Independent Legal Representation and the Victims, Witnesses, and Justice Reform (Scotland) Bill: A Review of Potential Models of Delivery

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Independent Legal Representation and the Victims, Witnesses, and Justice Reform (Scotland) Bill: A Review of Potential Models of Delivery

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The report's findings, and any errors, are of course our own.

Executive Summary

Background

The Victims, Witnesses, and Justice Reform (Scotland) Bill makes provision for a system of independent legal representation for complainers in sexual offences cases where an application is made to admit evidence of their character or sexual history in a criminal trial. In this report, we use "independent legal representation" (ILR) to mean in-court representation in relation to a part of the criminal process whereby the complainer is recognised as a party to proceedings. We use "independent legal advice" (ILA) to refer to services delivered by qualified legal professionals which advise complainers, for example, of the operation of the legal process and their rights within it but do not extend to the representation of the complainer in a court at a hearing where they have a right to be heard. The provision of ILR inevitably entails the provision of ILA, given that a legal representative will need to provide advice and information in order to take instructions and make representations at the court hearing.

The Bill is by design largely silent on the mechanism by which this provision will become operative. The aim of this research was to develop an evidence-based understanding of different models of delivery of ILR in comparable adversarial legal jurisdictions, identify their advantages and disadvantages and consider how ILR might best be implemented in light of relevant factors pertaining to the Scottish criminal justice system.

Research methods

The research involved two main components: a literature review and semi-structured interviews. The literature review identified comparable jurisdictions that operated (or have operated) ILR and/or ILA from which lessons might be learned for Scotland. It then involved an in-depth examination of publicly available sources in the selected jurisdictions (including Scotland) in order to consider the schemes that are available in more detail.

We undertook **30** semi-structured, in-depth interviews, each of approximately an hour long, involving a total of **41** participants, either from Scotland or from the comparator jurisdictions. The international participants were either legal professionals/service managers involved in the management or delivery of ILR or policy makers/other stakeholders with experience of designing/operating ILR schemes. The Scottish participants were all criminal justice stakeholders with knowledge or experience of sexual offence work.

Key findings

Which international jurisdictions can we learn from?

We identified a number of comparable jurisdictions that operate a system of state-funded ILR. Several Australian jurisdictions do so (established schemes in New South Wales and Queensland and a pilot scheme involving Australian Capital Territory, Victoria and Western Australia), but ILR is only available for applications to admit sensitive records. Only Ireland

and Canada currently provide state-funded ILR for applications to admit sexual history evidence. There is no ILR scheme in New Zealand.

We also identified jurisdictions that operate (or have operated in the past) state-funded schemes providing ILA, namely England and Wales and Northern Ireland. Both of these jurisdictions were, at the time of writing, considering the introduction of ILR. It is worth noting too that a pilot scheme of ILA provision has been announced for Scotland.

We studied the operation of ILR/ILA in all of the jurisdictions noted above, with the exception being that of the three pilot sites in Australia, we only studied Victoria (on the basis that these schemes had only recently been established so the learning that could be gained from them was limited). It was important to look beyond the two jurisdictions that offered ILR in the context of sexual history evidence (Canada and Ireland). There are clear parallels between applications to admit sensitive records and applications to admit sexual history evidence such that there are important lessons to be learned, especially from those jurisdictions that have well established ILR schemes in relation to sensitive records (New South Wales and Queensland). Established systems of ILA also offer learning points, especially in terms of the effectiveness of the model of delivery and the features of trauma-informed practice.

The selected jurisdictions operate (or operated) a number of different models of ILR/ILA delivery. The key distinction was between salaried models (the Australian jurisdictions, England and Wales, Northern Ireland) and private practice models (Canada). Ireland operated a hybrid model. The salaried models also differed in terms of where the lawyers were located – which could be within a legal aid service, a third sector organisation or a mixture of both.

Another key difference between the models was whether ILR was provided by solicitors (in those jurisdictions where this was permitted), counsel, or both.

Referral pathways

Systems of ILR delivery require to be structured around a 'triggering event'. Rules of professional practice on how solicitors may obtain clients impact the design of referral pathways that follow from that triggering event.

All the jurisdictions we studied that operated an ILR service assigned initial responsibility to the prosecutor to take action following the triggering event to inform the complainer of their rights to ILR. All these jurisdictions also operated a form of direct prosecutor referral, whereby the prosecutor passed on the complainer's details to an ILR provider, who in turn contacted the complainer.

Direct prosecutor referral has considerable advantages but would not be possible in Scotland, given professional practice rules. The relevant rules on professional practice would not, however, preclude COPFS providing complainers with information about a dedicated service of ILR provision for complainers at section 275 hearings, assuming the complainer then took the next step of instructing a solicitor at that service directly. This would be a similar model to that operating in Northern Ireland, albeit in the context of ILA, not ILR.

Regardless of the referral mechanism utilised, swift action by the prosecutor in terms of contacting the complainer following the triggering event is of the utmost importance to the effective operation of an ILR scheme, especially given the time parameters within which ILR must be provided.

There is no way to ensure consistent and effective representation of docket witnesses or other classes of witnesses in relevant cases via consistent referral pathways under the system of ILR proposed in the Bill, other than by amending section 274 of the 1995 Act to ensure such individuals are now protected by this provision.

ILR in court hearings

Facilitating ILR in court proceedings is a matter that requires careful thought and consideration even where the right to ILR is narrowly defined. The form ILR can take varies between written and/or oral submissions. We consider that in some instances involving unopposed and uncontentious section 275 applications there is capacity for submissions to be provided in writing only, although opposed applications will require a legal representative to attend court.

In the jurisdictions we analysed, the role of ILR was sometimes performed by solicitors alone and sometimes with solicitors instructing a class of independent specialist pleaders, such as barristers. The advantage of involving a specialist independent pleader in a system of ILR was the added expertise and ability that such a lawyer brought to the service. The involvement of such individuals, however, comes at both a logistical and financial cost. In Scotland any system of ILR will require the involvement of advocates or solicitor-advocates who have rights of audience in the High Court of Justiciary. Policy makers might consider whether in future a service could utilise an employed number of solicitor advocates. Regardless of the type of service delivery adopted, it must protect complainers' choice of representation as far as possible and have capacity to utilise other independent specialist pleaders, where appropriate.

Whilst the danger of the impression of coaching of witnesses is a risk in systems providing ILR, relevant Scottish professional rules and careful legal practice should ensure appropriate conduct.

Where ILR requires to be provided after the trial has commenced, or where complainers are given a right of appeal, difficult issues for policy makers arise. In respect of the former, a salaried model of ILR provision has the potential to mitigate against delay. In respect of the latter, the Bill's approach appears to be arbitrary, and more thought requires to be given to the position in summary cases.

