020c, p. 425). In other words, questions about the victim's previous sexual history with the accused are permitted. Given that most sexual violence is perpetrated by someone known to the victim such as an intimate partner, this diminishes the victim protection that the legislation claims to offer.

Iliadis (2020c) argues that such legislation "fails to recognize the complexities surrounding rape investigations and prosecutions, as any evidence relating to a victim's prior sexual history can reduce the likelihood of successful conviction" (p. 426). Drawing on research literature, Iliadis demonstrates the prevalence of rape myths and misconceptions, including that rape cannot occur in marriage (or an intimate relationship) because ongoing consent is assumed, that only 'stranger rape' is 'real rape', and that women "maliciously fabricate claims to seek revenge" (p. 426). These myths persist among criminal justice personnel as well as the public, despite extensive debunking and counteracting research, "to distort the pursuit of justice, from as early as the initial reporting of a crime through to the trial" (p. 426).

Iliadis (2020c) concludes that the likelihood of sexual violence victims attaining procedural justice is limited firstly through the restricted form of ILR offered in Ireland and secondly through the significant gaps between the theoretical aims of the legislation and the practical outcomes. This may be improved if ILR was extended beyond the application stage, as recommended by the O'Malley Review (2020), however, it is crucial to challenge the "deeply embedded practices [underpinning the frequency and rationale of applications to adduce sexual history evidence] … that result in women's sexual history and character influencing determinations of responsibility, blame and guilt" (McGlynn, 2017, p. 392).

This echoes research[24]-based concerns raised by the Dublin Rape Crisis Centre (2009) about:

- the frequency of the applications to introduce sexual history evidence being granted even in cases even when consent is not an issue
- the 'highly prejudicial nature' of the reasons offered by the defence to adduce previous sexual history evidence
- the reliance of the defence counsel on common rape myths to justify the inclusion of such evidence. (e.g., assertions of promiscuity).

Table 1: Shortcomings of current legislation with corresponding recommendations from the O'Malley Review

Identified shortcomings of the current legislation	**Corresponding recommendations from the O'Malley Review (2020)**
It applies only to victims of rape and aggravated sexual assault	ILR should be extended to cover sexual assault complainants
In practice the defence delays making the application until during the trial which limits the time available for the victim to find sufficiently briefed legal counsel and diminishes the opportunity for meaningful consultation	The defence should be required to notify the judge conducting the preliminary trial hearing of the intention to make an application and the Legal Aid Board should be immediately informed "to ensure that the victim is represented by counsel of a level of seniority similar to that of counsel representing the prosecution and defence" (O'Malley et al., 2020, p. 136).
Most applications by the defence are still being granted by the judge. (The Dublin Rape Crisis Centre expressed concern eight years after the introduction of ILR about the frequency of application requests even when consent is not an issue, and the highly prejudicial nature of reasons for requests.)	ILR should be extended to include the cross-examination stage "if permitted by the trial judge" (O'Malley et al., 2020, p. 136).
It did not provide any protection in relation to applications to disclose counselling records. However, in 2017 the enactment of s. 19A of the Criminal Law (Sexual Offences) Act 2017 introduced a procedure whereby the accused must apply to the trial court for the disclosure of counselling records	Consideration should be given to extending the s. 19A protections relating to counselling records to also cover the disclosure of medical records
It did not provide any protection in relation to applications to access digital/electronic data from victims' mobile devices.	A "formal code of practice should be established to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage" (O'Malley et al., 2020, p. 85).

[24] Bacik et al'., Research paper 'Separate legal representation in rape trials' presented at the Rape Law: Victims on Trial? Conference held jointly by Dublin Rape Crisis Centre and School of Law, Trinity College in January 2010.

Northern Ireland - The Gillen Review

In April 2018, Sir John Gillen was commissioned by the Criminal Justice Board, to undertake an independent review of arrangements around delivery of justice in serious sexual offences. This was in the wake of a nine-week trial that became known as the 'Belfast Rugby Rape Trial' that dominated the news on both sides of the border. Two rising stars of Ulster and Irish rugby, Paddy Jackson and Stuart Olding, were charged with rape and two of their friends were charged with exposure, concealing evidence, and attempting to pervert the course of justice. All four men were found 'not guilty'. The trial and the men's acquittal provoked an intense public debate and a series of protests including one under the hashtag #IBelieveHer (Iliadis et al., 2021; McKay, 2018). The country was divided:

> *Men and women were appalled by the sexist attitudes the young men displayed in private social media conversations that had been aired in evidence. Others focused their anger on the judicial process. The complainant had to spend eight days in the witness box, being cross-examined by four sets of barristers, all men…*
>
> *Yet others were outraged on behalf of the defendants, pointing to flaws and inconsistencies in the complainant's evidence… They felt it was unjust that the defendants were named[,] … [that] almost every day … their photographs were displayed alongside shocking headlines in the papers, … [and that] despite the not guilty verdict, … the whole process ha[d] been damaging to their careers.* (McKay, 2018, n.p)

Northern Ireland's history of political violence has led to a general distrust of the criminal justice system. Iliadis and colleagues (2021) relayed that during the 'Troubles' a culture of "'self-policing' within republican and loyalist communities" (p. 253) led to Northern Ireland having one of the lowest levels of recorded crime in Europe with "cases of rape and domestic abuse [going] unreported due to fear of reprisals" (p. 253). Although the reporting of sexual violence has increased over the last twenty years, attrition rates remain high. McKay (2018) reveals that out of 823 rape reports made to the police, between 2016 and 2017, there were only 15 convictions which equates to a rate of 1.8%, the lowest in the UK. Likewise, Iliadis and colleagues (2021), showed how Northern Ireland's statistics compare unfavourably with England and Wales which itself receives criticism for its low conviction rates: "currently in Northern Ireland less than 1 per cent of recorded rapes and only 18 per cent of prosecuted cases result in conviction" whereas the figures for England and Wales are approximately 5 per cent and 58.3 per cent respectively (2021, p. 254).

