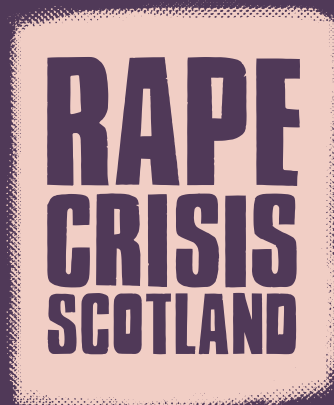




# BRIEFING

Beyond ILR:  
The Case for  
Independent Legal  
Advice for all Survivors of  
Sexual Violence (2022)



## **Beyond ILR**

### *The Case for Independent Legal Advice for all Survivors of Sexual Violence*

The criminal justice system can be a complex and intimidating environment for rape complainants to negotiate. It has a myriad of rules and pathways. It is demanding of a survivor's input and personal information often leading to no return. It is complex for lawyers to understand, let alone a survivor. At RCS we support survivors who are confused and lost within a system which should vindicate their rights and protect them, but which routinely fails them.

**We are proposing that complainants of sexual violence are given the right to independent legal advice (ILA) throughout proceedings within the criminal justice system. This should be provided through non means tested legal aid.**

We fully support the Scottish Government's proposals<sup>1</sup> to introduce independent legal representation (ILR) for applications to lead evidence of sexual history and character evidence<sup>2</sup>, but propose that this provision is extended to address the justice gap<sup>3</sup> which prevents survivors accessing all the rights available to them.

Rape survivors tell us that the process of going through court is more traumatising than the rape itself. This is unacceptable. The criminal justice system does not have to be inherently traumatising.

### Complexity

The confusion that is caused to survivors from complex legal procedure contributes to secondary trauma and can mirror a loss of control and agency. Survivors need information about legal rules and processes, they need the nature of evidence and procedure explained to them.

Lawyers can give expert, impartial advice, confidentiality, explain the effects of different decisions or outcomes and offer guidance through the process. Most importantly they

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<sup>1</sup> Scottish Government (2022) 'Improving victims' experiences of the justice system: consultation'

<sup>2</sup> And note that these already exist in sensitive record cases - Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017

<sup>3</sup> Cowen (2020) 'The use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials'

must act in their client's best interests<sup>4</sup>. This could run from the investigation stages, through to the trial.

An independent solicitor is the only appropriate means to provide this advice, the COPFS cannot provide this support.<sup>5</sup> Advocacy services provided by RCS have been described as "life-changing"<sup>6</sup> but advocacy workers cannot provide legal advice – both advocacy and legal advice is required.

### Sensitive records

The existing provisions for ILR only cover applications at preliminary hearings<sup>7</sup> for sensitive records. However, often the recovery and use of sensitive records can occur at the earlier stages of investigation. Sensitive records can include medical, counselling, school and phone reports.

During the investigation stages the police or the Crown can ask permission from a survivor to obtain personal records. If they refuse, they can seek a search warrant.<sup>8</sup> Survivors can be told that if they do not give permission, to obtain records, then the case will not progress.

This is a major intrusion into the privacy of a survivor. These requests have potential interference with rights under the ECHR and Data Protection legislation. The Information Commissioner has voiced concerns about these processes.<sup>9</sup> We believe that survivors should be given legal advice regarding their rights and supported through these decisions.

Support for this has been found in the pilot for providing legal representation in Northumbria, England, where they provided legal advice at preliminary stages.<sup>10</sup> The police referred them to a solicitor at the start of the procedure. Complainers were very positive about the legal advice they received, citing an increased sense of confidence which mitigated trauma.

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<sup>4</sup> <https://www.lawscot.org.uk/for-the-public/client-protection/standards-for-solicitors/>

<sup>5</sup> [Improving the Management of Sexual Offence Cases March 2021](#) Final Report from the Lord Justice Clerk's Review Group

<sup>6</sup> Evaluation of the Rape Crisis Scotland National Advocacy Project – Summary Report (2018)

<sup>7</sup> Or intermediate diets in Sheriff Court matters

<sup>8</sup> COPFS – 'Sensitive Personal Records Policy'

<sup>9</sup> Information Commissioner's Opinion (2022) 'Who is Under Investigation?'