Relationships with stakeholders

Facilitating effective communication between criminal justice stakeholders in respect of the design and operation of systems of ILR is a matter of vital importance, which can lead to the early identification of potential problems and improvements in the performance of such systems.

The involvement of service users, i.e. victim/survivors of sexual violence, in these processes of design and oversight can provide policy makers with valuable insight.

The proposals in the Bill relating to the disclosure of evidence as currently drafted risk overcomplicating matters, creating delays and creating unnecessary work for the Crown. A simpler system would be for the independent legal representative to apply to the court for disclosure – in those cases that require it – and intimate that application to the Crown and defence. This application should be advanced within seven days of intimation of the section 275 application, or later on cause shown, with the Crown and defence thereafter intimating any opposition to same within seven days, or later on cause shown.

There is a danger of over-crowding of the space if different agencies are all involved with the complainer, which has the potential to confuse and further traumatise. There is a need to clarify the roles of the different parties involved in interacting with complainers and to ensure that all parties (and complainers) understand this delineation.

Trauma-informed practice

Trauma-informed practice is vital to meet the needs of complainers in cases of sexual violence and to minimise the risk of re-traumatisation.

The key components of trauma-informed practice in the context of ILR that emerged from the research conducted for this report were (a) clear timelines that minimise delay so that there is adequate time to build the trust and confidence of complainers; (b) ensuring that information is conveyed in ways that are alive to the impacts of trauma and that communication styles are adjusted accordingly; (c) bespoke training and ongoing reflective practice drawing upon multidisciplinary expertise; and (d) managing expectations about the limitations and extent of the provision of ILR and signposting to other support services if necessary.

There is a heightened risk of vicarious trauma and burnout for lawyers providing an ILR service. This risk can be lessened through allocating resource and time to peer support, the provision of breaks and reflective supervision.

Models of delivery

Across the jurisdictions studied, the key distinction was whether ILR was delivered by way of salaried or private practice lawyers. Both models have distinct advantages and disadvantages.

The advantages of a salaried model include the development of expertise in relation to service provision; easier integration of principles of trauma-informed practice; a single point of contact for clients with potential access to other support services; greater ease of monitoring and evaluation; potential benchmarking of rates of pay; lawyers can rely on the technical and administrative support of the wider organisation; and they can support one another, including during periods of leave, thus minimising the likelihood of burnout. Disadvantages might

include low rates of pay; capacity issues; and conflicts of interest around cases, especially if services are situated within legal aid.

A salaried model will usually require some degree of ad hoc private provision to deal with conflicts of interest, a need for specialist expertise, or unexpected capacity issues.

The key advantage of a private practice model was flexibility and with that a reduced risk of burnout and the risk of vicarious trauma. Reaching more remote geographic areas is also a potential advantage. Disadvantages include insufficient time to spend with traumatised clients to build trust; reduced potential for the development of specialist expertise; difficulties in finding roster or panel lawyers at short notice; conflicts of interest; and the challenge of monitoring the quality of casework.

Interviewees tended to observe a greater number of advantages and fewer disadvantages with the salaried model of provision. In addition, the disadvantages of the salaried model were seen as more easily addressed compared to those of the private practice model. The risk of burnout can be lessened through allocating resource and time to peer support, the provision of breaks and reflective supervision. Capacity and conflict of interest issues can be addressed by having additional provision by way of an ad hoc panel of lawyers. The most significant disadvantages of the private practice model relate to difficulties in developing specialist expertise and embedding trauma-informed approaches. These are not impossible to address, but the constraints of private practice make it harder to do so.

It is notable that in both jurisdictions that operated a private practice model, interviewees told us that if they could start again and design their system from scratch, they would choose a salaried model.

Regardless of the model chosen, key issues include rates of pay and conditions and (in a salaried model) grants being for sufficient lengths of time to prevent insecure employment and facilitate the development of trauma-informed approaches, specialist expertise and reflective practice skills.

Evaluation and measuring success

ILR services can be evaluated using ‘victim measures’, ‘system measures’, or a mixture of both. Victim measures relate to how complainers feel as a result of engaging with the service. The two victim measures that were repeatedly mentioned by research participants were increased agency for complainers and improved complainer wellbeing. Both can also have a positive impact in terms of preventing complainer withdrawal from the prosecution process.

As well as the positive benefits to complainers arising from ILR, participants noted that complainer wellbeing might be adversely affected if introducing ILR had the knock-on effect of introducing delays into the progress of the case.

System measures relate to service outcomes, such as substantive legal outcomes, the take-up of the service, or case processing times. These can be informative but the substantive legal outcome, in particular, is a measure that needs to be regarded with caution, as complainers

may feel an increased sense of agency even if the outcome of the hearing is not the one that they wanted.

There is a lack of transparency around the evaluation of existing ILR schemes. Publicly available data is almost non-existent, which limits the opportunity for an international community of practice to develop.

The Scottish context

There are a number of features of the Scottish context that have important implications for the design of an ILR service and which mean that models from other jurisdictions cannot simply be transplanted into the Scottish criminal justice system.

The professional ethical rules which govern how lawyers may obtain clients in a particular jurisdiction dictate the contours of what is possible in terms of the precise way in which referral mechanisms operate.

In the Bill, ILR is proposed in respect of sexual history and character evidence applications (section 275 applications), unlike the majority of the jurisdictions we studied where it is only available in respect of applications to access sensitive records. Many section 275 applications are opposed, and the policing of the boundaries of permitted applications remains a contentious feature of Scottish practice.

The Scottish Legal Aid Board administers publicly funded legal assistance, but does not, within the criminal justice system, with the exception of the Public Defence Solicitors' Office, itself employ salaried lawyers to provide it. There is only limited free legal advice available for complainers in sexual violence cases in Scotland at present. No comprehensive state-funded service currently exists.

Only advocates and solicitor-advocates have rights of audience in the High Court of Justiciary, where the majority of section 275 applications are considered and they require to be instructed by a solicitor. We were told by representative bodies for Scottish solicitors that an ageing demographic of criminal legal aid defence solicitors and fewer new trainees and early career solicitors coming into the profession has led to a lack of available solicitors to undertake criminal defence business.

Key conclusions

Referral pathways

Effective communication with complainers appears critical to the success of ILR in practice: the proposal contained in the Bill to allocate responsibility to the Crown for informing a complainer of their rights to ILR in Scotland at section 275 hearings is logical, sensible and in line with comparative international practice. That said, scrutiny requires to be applied to their effective performance of this role, given its importance to the uptake of ILR and to trauma-informed practice. In view of our research findings regarding concerns about the Crown's current practice in relation to communication with complainers, a short-life

working group could be established at the earliest opportunity to specifically address the methods and means of communication, and other matters related to ILR service delivery, drawing upon examples of best practice elsewhere.