A similar polarity of views to that sparked by the Belfast Rape trial was noted by Sir John Gillen in relation to the responses he received from his preliminary review[25]. Although most responses supported his recommendations which included a form of ILR for victims similar to that in the Republic of Ireland:

> *[some people stated that he had] not gone far enough in removing the perceived barriers to justice for complainants and the accused alike [while others expressed that he had] gone much too far proposing legal and procedural changes, which will be either too expensive or too radical a departure from conventional legal practices and procedures*. (Gillen, 2019, p. iv)

[25] Gillen refers to responses to his preliminary review in the main Gillen Review, however, the preliminary report no longer appears to be available.

The latter perspective reflects Northern Ireland's common law principles are "underpinned by the need to safeguard the accused person's rights to a fair and impartial trial" (Iliadis et al., 2021, p. 251).

Gillen (2019) acknowledged the dilemma caused by the tension between the professional views of stakeholders in the criminal justice system and the 'ordinary common sense' of the public. He explains how complainants are often shocked to discover that they are not entitled to legal representation and ponders the question:

> *How far should the rule of law be based on everyday understanding and buy-in of the majority of the population, and how far on the specialised, often less easily intelligible, wisdom of the experts?* (Gillen, 2019, p. iii)

Noting the under-reporting and high attrition rate of cases of sexual violence which he describes as the 'worst violations of human dignity', Gillen (2019) acknowledges his "deep concerns about how serious sexual offences are processed and determined" (at p. i). Creating a pattern of coordinated reform, Gillen (2019) makes 253 recommendations. Out of those, 16 emerged as key recommendations including one relating to independent legal representation for complainants:

> *A measure of publicly funded independent legal representation should be offered to complainants from the outset up to but not including the trial* (Gillen, 2019, p. 29, key recommendation no.3).

Gillen (2019) clarifies:

> *[ILR] should be granted to all complainants in all serious sexual offence cases in the following circumstances:*
>
> - *to afford relevant information and general legal advice on a time limited basis throughout the process up to the commencement of the trial, with the option of bringing such matters to the attention of the court prior to trial;*
> - *where complainants wish to exercise the right to appear in court to object to disclosure of private material to the accused's defence team or to ensure it is restricted to the minimum necessary; and*
> - *where complainants wish to appear in court to object to the introduction of their previous sexual history.* (Gillen, 2019, p. 187)

According to Iliadis and colleagues (2021) ILR may include appearance at ground rules hearings (GRHs)[26] to "enable more effective judicial control over the nature and duration of questioning of child witnesses" (p. 255). Research has shown that the bar and judiciary are generally in favour these hearings, first formalised in England and Wales in 2013, which can result in child witnesses being asked "fewer suggestive, and less complex, questions under cross-examination" (2021, p. 255). Considering a measure of publicly funded legal representation for complainants as 'essential', Gillen (2019) explains that the concept is "neither novel nor uncommon in both inquisitorial and adversarial systems worldwide" (Gillen, 2019, p. 13). Concurring, Iliadis and colleagues (2021) show that ILR is becoming more widely available for complainants within legal systems that employ adversarial frameworks:

[26] Ground rules hearings are a pre-trial process that involve all parties and the judge to address a number of issues, including the manner and content of cross-examination. (https://www.judicialcollege.vic.edu.au/eManuals/VCPM/66162.html)

> *[ILR] is available in some form in Australia (New South Wales, … and South Australia), Canada (Manitoba and British Columbia), … the Republic of Ireland, … Scotland, and the United States (US) (New Hampshire, West Virginia, Wisconsin, and the US Military)*[27]. (Iliadis et al., 2021, p. 261)

Furthermore, Iliadis and colleagues (2021) demonstrate that in jurisdictions in which ILR does not yet exist, "calls for its introduction have increasingly featured in international commissions of inquiry" (at p. 261).

Gillen (2019) regards the right for complainants to have "legal representation to oppose cross-examination on previous sexual history and to oppose disclosure of personal medical records [as] eminently sensible" (p. 13). He also reveals that the findings from their online survey showed very substantial public support. Indeed, the ILR recommendation is very similar to the ILR for complainants in the Republic of Ireland but is extended to include medical records. However, whereas the Republic of Ireland's more recent O'Malley review (2020) recommends that complainants' right to ILR should be extended to include the cross-examination stage, Gillen (2019) remains adamant that such legal representation in Northern Ireland should "in no instance … involve attendance during the trial itself … [because it] might confuse the jury as to the respective roles of counsel" (p. 13).

In contrast, Iliadis and colleagues (2021) are disappointed that ILR, in the Gillen Review, was not recommended to be extended to cover the cross-examination stage to ensure any questioning is consistent with what was agreed. This is echoed by Killean (2021) who argues that to "comprehensively address the specific and serious challenges facing complainants in sexual offence trials, legal representatives should be present, at minimum, for the process of examination and cross-examination [to ensure] that proper procedures are followed and inappropriate questions are prevented" (2021, p. 182). Indeed, Gillen (2019) did recommend that extending ILR to these stages of the trial should be considered after his other ILR recommendations had been piloted and analysed.[28] Iliadis and colleagues (2021) consider that Gillen's reluctance to recommend such an expanded role immediately is due to his belief that the existing rape shield measures are sufficient so that ILR should rarely be needed(Gillen, 2019, as cited in Iliadis et al., 2021, p. 256). However, research has shown that "protections on complainants' sexual history and character evidence are overwhelmingly 'evaded, circumvented and resisted'" (Iliadis et al., 2021, p. 256).

The concept of ILR for complainants remains a contentious issue despite the fact that it is in operation in some countries with adversarial systems, such as, the Republic of Ireland. Analysing the Gillen Review, Kirchengast (2021) acknowledges that Gillen (2019) provided some guidance about the application of legal representation for sexual violence complainants, however, he is disappointed by the lack of "a review of the law of evidence or trial process" which he deems "a significant deficit" (Kirchengast, 2021, p. 5). He further critiques the Gillen Review, stating:

> *the lack of consideration of the law of evidence and trial process and the case law that reports the complexities around lifting the 'rape shield', including a critical discussion of the immovable complexities of consent to intercourse, is a systemic weakness of the report. Poorly referenced and articulated explanations of the scope, impact and thus usefulness of pilot studies or reform initiatives across international jurisdictions also hamper the veracity of the recommendations*. (Kirchengast, 2021, p. 17)

[27] All of these jurisdictions are covered in this review

[28] See the Gillen Review (Gillen, 2019) Recommendation 41 on p.187.