<sup>10</sup> Smith and Daly (2020) 'FINAL REPORT: Evaluation of the Sexual Violence Complainants' Advocate Scheme.'

## Information Sharing

The provision of ILA could also assist complainers of sexual violence to receive the information regarding the cases that they are entitled to. This includes information on their rights and on the process of the investigation or trial.

Inconsistent information is often given about a complainer's right to review her statement<sup>11</sup>, some are not told of this at all. They are frequently not updated as to the status of their cases; they report having to chase the Crown or police for updates to find out about court dates and outcomes. A solicitor would ensure that she had access to this, and these rights were upheld.

## International Comparisons

If we look to other jurisdictions, we can see that the proposals for Scotland, fall short of what is available in other countries.<sup>12</sup> Many of these have adversarial systems, like Scotland. For example, Canada, in addition to ILR, offers 5 hours of state funded legal advice. In India, there is provision for state funded legal advice which includes advice prior to reporting to the police and to prepare the complainant for cross examination. In Ireland legal advice is available for survivors<sup>13</sup> and solicitors have been permitted to sit in the trial and monitor the cross examination, they can indicate to the prosecutor if they wish to intervene.

Many of the Nordic countries have 'quasi-adversarial' systems (where there is a mixture of the inquisitorial and adversarial) but afford far more by way of provision of legal advice and representation to complainers throughout proceedings. Sweden provides legal advice throughout proceedings and about police processes. In Denmark, guidance is given on cross examination. There are similar provisions in Norway and Finland.

Research has found that legal advocacy positively impacted 'complainants' wellbeing and caused no negative impacts on the accused right to a fair trial<sup>14</sup>. Benefits cited are that survivors are treated with more respect; cross examination was less hostile and intrusive, and survivors felt more confident giving evidence.

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<sup>11</sup> Criminal Procedure (Scotland) Act 1995 s261A

<sup>12</sup> Daly and Smith (2020) 'Legal and Non Legal Advocacy for Rape Complainants in Adversarial Jurisdictions'

<sup>13</sup> <https://www.legalaidboard.ie/en/our-services/legal-aid-services/common-legal-problems/rape-and-sexual-assault/>

<sup>14</sup> Daly and Smith (2020)

## What do Rape Survivors Think?

In the process of preparing this briefing we consulted with survivors who had been through the criminal justice system.

There was resounding support for the introduction of independent legal advice and many survivors indicated examples of when this would have assisted them in their criminal trials.

Miss M commented that such advice in the criminal process;

'Would have made a huge difference, you spend a lot of time trying to understand legal jargon, I could spend weeks trying to work out what something meant only to work out that I got it wrong. That is traumatic and stressful and takes up your life...So many people can't cope with the (criminal) legal system so pull out. ILA could lead to fewer people pulling out.'

A survivor in the SRG made the following comment;

'(I had) no indication of the kind of questioning which felt like a character annihilation. I didn't feel prepared for how vicious it was. The way I was treated, and the lack of knowledge left more trauma than the incident itself. I think more information would have been helpful.'

## Conclusion

We believe there is a strong case for the extension of legal advice to all survivors of sexual violence during their journey through the criminal justice system. This will help reduce secondary trauma and increase confidence in the system, leading to more survivors reporting.

The lawyers involved need to be trauma-informed and able to deal with the sensitivities in dealing with vulnerable witnesses.

This is not proposing a change to the nature of the adversarial system – this is about understanding processes, reducing re-traumatisation, providing better access to rights which already exist and giving professional advice to the most vulnerable victims of crime. A vindication of the rights of survivors.

*'Providing rights to the complainer does not change their legal status, they need not compromise the substantive rights of the accused, it is not a zero-sum game, where additional rights of the complainer are only gained at the expense of a fair trial for the accused.'* (Fiona Raitt)

If you have any further questions, or would like to discuss this briefing in more detail, please contact Sandy Brindley: E: [sandy.brindley@rapecrisisscotland.org.uk](mailto:sandy.brindley@rapecrisisscotland.org.uk)