Communication with complainers should be timeous in order to facilitate effective delivery of ILR: swift action by the prosecutor in terms of contacting the complainer following the triggering event is of the utmost importance to the effective operation of an ILR scheme, especially given the time parameters within which ILR must be provided. It is clear from the data collection that complainers should be contacted as soon as possible by the Crown and provided with the necessary information to achieve effective ILR delivery. It seems feasible that the Crown might attempt to do this no later than three working days after the triggering event i.e. the lodging and/or intimation of the section 275 application. If additional resources are required for them to perform this role, that might be considered given the importance of efficiency, as identified in the research, to minimise delay in providing the necessary information.

The role of docket and other witnesses needs to be carefully considered: there is no obvious way to ensure consistent and effective representation of such witnesses via consistent referral pathways under the proposed system of ILR, other than by amending section 274 of the Criminal Procedure (Scotland) Act 1995 to ensure said witnesses are now protected by this provision. Careful consideration is needed as to whether this provision may require amendment to ensure consistency of provision.

Relationships with stakeholders

It is important that a diverse group of criminal justice stakeholders and those with lived experience be consulted as service design plans develop: other international models of delivery demonstrate the value of a forum of communication by which issues can be aired post-implementation and can be addressed. To this end, the Scottish Government might similarly ensure that all criminal justice stakeholders are involved in service design and that design processes include the perspectives of victim-survivors of sexual violence.

It is worth considering the extent to which the provisions in the Bill on the disclosure of evidence may need amendment: the research findings demonstrate the importance of developing criminal procedure in this area. For example, the independent legal representative might apply to the court for any disclosure they consider necessary within seven days of intimation (or other specified period), of the application or later than that on cause shown. Thereafter the Crown and defence could have seven days (or other specified period), or later on cause shown, within which to intimate any objection to the requested disclosure. In the absence of any objection the court should be able to determine the matter in chambers, administratively, through an interests of justice test. If the disclosure sought is opposed than the matter will require to be heard at the Preliminary Hearing or other administrative hearing with consideration of the substantive section 275 application continued to a further hearing. Relevant legislation and guidance could also be amended to regulate the independent legal representative's use of disclosure obtained during their instruction.

Written guidance serves to effectively delineate different roles and responsibilities: introducing ILR into the criminal justice system has the potential to confuse, especially where different agencies are involved in communicating or providing services to complainers. There is a need to ensure that all stakeholders are aware of their own roles and responsibilities and the roles and responsibilities of others. There is also a need to simplify as far as possible the number of different agencies that are communicating with complainers. Written guidance, or a memorandum of understanding, will help to effectively delineate different roles in the space.

It is important to manage expectations and ensure clarity about the limitations and extent of the provision of ILR and its role in the adversarial system: lawyers face challenges when complainers seek advice and representation, or otherwise need support, outside of the confines of their role. Ensuring clarity from the outset about the extent of the service is important. Having partnerships in place with wider support services may help to facilitate meaningful signposting and minimise referral fatigue.

Trauma-informed practice

Timelines for ILR referrals should be clearly specified: trauma is exacerbated where complainers do not have sufficient time to receive advice and representation, and to build trust and confidence with their legal representative, given the highly sensitive nature of the issues involved in section 275 applications. As set out above, complainers must be timeously notified of their right to representation. This might be done, for example, immediately following the triggering event and no later than three working days from the triggering event. The Crown already has channels of communication with complainers and docket witnesses. The research highlights that, should there be communication failures in this respect, the entire system of ILR could be adversely impacted. Consideration might therefore be given to judicial oversight of the matter at the Preliminary Hearing or First Diet, through inclusion of a question on the Written Record of Preparation relating to the matter.

Specific training in trauma-informed lawyering should be delivered by those with appropriate background expertise: for example, counsellors, psychologists and/or other mental health specialists should design and deliver training, together with lawyers who bring experience from practice of advising and representing survivors of sexual violence. For those acting in this space, the commitment to trauma-informed training should be ongoing and not simply delivered once via an online module without considering its importance to ongoing reflective practice.

Reflective practice should be built into models of supervision and carefully monitored: the data collection made clear that reflective supervision helps to ensure advice and representation is refined to ensure trauma-informed principles are adhered to. It was also noted as an important part of minimising the risk of vicarious trauma and burn-out. Monitoring reflective practice will be easier in salaried models of delivery.

Allocate resource to embedding trauma-informed practice: discrete training, as well as reflective supervision, is necessary for successfully embedding trauma-informed approaches and minimising vicarious trauma. The research highlights the importance of time and

resource for successfully embedding a trauma-informed approach, drawing upon multi-disciplinary expertise related to sexual violence.

There is value in supporting the establishment of a community of practice for lawyers delivering ILR: this will promote the exchange of learning around best practice and provide support to minimise vicarious trauma. It may improve rates of long-term retention in roles and help lawyers to develop specialist skills in trauma-informed practice.

Models of delivery

A salaried model appears to be the most appropriate model for delivery of ILR in Scotland: it affords the opportunity to develop a concentration of specialist expertise in the provision of ILR, monitor casework, build capacity and provides comparatively more time to build trust with clients and take a trauma-informed approach. It also facilitates the ability to act more quickly under pressure of time, such as where an application is made late, and should provide a team approach and wider support for lawyers, which minimises burnout and promotes lawyer retention. It was the model associated with the most benefits and fewest drawbacks in our data collection, and its disadvantages are easier to address than those of the private practice model.

Salaried models located in not-for-profit settings bring a number of added benefits: these include the availability of wider support services, ensuring more holistic service provision, being able to draw upon wider expertise in victim support and relying on wider networks in knowledge exchange and developing best practice.

An ad hoc panel of legal aid lawyers will overcome some of the challenges of the salaried model: many of the disadvantages of the salaried model can be overcome with some provision for ad hoc private practice lawyers. These do not have to be heavily relied upon, as in some models, rather they would be needed on an ad hoc basis should conflicts of interest arise or specialist expertise be needed on a complex case. An ad hoc panel might also help to cover a wider geographic region on a case-by-case basis should in-person representation be required in more remote areas. Thought will require to be given by policy makers, in collaboration with the profession and the Scottish Legal Aid Board, as to how this best can be facilitated.

Skills and expertise

Developing and maintaining specialist expertise in the field of ILR is critical to success regardless of the delivery model adopted: the data collection shows the delivery of ILR requires a discrete skillset and specialist trauma-informed approach. It is important that it is valued as a specialist service rather than being absorbed into other types of criminal legal aid delivery.