Kirchengast (2021) concludes that:

> *The final recommendations of the Gillen Review should … **not** be accepted without further consideration as to how the law of evidence and trial process may accommodate counsel for victim complainants within the context of the overarching requirements of the fair trial at common law. This necessarily includes consideration of limitations placed on the Crown, against the rights and duties owed to the accused, which may not be overcome without due examination of these longstanding and constitutive aspects of adversarial justice.* (Kirchengast, 2021, pp. 5–6 [emphasis added])

Kirchengast (2021) highlights that, in addition to the main reason for introducing ILR for complainants of preventing re-traumatisation and secondary victimisation, the Gillen Review cites another justification for ILR in terms of protecting victims' interests to ensure their confidence in their evidence. He quotes from the review:

> *When complainants are offered this level of support it can lead to them being a more effective witness. The stress that complainants are under when giving evidence can be reduced when a legal advocate is present as they are more confident in their presence . . .*
>
> *There is evidence in the literature to show that court-related stress can make complainants more vulnerable to suggestion by counsel as a result of retrieval failures of short-term memory, which reduces the quality of testimony. In addition, this causes incomplete description of events and an increase in errors and inconsistencies in testimony, with that testimony taking longer to provide* (Gillen, 2019, as cited in Kirchengast, 2021, p. 5)

Rather than providing ILR for victims, Kirchengast (2021) proposes that such support could be provided by non-legal advocates.

Iliadis and colleagues (2021) reveal that the Implementation Plan arising from the Gillen Review Implementation Board, omitted the recommendations for ILR to protect complainants' privacy in terms of sexual history and personal records, despite it having received strong support (Gillen, 2019, p. 180). Although this was identified as a strategic priority area, it was limited to "the 'provision of agreed legal advice pre-trial to ensure complainants have advice in relation to their privacy'" (Gillen Review Implementation Team, 2020, as cited in Iliadis et al., 2021, p. 258). It was launched in April this year (2021) as a publicly funded 2-year pilot – the Sexual Advice Legal Advisors (SOLAs) scheme as discussed earlier.

Iliadis and colleagues (2021) reflect that although some pushback was expected, the only 'substantive objection' to ILR came from the Northern Ireland Bar. The Bar Council objected to the ILR recommendation on the basis that:

> *the prosecutor owes duties [to the complainant] as set out in the Victim and Witness Charters ... [and] once a case comes to trial and the issues of previous sexual experience, or disclosure of medical documents are encountered, a senior prosecution counsel being conversant with all of the circumstances, having access to all the witnesses, knowing how decisions are reached and being familiar with the disclosure in the case, could adequately deal with these matters.* (Gillen, 2019, pp. 185-6 as cited in Iliadis et al., 2021, p. 258)

Gillen (2019), however, argued that the Bar Council's objection:

> *fails to address the private interests of the complainants which they are entitled to have protected ... [and] the rights of privacy of complainants adds persuasively to the reasons why separate legal representation ought to be available at the State's expense.* (Gillen, 2019, p. 186, as cited in Iliadis et al., 2021, p. 259)

Referring to anecdotal reports, from within the Department of Justice, of a growing concern about the difficulty of convincing trial counsel of the need for ILR, Iliadis and colleagues (2021) attribute this 'difficulty' to the legal profession culture:

> *Lawyers' behaviours are shaped by the adversarial framework; lawyers are conditioned to approach their working culture – perhaps unconsciously – from 'their own standpoint of interpretations of reality contained in the law'. In many common law jurisdictions, legal education and training is rooted in the adversarial tradition, meaning that zealous advocacy is ingrained in criminal lawyering*. (Iliadis et al., 2021, p. 259)

Iliadis and colleagues (2021) relay how traumatising encountering such attitudes can be for victims. They highlight survey results which showed that the majority of victims who reported to police "found the justice process more traumatic than the original offence" (2021, p. 259). Furthermore, Iliadis and colleagues argue that far from ILR potentially being expensive as suggested in the Gillen Review, savings can be made:

> *The Home Office estimated the cost of sexual offences in England and Wales as £12.2 billion each year (based on 2015/2016 calculations). Of this, an estimated £9.8 billion was caused by the emotional consequences of both the crimes and the inadequate responses to those crimes. Research shows that improved criminal justice responses lead to better health and employment outcomes for complainants, as well as increasing public confidence in the justice system and preventing future offending [Bacik, 2019]. Additionally, Westmarland et al. [2015] estimated that each rape conviction prevents an average of six further sexual offences when accounting for repeat offending. This equates to an estimated saving of £197,160 per conviction, even after the cost of imprisonment.* (Iliadis et al., 2021, p. 271)

In sharp contrast to Kirchengast's (2021) conclusions that the Gillen Review recommendations should not be accepted, Killean (2021) and Illiadis and colleagues (2021) argue that the recommendations do not go far enough. Going one step further than Gillen's recommendations, Iliadis and colleagues propose a 'Gillen-plus' model of ILR. In addition to legal representation to support "complainants responding to intrusions of privacy, including, but not limited to, digital and school records, as well as 'bad character' evidence", they argue that ILR "should extend beyond pre-trial processes so that complainants are supported in their efforts to protect their privacy and interests where such issues arise at trial"(Iliadis et al., 2021, p. 272).