Rates of pay need to be carefully benchmarked to attract suitably qualified candidates: it is important that lawyers bring appropriate knowledge and expertise. Candidates with at least five years post-qualification experience, ideally with a background in criminal law and qualification as a solicitor advocate, would be most appropriate for the role in the Scottish

context. Rates of pay should be reflective of this level of expertise and experience and carefully benchmarked with equivalent civil service and/or public sector legal roles.

A salaried model comprised of some in-house solicitor advocates may be appropriate for meeting requirements in relation to rights of audience: independent specialist pleaders with rights of audience in the High Court of Justiciary might be appropriate for the effective delivery of ILR. Recruitment of solicitor advocates would meet the requirements of practice and work well alongside a panel of other solicitor advocates and counsel to provide ad hoc specialist support as needed. Complainers' choice of representation needs to be respected in this context, as far as is possible.

Evaluation

An important measure of the success of an ILR service is the impact that it has on complainer wellbeing: this was the overwhelming consensus of those interviewed. This could be quantitively assessed – at least to an extent – by comparing the satisfaction levels of two separate groups of complainers who have engaged with the criminal justice system with and without ILR. The most valuable data will come, however, through qualitative methods.

Quantitative measures of the success of ILR will also be informative: these might include substantive legal outcomes, the number of complainers engaging with the service or case processing times. The first one in particular, however, needs to be regarded with caution. Client satisfaction may be positive even where the outcome was not the one that the complainer desired, if it increased the sense of agency that the complainer felt they had over the issue.

It would be beneficial for evaluation and learning around the ILR scheme to be made publicly available so it can be shared across different schemes: publicly available data relating to the evaluation of ILR schemes is almost non-existent. This limits the extent to which stakeholders in one jurisdiction can learn from another. As such, it would be beneficial to establish a wider international community of practice among comparable jurisdictions that operate ILR schemes.

ILR and legal practice

It is important to consider the appropriate scope of initial delivery of ILR based on the key findings of this report: it may be appropriate to deliver ILR first in the High Court of Justiciary, this being where most section 275 applications occur. This would allow experience to be developed in the delivery of ILR before a fuller roll out. This approach also benefits from the fact that ILR would occur at first in a forum involving advocates and solicitor-advocates, and the oversight of Senators of the College of Justice. A phased commencement of relevant provisions could be restricted to the High Court sitting in certain locations, and potentially include specified Sheriff Courts.

It is important to consider how ILR might be provided at trial where a late application is made: where a section 275 application is made late, at trial, on special cause shown, there is no principled basis as to why ILR should not be delivered in that context for complainers. The

experience of Ireland shows that a system can be designed to facilitate such representation with minimal delay, as long as sufficient resources are allocated in order to make it work. A salaried model of provision (potentially with an in-house solicitor advocate) might be agile enough to act in such circumstances with very little delay should the complainer wish to instruct a representative. It does, however, become more difficult to protect complainer choice of representative, without unduly delaying the trial.

The lawyers who provide ILR will require to perform their role carefully and ongoing training will be required: there is a risk of giving the impression of coaching. However, there are appropriate ethical and professional rules in place which should mitigate the risk of same, as long as lawyers are alive to the issues.

There will be instances where matters can be easily dealt with by way of written submissions: where the complainer consents to what is sought in a section 275 application or where matters are otherwise uncontentious, written submissions to the judge in the context of agreement between the parties will minimise delay and remove the requirement for a lawyer to attend a hearing dealing with a section 275 application in these circumstances. It is worth paying further attention to the form of written submissions and the procedural mechanisms which might standardise their use in practice. Where an application is to be opposed by the complainer, attendance of their legal representation will always be appropriate.

Chapter 1: Introduction to the Research

1.1 Background

The Victims, Witnesses, and Justice Reform (Scotland) Bill[1] is a landmark piece of legislation which aims to improve the experience of victims and witnesses in the Scottish criminal justice system. The Bill forms part of a series of measures from the Scottish Government and other criminal justice stakeholders that look to provide support for such witnesses through their engagement with the criminal process.[2] The Bill makes provision for a system of independent legal representation[3] for complainers in sexual offences cases where an application is made to admit evidence of their character or sexual history in a criminal trial.[4] The Bill is by design largely silent on the mechanism by which this provision will become operative. The manner in which it does so, however, will determine the efficacy of the proposed system of ILR. There are questions specific to the Scottish context in which the legislation will take effect, highlighted in related research, and aired during the consideration of the Bill at Stage 1, about the capacity of Scottish lawyers and related resourcing issues in the criminal justice system generally. These impact upon the choice of model of delivery for ILR and require to be carefully considered.[5]

In light of the importance of these issues, in early 2024 we were awarded a grant by the Scottish Government to undertake a review of potential models of delivery for ILR in Scotland for complainers, and wider categories of witnesses, at section 275 hearings.[6] This review investigates comparable international best practice in order to inform the implementation of ILR in Scotland.[7]

In the remainder of this chapter, we set out the research aim and research questions in section 1.2. We then set out some key definitions in section 1.3, most importantly the distinction between Independent Legal *Advice* and Independent Legal *Representation*. In order to inform the work that follows in later chapters of the report, we outline in section 1.4 some key legal provisions, both prospective and currently in force, that are central to the proposed operation of ILR at section 275 hearings in Scotland. Finally, in section 1.5 we outline briefly some of the concerns relating to capacity and other structural issues pertaining to the Scottish criminal justice system.

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[1] Hereafter referred to as 'the Bill'.
[2] See e.g. "Free Legal Advice Pilot for Complainers in Rape and Attempted Rape Cases", Scottish Legal News, 4 April 2025; COPFS' Victim Information and Advice Service; Rape Crisis Scotland's National Advocacy Service.
[3] Hereafter referred to as 'ILR'.
[4] As per s.64 of the Victims, Witnesses, and Justice Reform (Scotland) Bill. See too ss. 274 and 275 of the Criminal Procedure (Scotland) Act 1995. The Criminal Procedure (Scotland) Act 1995 is hereafter referred to as 'the 1995 Act'.
[5] In this respect see also S Cowan, EPH Keane and VE Munro, The Use of Sexual History Evidence and 'Sensitive Private Data' in Scottish Rape and Attempted Rape Trials (2024).
[6] By which is meant any witness who gives evidence in relation to a matter that is specified on a docket to an indictment or complaint in a sexual offences case by virtue of s.288BA of the 1995 Act.
[7] We outline our methodological approach to addressing this question in detail in chapter 2.

1.2 Research aims

The primary aim of this research is **to develop an evidence-based understanding of different models of delivery of independent legal representation in comparable adversarial legal jurisdictions and to provide a review of same in light of relevant factors pertaining to the Scottish criminal justice system.**

The research addresses six specific questions as follows:

1. What are the methods of ILR delivery in the UK, Ireland and other comparable jurisdictions?
2. How are these models funded, monitored, and evaluated in these jurisdictions?
3. What procedural rules and codes of professional legal practice guide the delivery of different models?
4. What makes an effective model of ILR provision bearing in mind factors such as availability of legal professionals, specialism, training, and previous experience, and to what extent are these factors applicable in the Scottish context?
5. What is the relationship between ILR and wider criminal legal aid provision?
6. How is trauma-informed practice incorporated into the delivery of ILR?

1.3 Key definitions

1995 Act: the Criminal Procedure (Scotland) Act 1995.

The Bill: the Victims, Witnesses, and Justice Reform (Scotland) Bill, introduced into the Scottish Parliament on 25 April 2023.

Complainer: a person who, in criminal proceedings, is alleged to have been the victim of an offence charged. Some jurisdictions use the term "complainant": in this report we use the terminology of the jurisdiction in question and "complainer" for any more general references. We note that we use the term "complainer" frequently in this report as it is the legal term referred to in relevant legislation. We acknowledge that "victim" or "survivor" are often preferred terms.

Docket witness: a person who is alleged to have been the victim of wrongdoing specified in a docket attached to an indictment or complaint in a Scottish criminal case. Dockets are a mechanism under section 288BA of the 1995 Act which allow the prosecution in sexual offence cases to give notice of their intention to lead evidence of a crime (or other behaviour) not charged. This may, for example, allow the prosecution to lead evidence of wrongdoing which cannot be the subject of prosecution because it occurred in another jurisdiction, or where prosecution is time-barred, but the evidence in question can serve as corroboration of an offence with which the accused is charged.

Dorrian Review: the work of the review group chaired by the Lord Justice Clerk, Lady Dorrian, Scotland's second most senior judge, resulting in the report *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (2021), which

proposed *inter alia* the introduction of publicly funded ILR for complainers in respect of applications to lead sexual history evidence and appeals therefrom.

Independent legal advice and independent legal representation: in both of these contexts, we use these terms to refer to services delivered by legal professionals such as solicitors, advocates or equivalent. We use "independent legal *advice*" to refer to services which advise complainers, for example, of the operation of the legal process and their rights within it but do not extend to the representation of the complainer in a court at a hearing where they have a right to be heard. We use "independent legal *representation*" to refer to services which involve (or potentially involve) in-court representation in relation to a part of the criminal process whereby the complainer is recognised as a party to proceedings. The provision of ILR inevitably entails the provision of ILA given that a legal representative will need to provide advice and information about the operation of the system, and the complainer's rights at different stages of the process, in order to take instructions and make representations at the court hearing.

Rape shield: legislation which restricts the admissibility of evidence of a complainer's sexual history and/or character in court is often referred to as "rape shield" legislation, notwithstanding some judicial disapproval of that term.

Sexual history evidence: evidence that the complainer in a sexual offence prosecution has engaged in sexual behaviour which does not form part of the subject matter of the charge which is being prosecuted.

We are primarily concerned with identifying and analysing comparative models that relate to ILR and advice for complainers regarding the admission of, or recovery of potential, evidence (i.e. sexual history and bad character evidence and or medical records etc.). However, our research approach is wider in scope, in order to gather data relevant to these evidential matters and better understand the interplay between more general ILA and legal representation in (or in relation to) court proceedings i.e. ILR. For this reason, schemes of ILA in comparable jurisdictions have been considered. We note that this is always in the context of considering how they may relate to the Scottish Government's legislative commitment to the provision of ILR at section 275 hearings.

1.4 Key Scottish legal provisions and related law

In order to inform and contextualise the findings of the report it is necessary to briefly outline the key legal mechanisms, procedures and tests (both current and prospective) which regulate the admissibility of bad character and sexual history evidence in the criminal law of evidence and procedure in Scotland. The work contained here is not intended to be a comprehensive analysis and account of the substantive and adjectival law, but rather seeks to inform the reader about the basic parameters within which applications are made to admit

evidence of bad character and sexual history evidence in criminal trials, such that they may better understand the analysis and discussion in later sections of the report.[8]

1.4.1 Introduction to legal provisions

Two areas of law are relevant in the context of this research: the common law of relevancy and sections 274 and 275 of the 1995 Act. Scotland, in common with many comparable adversarial jurisdictions, has distinct evidential processes which regulate the admissibility of character and sexual history evidence of complainers in criminal trials. Contemporary legal developments in this area, arising both from the courts and from parliament, have in a general sense been aimed at protecting complainers in sexual offences trials from demeaning and insulting questioning during evidence and from attacks on their character. This, in turn, may lead to prejudicial judicial decision making relating to what are sometimes referred to in the associated literature as the 'twin myths'; namely that promiscuity is related to credibility generally in women and that sexual activity on unrelated occasions can be used to infer consent on the occasion which features in the criminal charge.[9] Any party wishing to lead evidence relating to a complainer's character and/or sexual history which is prohibited by the rape shield legislation in a criminal trial for sexual offences must lodge an application with the court, within specified timescales or, if outwith these time periods on special cause shown, which outlines why the application should be permitted by reference to a series of tests, further detail of which is provided below. These applications are known as section 275 applications. The section 275 application is usually considered in advance of trial at a pre-trial administrative hearing. If the application is late and this is not possible then it is in any event always considered in the absence of the jury.

In order to comprehend how the law in this area operates, one must understand the interaction between the common law of relevancy and sections 274 and 275 of the 1995 Act, colloquially referred to as 'the rape shield' provisions. This understanding is necessary because the rape shield provisions cannot render evidence admissible that is inadmissible at common law, and therefore the common law of relevancy requires to be considered prior to consideration of the legislative provisions.[10]

1.4.2 The common law of relevancy

The common law of relevancy has been described as "the touchstone" for consideration of a section 275 application.[11] If a section 275 application seeks to lead evidence that is irrelevant at common law, then it falls to be refused outright. When a section 275 application is made, therefore, it is to the common law of relevancy that courts will turn first, prior to considering whether the application meets the requisite standards for admission in the legislation.

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[8] For a more detailed analysis of the development of the law and legal practice in this area, see Cowan, Keane and Munro (n 5) 24-36.
[9] See inter alia Lord Carloway's comments on the purpose of the legislation and the twin myths in *CJM (No 2) v HM Advocate* [2013] HCJAC 22, 2013 SLT 380 at [12].
[10] *Moir v HM Advocate* [2007] HCJAC 20, 2007 SCCR 159.
[11] As per *XY v HM Advocate* [2022] HCJAC 2, 2022 JC 82 at [44].