Scotland

As the victims' rights discourse in Scotland evolves, momentum gathers for the introduction of ILR not only to improve sexual violence complainants' experience of the criminal justice process but also to tackle Scotland's low conviction rates (Leverick, 2021). Explaining how Italy, Germany, Belgium, Norway and Denmark whose legal systems include adversarial features, as well as the Republic of Ireland whose jurisdiction is described as 'adversarial', already offer sexual violence complainants some form of legal representation, Raitt (2011) affirmed:

> *Let me dispel any misconception that the adversarial process is an insurmountable obstacle for independent legal representation. It is not … [T]he idea that the adversarial*

> *process prevents rape survivors from access to their own legal advice and representation is simply not accurate. It is a question of political will, and of convincing the legal establishment of its merits*. (Raitt, 2011, pp. 7–8)

Contributing to the ongoing debate about progressive legal reform in Scotland, Keane and Convery (2020) proposed that ILR for victims of sexual violence should be available in a similar way to how it operates in Ireland. That is, that victims have access to free ILR to oppose the defendant's application to introduce their sexual history evidence in court. In Scotland, applications to lead evidence of character, sexual history or medical records are made under s. 275 of the Criminal Procedure (Scotland) Act 1995. Keane and Convery assert that whenever an application is made, complainants[29] should "have a right to be heard, and to be legally represented … in order that they can make submissions in relation to whether that application should be granted" (p. 2). Maintaining that s. 275 hearings should generally take place 'pre-trial', they recommend that if an application is made mid-trial, "the court should require to adjourn to allow the complain[ant] to obtain representation, be heard and, if necessary, exercise their appeal rights" (p. 36). In fact, the authors contend that "relevant case law on Article 8 of the European Convention on Human Rights [ECHR][30], … may provide a legal basis for [such] representation" (p. 2).

Indeed, Gillen (2019) cited "a recent judicial review[31] [in Scotland, which] established that complainants had the right to obtain legal aid to object to disclosure of their medical records to the accused's defence team to ensure it is restricted to the minimum necessary" (p. 169). He explained:

> *The Court of Session ordered the provision of legal aid in a case of a complainant who objected to the disclosure of her medical records to the lawyers for the alleged perpetrator, in compliance with her right to privacy under Article 8 of the ECHR.* (Gillen, 2019, p. 169)

Similarly, Leverick (2021) reports that although in Scotland, subject to certain exceptions, the leading of a complainant's sexual history evidence is already prohibited. However, "these protections have not always been well-enforced in practice [so] applications to lead sexual history evidence often go unopposed by the Crown" (p. 4). However, the Dorrian Review[32] (2021) stated that currently:

> *In the context of section 275 applications the current position in Scotland is that a complain[ant] has no statutory right to oppose or present their response to the court. A complain[ant] is not entitled to notification of the application and should one be made in the course of the trial, the statutory provisions provide that they must not be present during its consideration.* (The Lord Justice Clerk's Review Group, 2021, p. 81)

The Dorrian Review cites Keane and Convery's (2020) proposal including their recognition that the nature of the questioning related to s. 275 applications "would 'represent a particularly intimate, sensitive and important aspect of a complain[ant]'s private life' and had the potential to engage a complainer's Article 8 rights" (The Lord Justice Clerk's Review Group, 2021, p. 7). In accordance with Keane and Convery's proposal, the Dorrian Review recommend that

[29] In Scotland, the term 'complainer' is used, however, for consistency, the terms complainant is used throughout this report.
[30] European Convention on Human Rights, Article 8: Right to respect for private and family life
[31] Both Gillen and Keane & Convery cited *WF v Scottish Ministers* [2016] CSOH 27
[32] A review led by the RT Hon Lady Dorrian, the Lord Justice Clerk, known as the 'Dorrian Review' commissioned by the Scottish 'Lord Justice-General (Lord Carloway)'

"publicly funded ILR should be made available to complain[ant]s in respect of section 275 applications, and appeals" (The Lord Justice Clerk's Review Group, 2021, p. 7).

The Dorrian Review (2021) acknowledged that:

> *the provision of ILR was beneficial in two important respects: (i) it allowed the prosecutor to focus on the application purely in terms of its significance for the prosecution; and (ii) it ensured that complain[ant]s could be satisfied that their views were heard by the court deciding the application* (The Lord Justice Clerk's Review Group, 2021, p. 85).

Furthermore, drawing on the Justice Journeys report (Brooks-Hay et al., 2019) based on in-depth qualitative research with sexual violence victims, the Dorrian Review recommended that the "provision of ILR would be in line with the trauma-informed principle of 'choice' and engage several of the core values associated with trauma-informed practice including collaboration and empowerment" (The Lord Justice Clerk's Review Group, 2021, p. 85).

England and Wales

The Stern Review (2010), conducted from November 2009 to March 2010 by Baroness Vivien Stern CBE, was an independent review into how rape complaints are handled by public authorities in England and Wales. The review included examining the concept of independent legal representation in Ireland and France, and concluded:

> *When we looked at the role of these lawyers for the victims, it seemed to us that the contribution they made to the victim's experience was an important one … These ideas are worthy of consideration and we are glad we were able to include these details in this report. We hope they will stay on the agenda.* (Stern, 2010, as cited in Gillen, 2019, p. 170)

Similar to Keane & Convery (2020) and the Dorrian Review's (2021) observations about the significance of the European Convention of Human Rights (ECHR) article 8 to such applications, Gordon and Gordon (2020), commissioned by the Victims' Commissioner for England and Wales, asserted that such applications "*undoubtedly* engage a victim's rights to privacy under ECHR Article 8" (Gordon & Gordon, 2020, p. 114 [emphasis added]).