The determination of relevancy in any case is always fact specific and judged by reference to the connection between the proposed evidence and the specific offence libelled.[12] Evidence that has too remote a bearing on the facts at issue is deemed to be collateral and is generally inadmissible on that basis.[13] That said, the parameters of relevancy in sexual offences cases has changed markedly in recent years, reflecting changing societal understandings of sexual offending and the modernisation of legal responses to same.[14] As the law currently stands, evidence of sexual activity by the complainer with the accused or others pre and post charge is prima facie irrelevant at common law and thus inadmissible unless there are particular circumstances "which would establish a connection between what the [court] will regard as, *prima facie,* unrelated events".[15] The Appeal Court has repeatedly emphasised that in general consensual sexual activity on one occasion between the accused and the complainer does not bear on the question of whether consensual sexual activity took place on the occasion specified in the charge.[16]

1.4.3 Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995

Even if evidence is considered to be relevant at common law, section 274(1) of the 1995 Act stipulates that the following sexual history and character evidence is prima facie inadmissible in the trial of an accused individual charged with a sexual offence;

> a) evidence that the complainer is not of good character (whether in relation to sexual matters or otherwise);
>
> b) evidence that the complainer has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
>
> c) evidence that the complainer has at any time – except shortly before or after acts forming the subject matter of the charge ("those acts") – engaged in behaviour other than sexual behaviour which might found the inference that they are likely to have consented to those acts or are not credible or reliable;
>
> d) evidence that the complainer has at any time been subject to a condition or predisposition which might found an inference that they are likely to have consented to those acts or are not credible or reliable.

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[12] "In very general terms relevant evidence may be said to be evidence which is logically connected with those matters in dispute between the parties, the facta probanda, which are under investigation by the court.": ML Ross, J Chalmers and I Callander, Walker and Walker: The Law of Evidence in Scotland, 5th edn (2020) para 1.3.1.
[13] In *Brady v HM Advocate* 1986 JC 68 at [73] the court noted that "[v]arious justifications have been put forward for this rule. The existence of a collateral fact does not render more probable the existence of the fact in issue; at best a collateral matter can only have an indirect bearing on the matter in issue; a jury may become confused by having to consider collateral matters and may have their attention diverted from the true matter in issue."
[14] See e.g. *LL v HM Advocate* [2018] HCJAC 35, 2018 JC 182.
[15] *LL v HM Advocate* [2018] HCJAC 35, 2018 JC 182 at [14].
[16] See *inter alia CH v HM Advocate* [2020] HCJAC 43, 2021 JC 45; *CJM (No 2) v HM Advocate* [2013] HCJAC 22, 2013 SLT 380.

A clear description of the purpose and operation of these provisions was provided by Lord Hope in the case of *DS v HM Advocate*:[17]

> The sections seek to balance the competing interests of the complainer, who seeks protection from the court against unduly intrusive and humiliating questioning, and the accused's right to a fair trial. They lean towards the protection of the complainer. The protection is very wide. It extends to questions and evidence about the complainer's sexual behaviour at any time other than that which forms part of the subject-matter of the charge. It extends also to behaviour which is not sexual behaviour at any time other than shortly before, at the same time or shortly after the acts which form part of its subject-matter which might found the inference that the complainer consented to those acts or is not a credible or reliable witness. But the court is permitted, in the accused's interest, to admit such evidence or allow such questioning if it is satisfied that it passes the three tests which are set out in sec 275(1).

The "three tests" specified in the legislation are as follows:

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour,[18] or to specific facts demonstrating:
  (i) the complainer's character; or
  (ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged;[19] and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.[20]

These "three tests" can accordingly be broadly categorised in the following way:[21]

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[17] *DS v HM Advocate* [2007] UKPC D1, 2007 SC (PC) 1 at [28].

[18] This comma does not appear in the statute but was read into the provision as necessary so as to avoid an undue restriction on the accused's right to a fair trial in terms of Article 6(1) of the European Convention on Human Rights in line with s.3 of the Human Rights Act 1998 as per Lord Hope in *DS v HM Advocate* [2007] UKPC D1, 2007 SC (PC) 1 at [47].

[19] This part of the test is effectively redundant given that the evidence in question must first be deemed relevant and admissible at common law prior to considering the operation of the statutory provisions.

[20] As per s.275(1)(a)(b) & (c) of the 1995 Act.

[21] The categorisation of the three tests that follows mirrors that outlined by one of the co-authors of this report (Eamon Keane), in an earlier report co-authored with Tony Convery: see EPH Keane and T Convery, Proposal for Independent Legal Representation for Complainers where an Application is Made to Lead Evidence of their Sexual History and Character (2020) 11–12.

1) **Specificity:** does the evidence relate to a specific occurrence or occurrences of behaviour, or to specific facts which bear on the question of character or a condition suffered by the complainer?

2) **Relevance:** is this evidence relevant to the facts at issue i.e. the guilt or innocence of the accused?

3) **Balancing Exercise:** does the probative value of the evidence outweigh the risk to the prejudice of the interests of justice?

In respect of the balancing exercise aspect of the test to be undertaken the legislation specifically directs courts that the "proper administration of justice" includes "appropriate protection of a complainer's privacy and dignity".[22]

1.4.4 Procedure concerning a section 275 application

Any application under section 275 must be in writing and should clearly set out the nature of the evidence and any questioning proposed, the issues to which the evidence is considered relevant and the reasons for its relevance, and the inferences which the applicant proposes should be drawn from it.[23] The Crown has a common law duty to ascertain a complainer's views on a section 275 application that relates to them and to relay those views to the court.[24]

1.4.5 Docket witnesses and section 288ba of the 1995 Act

A docket allows the Crown to lead evidence of matters related to a sexual offence on the indictment that would not be competent for the trial court to hear because, for example, the offence occurred in a jurisdiction other than Scotland. While the accused does not face any charges in respect of the matter specified on the docket, evidence led from witnesses and other sources in relation to the matter specified can be of corroborative value.[25] The Crown's position in respect of witnesses they cite who appear to give evidence in relation to a matter specified in a docket (such evidence inevitably relates to sexual conduct not specified in a charge) is that they require to lodge a section 275 application to permit such witnesses to give evidence. This has not always been the case but it is now the position of the Crown that section 275 applications are lodged to cover such witnesses' evidence and we have been expressly asked to consider how a proposed system of ILR might operate in respect of such witnesses.[26]

1.4.6 Section 64 of the Victims, Witnesses, and Justice Reform (Scotland) Bill

The Bill, following recommendations made by the Dorrian Review on Improving the Management of Sexual Offence Cases, and others, proposes a system of ILR for complainers

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[22] 1995 Act, s.275(2)(b)(i).
[23] 1995 Act, s.275(3).
[24] *RR v HM Advocate* [2021] HCJAC 21; *RR, Petitioner* 2021 JC 167.
[25] See s.288BA of the 1995 Act and *HM Advocate v Moynihan* [2018] HCJAC 43.
[26] See Cowan, Keane and Munro (n 5) 16 and 94.

where applications are made to lead evidence of their sexual history and character.[27] The system proposed grants complainers in such cases a right to be heard in court in respect of whether the application should be granted or not and thus envisages the introduction of a system of ILR and not merely ILA.[28] ILR will be available to all complainers on a non-means tested basis.[29]

The Bill provides that where an application is made under section 275, the prosecutor must, as soon as is reasonably practicable after the application is made, notify the complainer, give them an explanation of the proposed application and the evidence and questioning proposed, and inform them of their rights to legal representation and other information.[30] The Bill also grants complainers a right of appeal in respect of section 275 decisions that mirrors the right of appeal that an accused and the Crown has in respect of matters, prior to the determination of the case.[31] The legislation stipulates that the complainer's legal representative is entitled to be provided with the application, the charges against the accused and if and to the extent approved by the court, any evidence referred to in the application, or which is relevant to it.[32] In respect of said evidence, the Bill requires the prosecutor to apply to the court in advance for authority to disclose (which the court may refuse or authorise with any such limitations that the court thinks are in the interests of justice), whilst offering the complainer's and the accused's legal representative an opportunity to make representations in respect of whether the court should authorise such disclosure.[33]

1.5 Issues relating to ILR and the Scottish criminal justice system

There have been longstanding concerns expressed by professional representative bodies, some politicians, and organisations which support victims/survivors of crime about the Scottish criminal justice system's ability to deal with the number of cases it must process.[34] These concerns often highlight that the reporting and prosecution of sexual offences in particular is at comparatively high levels,[35] and that in such cases, there are myriad complicated and sensitive issues arising which, as noted by the terms of reference to the

[27] Scottish Courts and Tribunals Service, Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group (2021). This review is known as the "Dorrian Review", as it was led by Lady Dorrian, Scotland's second most senior judge, and is subsequently referred to by this title in this report. See also Keane and Convery (n21).
[28] See Dorrian Review, paras 4.34-4.45.
[29] See Victims, Witnesses, and Justice Reform (Scotland) Bill: Policy Memorandum, paras 491-493.
[30] The Bill, s.64(2) (inserting a new s.275(4A) into the 1995 Act).
[31] The Bill, s.64(5) (inserting a new s.74(1A) into the 1995 Act).
[32] The Bill, s.64(2) (inserting a new s.275(4B) into the 1995 Act).
[33] The Bill, s.64(2) (inserting a new s.275(4D) into the 1995 Act).
[34] Dorrian Review, paras 1.1-1.8.
[35] See the Dorrian Review, para 1.2: "The indication given to the Review Group was that 75% of the work of the Crown Office and Procurator Fiscal Service (COPFS) consists of sexual offences of one kind or another. The vast majority of High Court trials which now proceed relate to sexual offending." The high volume of sexual offence prosecutions and concerns about capacity to deal with these has led in the past to increased governmental funding for some criminal justice stakeholders: see e.g. Jenni Davidson, "Crown Office to take on extra staff following funding increase" (Holyrood Magazine, 28 August 2018).

Dorrian Review, may require a "clean sheet" approach to deliver "tangible improvements for complainers".[36]

In terms of the response from key stakeholders at Stage 1 of the Bill, the Faculty of Advocates[37] and the Law Society of Scotland[38] expressed support for the introduction of ILR at section 275 hearings. The Senators of the College of Justice stated that they "see the benefit"[39] of ILR. COPFS stated that they "welcome the proposed introduction of ILR" but that "the operational requirements of the provisions as currently framed will lead to practical difficulties".[40] The Scottish Courts and Tribunals Service welcomed in principle the introduction of the provisions in the Bill but, like COPFS, expressed concerns over the implementation of the provisions.[41]

The nature of what some of these practical difficulties might be were set out by stakeholders in their evidential submissions at Stage 1 of the Bill. These can be summarised as relating to three issues:

1. The impact of delay on the progression of cases by the proposed system;[42]
2. Related technical matters pertaining to the disclosure of evidence and authorisation provisions;[43] and
3. The availability of solicitors to undertake the work required.[44]

These issues were explored further in the semi-structured interviews that took place with relevant Scottish stakeholders,[45] and the information gathered in this respect was used to inform the analysis that we undertook when considering the efficacy of the various models of provision for ILR in the Scottish context.

1.6 Structure of this report

In the remainder of this report, chapter 2 outlines the project's research methods. Chapter 3 outlines the key features of the ILA/ILR systems in the jurisdictions selected for analysis. It is based primarily on the desk-based literature review but is also informed by the semi-structured interviews. Chapters 4 to 9 provide more detailed analysis of key issues relating to ILR and are based primarily on data gathered from the semi-structured interviews. Chapter 4

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[36] Dorrian Review, Terms of Reference, 140.
[37] Faculty of Advocates, Response to the Victims, Witnesses, and Justice Reform (Scotland) Bill (2023) 9.
[38] Law Society of Scotland, Response to the Victims, Witnesses, and Justice Reform (Scotland) Bill (2023) Q8.
[39] Senators of the College of Justice, Response to the Victims, Witnesses, and Justice Reform (Scotland) Bill (2023) 9.
[40] COPFS, Submissions to the Criminal Justice Committee – Victims, Witnesses, and Justice Reform (Scotland) Bill (2023) para 70.
[41] Scottish Courts and Tribunals Service, Response to the Victims, Witnesses, and Justice Reforms (Scotland) Bill (2023) Q8.
[42] See e.g. Law Society of Scotland (n 38) question 8; Scottish Courts and Tribunals Service (n 41) Q8; Senators of the College of Justice (n 39) 13.
[43] See e.g. Scottish Courts and Tribunals Service (n 41) Q8; COPFS (n 40) paras 77-82.
[44] See e.g. Law Society of Scotland (n 38) Q8.
[45] See section 2.3.

discusses referral pathways; chapter 5 ILR in court hearings; chapter 6 relationships with stakeholders; chapter 7 trauma-informed practice; chapter 8 models of delivery and funding; and chapter 9 evaluation of ILR. Chapter 10 summarises our findings and sets out some conclusions.

Chapter 2: Research Methods

2.1 Introduction

The research was undertaken using two main methods: a literature review and semi-structured interviews, each of which is outlined below.

2.2 Literature review

The literature review proceeded in two stages. An initial phase involved identifying comparable jurisdictions that operate (or have operated in the past) systems of ILR and/or ILA for complainers in sexual offence prosecutions. Our remit was to consider only jurisdictions that have an adversarial system of proof and provide some measure of ILA and/or ILR relating to the admission of evidence in criminal proceedings. This resulted in the identification of the following jurisdictions: Australia, Canada, England and Wales, Ireland, Northern Ireland. These, along with Scotland, will be discussed in more detail in the remainder of this report.