Applications for disclosure of private and confidential information was formally recognised as engaging the victim's rights to privacy under ECHR Article 8 in the Judicial Protocol of 2013:

> *Applications for third party disclosure must identify the documents that are sought and provide full details of why they are disclosable. This is particularly relevant when access is sought to the medical records of those who allege they are victims of crime. It should be appreciated that a duty to assert confidentiality may arise when a third party receives a request for disclosure, or the right to privacy may be claimed under article 8 of the ECHR…* ***Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by making a complaint against the accused. The court, as a public authority, must ensure that any interference with the right to privacy under article 8 is in accordance with the law, and is necessary in pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused. Confidentiality rests with the subject of the material, not with the authority holding it. The subject is entitled to service of the application and has the right to make representations.*** (Judiciary of England & Wales, 2013, as cited in Gordon & Gordon, 2020, p. 116 [emphaisis in the original])

However, although "a victim of crime must be notified of an application for disclosure of records relating to them", they are not entitled to legal representation to support their opposition to such applications (Gordon & Gordon, 2020, p. 116). This is still the case, despite the concept of legal representation for complainants in sexual violence cases having been debated in England & Wales since 2005 when the former Labour Government championed the provision of legally aided representation for victims of serious crime including rape (Gillen, 2019; Gordon & Gordon, 2020). Additionally, as early as 2006 during a judicial review of proceedings in the Crown Court, the High Court stated:

> *TB [the child victim of sexual abuse] should have been given notice of the application [to disclose her medical records] and given the opportunity to make representations, orally if she had wished. It was not sufficient for the court to delegate her representation to the NHS Trust alone.* (Gordon & Gordon, 2020, p. 116)

Citing this High Court recommendation, along with recommendations made in the Gillen Review 2019 and a report by the Information Commissioner's Office (2020), Gordon and Gordon (2020) recommended:

> *that all victims of crime be given the right to publicly funded independent legal advice and representation in relation to requests by the police for access to, and applications by third parties for disclosure of or digital downloads of their private or confidential records or communications, including mobile phone data and all health, social services, mental health, counselling and education records*. (Gordon & Gordon, 2020, p. 117)

Acknowledging that "victims should be recognised as participants in their own right and not simply an adjunct to the case for the Crown", the Victims' Commissioner for England and Wales (2021) subsequently recommended as part of her Victims Law Policy Paper, a "statutory right for victims to be given free legal representation in respect of any decisions taken by police, prosecutors or courts that threaten their Article 8 Right to Privacy" (Victims' Commissioner, 2021, p. 23).

Australia

One national and two state inquiries, in Australia, have considered the need for legal representation for victims. The Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) (2017) was announced by the then Prime Minister, the Hon. Julia Gillard, on 12 November 2012. The two state inquiries both relate to Victoria: The Victorian Law Reform Committee (VLRC (2016), and the Royal Commission into Family Violence Victoria (RCFVV) (2016). However, most complainants in Australia do not yet have the right to independent legal representation (ILR). According to Kirchengast (2021), all three inquiries separately assessed the need for legal representation for victim complainants. He asserted:

> *Across the various inquiries, none of which convened to squarely consider the appropriateness of victim legal representation, consensus has emerged, in criminal proceedings, that:*
>
> *(i) the victim is not a party to proceedings,*
>
> *(ii) discrete risk to the integrity of the interests of the victim, their privacy or safety, warrants possible legal representation,*
>
> *(iii) the adversarial character of the trial ought to remain unchanged and*

(iv) alternative (non-legal/lawyer) mechanisms ought to be explored that are compatible with the nature of adversarial engagement. (Kirchengast, 2021, p. 6)

New South Wales

A state-funded legal representation scheme is available for complainants of sexual violence in New South Wales (NSW) in relation to preventing or restricting disclosure evidence relating to privacy, for example, counselling and medical records (Gillen, 2019, p. 171; Kirchengast, 2021, p. 6; Smith & Daly, 2020, p. 75). This service, called the Sexual Assault Communications Privilege Service (SACPS), provides specially trained lawyers who "speak only on behalf of the complainant. Usually they will oppose the defence, but sometimes they will oppose the prosecution. They can also guide the court on the operation of the privilege and the complainant's right to privacy"[33]. Complainants have access to this service when their confidential records are subpoenaed (Victim of Crimes Commissioner, 2021, p. 38). The SACPS service is hosted by Legal Aid NSW and has been operating in New South Wales since 2011 (Kirchengast, 2016, p. 110).

South Australia

The South Australian Commissioner for Victims' Rights (SACVR) has extraordinary powers in that section 16(3)(b) of the Victims of Crime Act 2001 (SA) permits them to 'assist victims in their dealings with prosecution authorities and other government agencies'. Thus, the Commissioner can intervene in cases if such intervention is deemed to be in the victim's best interests, including providing ILR. (Iliadis, 2017, p. 10). Sexual violence complainants in South Australia therefore may, if agreed by the SACVR, challenge applications to discover confidential records, for example counselling records (Smith & Daly, 2020, p. 75). Kirchengast and colleagues (2019) report that the SACVR can appoint legal counsel to help victim during criminal proceedings. They cite eight cases whereby the provision of legal counsel organised through the SAVCR "resulted in court decisions and interpretations of law that have favoured victims' interests without unduly impacting the rights of accused people" (p. 17). Interestingly, these cases also included victims of other crimes in addition to sexual violence.

Kirchengast and colleagues (2019) report that between 1 July 2008 and 31 December 2017, the SACVR engaged legal counsel to assist victims post-investigation on over 200 occasions. Such provision of legal counsel has empowered victims and given them a voice whilst reducing potential secondary victimisation. Despite the initial wariness and opposition by defence counsel and other legal professionals, they now recognise "the potential to improve the administration of justice by having a 'third voice' actively involved in decisions that affect victims" (p. 21). Thus, the authors proclaim, South Australia demonstrates that the role of victim need not be limited to that of witness and suggests progress toward more comprehensive victim participation in South Australia's criminal justice system (p. 22).

Victoria

Iliadis (2020b) explored the prospect of introducing ILR for sexual assault victims in Victoria's adversarial system, with participants comprising criminal justice professionals, legal stakeholders and victim support workers. She found that while some participants supported the idea of ILR for sexual assault victims throughout the entire process, most thought ILR was only feasible in a limited context, for example, to limit or prevent prior sexual history or medical and counselling records being used as evidence. The main concerns that participants had about introducing ILR for victims related to the perception of imbalance with two lawyers, the prosecutor and the victim's representative, against one defence lawyer. She concluded that

[33] Sexual Assault Communications Privilege Service - Legal Aid NSW - https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service

ILR for victims throughout the whole process, may jeopardise the principles of the adversarial system and "unduly complicate the trial process" (p. 151), however, would be of value and less contested if limited to the pre-trial stage.

Similarly, the Victorian Law Reform Commission (VLRC (2016) asserted that:

> *Victims need legal representation, independent of the prosecution, to ensure that they do not lose the right to protect their confidential communications in a situation where their interest conflicts with the prosecution's. Sometimes prosecutors may be reluctant to oppose an application, even where the victim objects. Sexual assault counsellors told the Commission that conflicts between the interests of the prosecution and the victim can arise frequently.* (Victorian Law Reform Commission, 2016, p. 145, para 7.81)

One of the recommendations made by the Victorian Law Reform Commission (2016) related to providing a similar service in Victoria to that of NSW's Sexual Assault Communications Privilege Service (SACPS):

> *Victoria Legal Aid should be funded to establish a service for victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW. It should provide legal advice and assistance, in accordance with the Legal Aid Act 1978 (Vic), in relation to:*
>
> *(a) substantive legal entitlements connected with the criminal trial process*
>
> *(b) asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.*
>
> *The legal service should be independently evaluated not more than three years after commencement* (Victorian Law Reform Commission, 2016, p. xxiv, Recommenndation 23).

The Victorian Law Reform Commission (2016) made a further recommendation to amend current legislation relating to victim participation and legal representation. Their recommendation (25) is as follows:

> *Division 2A of Part 2 of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) should be amended by:*
>
> *(a) requiring the prosecution to notify the victim of their right to appear and the availability of legal assistance in relation to an application to subpoena, access and use their confidential communications (see recommendation 23 [above])*
>
> *(b) requiring the court to be satisfied that the victim is aware of the application and has had an opportunity to obtain legal advice*
>
> *(c) prohibiting the court from waiving the notice requirements except where the victim cannot be located after reasonable attempts or the victim has provided informed consent to the waiver*
>
> *(d) providing victims with standing to appear*
>
> *(e) permitting victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted.* (Victorian Law Reform Commission, 2016, p. 147)

The Victorian Victims of Crime Commissioner (2021), supported the Victorian Law Reform Commission's Recommendation 25 by making a very similar recommendation herself.[34]

After reviewing relevant research as well as the recent progress made in relation to ILR for victims in New South Wales (SACPS), England and Wales (SVCA scheme), Ireland (O'Malley Review) and Denmark (where state-funded victims' legal representatives can be present at cross-examination and object to questions from both prosecution and the defence), the Victorian Victims of Crime Commissioner (2021) made the following recommendation:

> *Victims of sexual assault should have the right to an independent legal representative to represent their rights and interests at key stages of the criminal justice process including in relation to:*
>
> - *applications to subpoena, access or use confidential medical or counselling records*
> - *applications to be cross-examined on, or admit evidence about, the sexual activities of the complainant*
> - *access and eligibility for the intermediary scheme, special protections and alternative arrangements for giving evidence*[35]*.*
>
> *Consideration should also be given to whether it would be appropriate for victims to have independent legal representation during cross-examination, as occurs in Denmark, to uphold protections under the Evidence Act 2008 (Vic) in relation to inappropriate questions or questioning.* (Victorian Victims of Crime Commissioner, 2021, p. 41, Recommendation 12)

In a separate recommendation, the Victorian Victims of Crime Commissioner (2021) stated: "Victims should be provided with the opportunity to be heard in relation to applications to lead evidence about their sexual history and have independent legal representation to do so" (Victorian Victims of Crime Commissioner, 2021, p. 69, Recommendation 21)**.** These, however, are recommendations for the future, currently victims in Victoria do not a right to ILR.

Canada

"The Canadian Victims Bill of Rights does not grant a victim, or anyone acting on the victim's behalf, the status of a party, intervener, or observer in any criminal proceedings" (Gordon & Gordon, 2020, p. 66). According to Gillen (2019), legislation was introduced in June 2017 to provide sexual violence complainants with a right to legal representation in relation to protecting their privacy in relation to section 7[36] of the Charter of Rights and Fundamental Freedoms and the Criminal Code.

Bellehumeur (2020) who has over 20 years experience of conducting criminal prosecutions as Crown counsel as well as more recent experience of representing sexual violence survivors in human rights cases, argues that putting unrepresented victims of sexual violence at risk of re-victimization or re-traumatization by the criminal justice system is a violation of section 7 of the Canadian Charter of Rights and Freedoms, in relation to security of the person. She explains that this is due to fact that such harm is predictable and could be reduced by the state but is unavoidable for the victim. Bellehumeur contends such a violation is unjustified and could be remedied with the provision of legal representation for the victim. She maintains that

[34] See Victim of Crimes Commissioner, 2021, p. 70, Recommendation 22

[35] These issues are out of scope for this review so will not be discussed further.

[36] Section 7 - the right to life, liberty, and security of the person

the Canadian criminal justice system is discriminatory and undermines the equality of women, given that 92% of victims of police-reported sexual assault are women and concludes that:

> *allowing legal representation offers overwhelming value and empowerment to survivors of sexual violence by improving their protection from harm and increasing their access to justice … providing this support to survivors could increase the reporting rate for sexual violence and thereby contribute to reducing the rate of sexually offending with impunity.* (Bellehumeur, 2020, p. 1)

Despite the Canada Criminal Code, at the federal level, making no reference to legal representation, the provinces of British Columbia and Manitoba provide ILR for victims in relation to third party applications for disclosure of information relating to their personal history (Gillen, 2019, p. 171; Gordon & Gordon, 2020, pp. 63–71). However, the situation may soon become more equitable for victims of crime across the whole country, as Canada's Department of Justice 'Budget 2021' is proposing to provide $85.3 million over five years, starting 2021-22:

> *to help ensure access to free legal advice and legal representation for survivors of sexual assault and intimate partner violence, no matter where they live … Funding will support a national program for independent legal advice and independent legal representation for victims of sexual assault, as well as to support pilot projects for victims of intimate partner violence.*[37]

United States of America

According to Gillen (2019) "in the US, Special Victim Counsel (SVC) are legal assistance attorneys who have received specialised training and represent the views of complainants as appropriate" (2019, p. 171). However, this service appears to be available only for "military-connected victims".[38] The SVC has three main roles:

> *(1) Advocate - to provide victims zealous advocacy by protecting their rights;*
>
> *(2) Advise - to provide legal advice – by developing victims' understanding of the often complex investigatory and military justice system;*
>
> *(3) Empower - by removing barriers to their full participation in the military justice process*[39]

This service is available across the US Military; however, the Navy and Marine Corps refer to these professionals as Victims' Legal Counsel (VLC) rather than SVC. This reform was introduced in 2014 under the *Victim Protection Act* in response to a 2012 report that showed unacceptably low rates of reporting in relation to sexual assaults; only 3,374 cases were reported out of an estimated 26,000 assaults. The goal of introducing this new legislation to provide independent legal counsel for victims of sexual assault at no cost, was to "make [the] military the most victim-friendly justice system in the world" (Senator Claire McCaskill as cited by Bellehumeur, 2020, p. 10).

In addition to educating the victims about the military justice system and the resources available to them, "the SVC's primary duty is to represent their client's interests during the entire process leading up to and during the court-martial proceedings" (Bellehumeur, 2020, p. 11). The Air Force was the first branch of the military to put the SVC programme into operation,

[37] https://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/index.html
[38] https://mvets.law.gmu.edu/2021/05/17/special-victim-counsel-services-extended-to-victims-of-domestic-violence/
[39] https://www.jbsa.mil/Portals/102/Documents/Legal%20Services/SVC_FAQ.pdf

and their “2014 [effectiveness] survey found that 92% of victims represented were ‘extremely satisfied’ with the SVC's advice and support during the court process” (Bellehumeur, 2020, p. 11). Further, the number of sexual assault reports increased substantially following the SVC implementation; there was a 50% increase in the first year and a 76% increase in the second year. Research suggests that increases in reporting rates are likely to have a deterrent effect on sexual violence (Bellehumeur, 2020).

Unfortunately, it appears that no independent evaluations of the SVC programme have been conducted, however, a five-year overview highlighted some of the challenges and successes. Some aspects underwent judicial tests, for example, a trial judges’ ruling that “the victim had no standing to present legal argument to the court through her SVC” (Yob, 2019, p. 66) was later reviewed by the Court of Appeals for the Armed Forces (CAAF). The CAAF ruling served as:

> *ground-breaking controlling precedent for all military courts, establishing the principle that although a victim is not a party to the case, she [sic] is a limited participant, the SVC is her [sic] legal representative, and legal arguments on behalf of the victim through her SVC must be considered by the trial court*. (Yob, 2019, p. 66)

Yob (2019) explained the benefits of the SVC programme in terms of:

- contributing to victims “short-term and long-term resiliency” (2019, p. 66)
- enabling victims to “engage in the military justice process with confidence that their dignity, privacy, and interests are important and will be respected” (2019, p. 66)

Yob (2019) concluded that over time, the benefits of the SVC programme are likely to “increase the percentage of victims who choose to immediately report offenses and engage in disciplinary actions against offenders” (2019, p.73).

Civilian victims of sexual violence are also entitled to ILR in relation to applications to adduce sexual history evidence across several states including Wisconsin, West Virginia and New Hampshire, (Gillen, 2019, p. 171; Iliadis et al., 2021, p. 261). The State of California’s progressive legislation on victims’ rights provides 16 personal enforceable rights for victims of crime which include:

- *To prevent the disclosure of confidential information or records to the defendant which could be used to locate or harass the victim or the victim’s family or which disclose confidential communications made in the course of medical or counselling treatment, or which are otherwise privileged or confidential by law.*
- *To refuse an interview or discovery request by the defendant or to set reasonable conditions on the conduct of any interview.* (Gordon & Gordon, 2020, p. 81)

Summary and Analysis

Over the last four decades a substantial amount of research has been published focussing on identifying and changing aspects of the criminal justice process which adversely impact victims, particularly victims of sexual violence. Further, in 1985, the United Nations (UN) General Assembly unanimously adopted the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which highlighted that the rights of victims were not adequately recognised (Braun, 2019). Victims’ legal requirements are diverse, ranging from requiring limited legal advice to having significantly complex legal needs. It is important that victims of sexual violence understand their rights and entitlements, particularly those relating to applications by the defence to access their confidential records. However, as the rights tend

to extend across multiple bits of legislation, involving various government and court policy documents, they are likely to need legal assistance in order to access and understand their rights (Victims Commissioner, 2021, p. 34). Further, providing independent legal representation (ILR) to defend the victim's interests and oppose the defence counsel's legal arguments, enhances victims' sense of agency and autonomy, and thus reduces potential revictimisation.

Concerned about the pace of change within adversarial systems driven by "rights movements" advocating for victims of sexual violence, Kirchengast (2021) urges caution, because he believes swift intervention to provide ILR for victims would jeopardise fairness to the accused. He is also concerned that such change may "unsatisfactorily modify the character of the criminal trial as based on adversarial exchange between prosecution and defence" (Kirchengast, 2021, p. 16). He argues that there is no need for further reform beyond the current 'rape shield', which he contends the courts are reluctant to lift. He claims that the 1980s' reforms still work to protect victims "against the harsh, arguably unwarranted practices of the common law adversarial trial" (2021, p. 16). Those reforms, he explains, influenced a shift from "one of 'breaking' the witness on the stand, by confronting them with adverse reputational or sexual history evidence, to one of understanding sexual offences complainants as a special class of victim in need of enhanced evidential and procedural protections" (p. 16). Maintaining that such protections "remain contentious", he asserts that most lawyers have now accepted the need for them (Kirchengast, 2021, p. 16).

Rather than providing ILR for victims, Kirchengast (2021) proposes that existing victim support provision could be brought together with professional non-legal advocates to assist victims. He suggests that an enhanced service of "high-level support" to victims to provide them with information and facilitate consultation with police, prosecutors and court staff could be undertaken by non-legal advocates. He prefers this solution, as non-legal advocates "do not conflict with the requirements of adversarial court processes in the way that legal representation can" (2021, p. 3).

In contrast, Killean (2021) argues that research has demonstrated that protective reforms for victims of sexual violence, such as limiting sexual history evidence have not been successful in improving complainants' experiences of the criminal justice system as the so-called protections "routinely fail to prevent inappropriate questioning or intrusive cross-examination" (2021, p. 174). Indeed, Iliadis (2020c) found that even in the Republic of Ireland, which offers ILR for sexual violence victims in relation to applications by the defence to examine sexual history evidence, such applications were still being made "to 'intimidate' the victim and 'discourage' them from continuing with the prosecution" (2020c, p. 424). Killean (2021) concludes that "the adversarial focus on winning leads to traumatic questions being asked regardless of whether or not complainants are availing of special measures" (Killean, 2021, p. 174). It is this failure to "protect complainants from humiliating experiences [that] has … led activists and scholars from diverse legal systems to argue in favour of granting sexual assault complainants' access to a legal representative" (Killean, 2021, p. 174).

Forms of ILR, however, have been successfully introduced into adversarial jurisdictions such as the Republic of Ireland, South Australia and New South Wales. The Victorian Victims of Crime Commissioner has made recommendations for ILR within her 2021 submission to the Victorian Law Reform Commission, however, currently Victorians do not have access to ILR. Despite the evident need, providing legal assistance for victims remains a very contentious issue among jurisdictions with adversarial frameworks. Most arguments against introducing ILR are based on it conflicting with adversarial processes, however, it is those same processes that make the need for ILR so pertinent, due to their potential effect of retraumatising and

revictimising complainants. This flaw in the adversarial system could perhaps be overcome, as Iliadis (2017) proposed by conceiving justice within a 'triangulation of interests' framework to better respond to victims' needs and expectations. Drawing on Lord Steyn's (2001) perspective, she suggests that such a reconceptualisation would potentially enhance victims' perceptions and experiences of the criminal justice system (2017, p. 182).

Providing victims of sexual violence with ILR would undoubtedly help protect victims from the trauma of feeling that they are being attacked during court proceedings, and this in turn could encourage more victims to report sexual violence crimes. Indeed, as discussed earlier, such results have been demonstrated by US Military, which uses adversarial justice processes, through its introduction of ILR for victims of sexual violence in relation to the Special Victim Counsel (SVC) programme. Effectiveness surveys showed very high victim satisfaction with the SVC service as well as substantial increases in reporting rates following the SVC implementation. Indeed, currently across many jurisdictions, commentators are calling for ILR, not only in relation to defending applications to adduce sexual history evidence and other private records including digital communications, but also to protect victims during the cross-examination stage. ILR is needed to protect victims from the harsh realities of the current adversarial criminal justice processes. Providing such protection is likely to lead to increased reporting rates of sexual violence which in turn will lead to increased conviction rates, as was demonstrated by the SVC programme.

Due to the current low conviction rates, most perpetrators are not being held accountable for their crimes. Elaine Craig (2018) graphically highlighted this problem when, before revealing that the scenario described the current situation in Canada (and could indeed describe any of the countries featured in this report including New Zealand), she asked her readers to:

> *Imagine a society – one that purports to be a rule of law society – in which one segment of the population regularly engages in harmful acts of sexual violation against the other segment of the community with almost complete legal impunity.* (Craig, 2018, p. 3)

Conclusion

Progress in relation to providing legal representation or even legal advice for victims has been very slow in jurisdictions with adversarial criminal justice processes. The stumbling block appears to be related to the adversarial contest between the prosecutor and the defence, and/or the traditional criminal theories which posit crime to be an attack on the state. A potential remedy was offered by Lord Steyn's (2001) perspective of 'a triangulation of interests' to provide fairness to all sides, the accused, the victim, and the public/state. However, the Republic of Ireland has demonstrated that ILR can be accommodated in adversarial frameworks in relation to applications to adduce sexual history evidence. Likewise, the US military's Special Victim Counsel (SVC programme appears to have been successful in terms of improving victims' experience of the trial process leading to increases in reporting rates for sexual assaults. Nonetheless, it would be very useful to have independent evaluations of both the Irish and the US Military's initiatives to gain insights from the victims' perspective.

The potential for providing legal advice/representation for victims seems to be gaining momentum in countries with adversarial frameworks. Canada has made a very promising proposal as part of their Department of Justice 'Budget 2021' to provide $85.3 million over five years, starting 2021-22, to fund "a national program for independent legal advice and independent legal representation for victims of sexual assault". [40] Victims' commissioners in England & Wales and Victoria, Australia, have been unwavering in their support for such

[40] https://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/index.html

reform as evidenced by their recent recommendations. The Irish O'Malley review (2020) recommended that ILR be extended to cover the cross-examination stage, and this was echoed by the Victorian Victims of Crime Commissioner in her recent recommendations for Victoria. Scotland's Dorrian Review cited the European Convention on Human Rights (ECHR) article 8 regarding privacy as providing a legal basis for introducing ILR to protect victims' rights to privacy. Further, Northern Ireland launched a two-year pilot of free legal advice for sexual assault victims in April this year (2021). Unfortunately, England and Wales missed a promising opportunity when they failed to roll out the SVCA programme across both nations, following a successful regional pilot in the northeast of England.

New Zealand, which gained international attention from the success of its recent Sexual Violence Court Pilot (SVCP)[41] risks falling behind international standards if it does not consider introducing legal advice or legal representation rights for victims. As this report has demonstrated, provisions of both legal advice services and legal representation have been shown to work within adversarial frameworks

Drawing on the findings of this literature review, it is recommended that independent legal representation (ILR) for victims of sexual violence be piloted in the District Courts in Whāngārei and Auckland, New Zealand, which participated in the SVCP and have now adopted the SVCP practices permanently. Such a pilot could incorporate learnings from the Republic of Ireland who implemented a form of ILR twenty years ago, whilst also taking into account the recent recommendations made by the O'Malley Review[42] that address some of the shortcomings of the legislation.

[41] For more details and an evaluation of the pilot see Gravitas Research and Strategy (2019)
[42] See Table 1

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