Both Canada and Australia operate a federal system. In Australia some states and territories have introduced ILR, but others have not and the report will focus on three jurisdictions that have done so, namely New South Wales, Queensland and Victoria.[46] In Canada the legislative provisions entitling complainers to be represented in respect of certain applications are federal (contained in the Canadian Criminal Code) but the provision of legal services differs between jurisdictions and this report considers British Columbia and Nova Scotia specifically.

As noted in chapter 1, the Victims, Witnesses, and Justice Reform (Scotland) Bill provides for ILR in relation to applications to admit a complainer's sexual history or character evidence. At the time this research was undertaken, only two of the jurisdictions identified – Ireland and Canada – offered ILR in the context of applications to admit sexual history evidence. It would, however, be remiss not to include the other jurisdictions in our analysis, because they offer important learning points. This is especially the case for the Australian jurisdictions. While the specific type of evidence for which ILR is provided is different – sensitive records evidence – there are very strong parallels with sexual history evidence. Both types of application relate to the admission of evidence about the complainer's past conduct where the complainer has a legitimate interest in keeping that information private that is separate and distinct from the interests of the prosecution. In both instances, there are legal provisions in place that allow for such applications to be made by the defence pre-trial (albeit that applications might also sometimes arise during the trial). The balancing exercise that the court must undertake in deciding whether to admit the evidence, while not identical, is similar for both types of evidence (very broadly speaking, balancing the complainer's privacy interests against the probative value of the evidence). Two of the Australian jurisdictions (New South Wales and

[46] For an explanation of the choice of these three jurisdictions and the exclusion of others, see section 3.2.1. The Australian Law Reform Commission has recommended that ILR for sensitive records applications be extended to all Australian states and territories: see Australian Law Reform Commission, Final Report: Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence (ALRC Report 143, 2025) recommendation 9.

Queensland) have very well-established systems of ILR for sensitive records evidence and there is much that can be learned from them.

The other two jurisdictions – England and Wales and Northern Ireland – did not provide an established system of ILR in relation to either sensitive record evidence or sexual history evidence applications at the time this research was undertaken.[47] They do (or in the case of England and Wales did in the past) provide ILA to complainers in relation to such matters. Northern Ireland as we explain below occasionally permits an ad-hoc system of ILR in relation to sensitive records applications seemingly based on judicial discretion. These jurisdictions are included in our analysis in any event because here too there are important learning points that are of relevance to the provision of ILR in the Scottish context. This is especially so in terms of the model of delivery that is utilised, such as whether the service is provided by salaried lawyers or lawyers working in private practice and related practical issues such as recruitment and information sharing with the prosecution. Likewise, there is valuable learning across each jurisdiction in relation to the provision of trauma-informed legal advice and representation.

A second phase of the literature review involved a more detailed examination of the selected jurisdictions (including Scotland) in order to consider in more depth the detail of the schemes that are available. Our goal was to identify key features of comparative models; different methods of categorisation; and respective types of funding in order to produce a critical evaluation of such models which takes into account relevant factors relating to stress and capacity. The following types of literature were consulted:

- **Legislation and Procedural Rules:** criminal law, evidence and procedure; relevant statutory legal aid rules.
- **Academic literature:** relevant monographs, edited collections and articles in leading journals studies (e.g. *Criminal Law Review*, *International Journal of Evidence and Proof, Journal of Law and Society*).
- **Grey literature:** reports (including from Parliamentary committees and independent inquiries), working papers and evaluations, case studies and short reports including consultation responses published by charitable organisations and practitioner associations (e.g. Victim Support Scotland, Rape Crisis Scotland, the Law Society of Scotland and the Faculty of Advocates, and equivalent bodies in other jurisdictions).
- **Web content analysis:** of relevant information provided by charities and service providers.

2.3 Semi-structured interviews

The second research method utilised was semi-structured interviews. These were necessary because the available literature on the ILA/ILR schemes we wished to analyse was limited and

[47] In England and Wales, the Law Commission has recommended that ILR be introduced for both of these types of application: Law Commission, Evidence in Sexual Offences Prosecutions (Law Com CP No 259, 2023) para 8.183. In Northern Ireland, a consultation is underway in this respect: Northern Ireland Executive Department of Justice, Consultation on Proposals for Inclusion in a Victims and Witnesses of Crime Bill (2024).

shed little light, for example, on the benefits and drawbacks of operating an ILR scheme in a particular way. Semi-structured interviews were needed to gain an in-depth insight into the schemes in question and allowed us to follow up and explore points in a way that would not have been possible using, say, a questionnaire survey. Most interviews were undertaken with a single participant. However, where there were two or more people within the same organisation who were all involved in the same ILR scheme, these participants were on occasion interviewed as a group. This proved to be a useful way of gaining insight into the scheme in question as participants could expand on (or occasionally question) points made by the other interviewees. This was only ever done with participants working in the same organisation. The wider use of focus groups as a research method was considered but rejected, as we needed to provide the time and space for interviewees to give in depth responses on their particular ILA/ILR scheme. It would also have added considerable complexity to set up focus groups across jurisdictions, given the time differences involved.

We undertook 30 semi-structured, in-depth interviews, each of approximately an hour long, involving a total of 41 participants. The characteristics of our interviewees were as follows:

International comparisons

- 20 legal professionals/service managers involved in the management or delivery of ILR in the aforementioned comparable legal jurisdictions
- 12 policy makers/other stakeholders with experience of designing/operating ILR schemes
- One legal academic with broad expertise in the topic of violence against women and girls and independent legal representation

Scotland

- Two legal professionals with experience of sexual offence work
- Seven other criminal justice stakeholders including representatives from the Scottish Legal Aid Board; The Faculty of Advocates; The Scottish Solicitors Bar Association; the Law Society of Scotland; the Crown Office and Procurator Fiscal Service; and the Scottish Courts and Tribunals Service

All of our participants were selected on the basis that they had professional experience that was relevant to the study. The decision was taken not to interview complainers who had experience of using (or who might use) ILR services. This was a decision taken primarily because of the relatively short time frame of the project. Including service users would have added complexity in terms of the ethical issues involved and the time that would have been needed to identify service users in multiple jurisdictions outside Scotland. It is acknowledged that this is a limitation of the research.

The majority of the interviews were conducted online, using a secure platform (either Teams or Zoom), depending on the interviewee's preference. The interviews were all conducted within the timeframe of September 2024 to February 2025. With the interviewees' permission, the interviews were recorded and they were then transcribed by a professional transcriber. Interviews were coded by theme.

2.4 Ethical considerations

No particular ethical considerations arise in respect of the desk-based research which included only material that is in the public domain. In relation to the semi-structured interviews, we sought and obtained ethical approval from the University of Glasgow College of Social Sciences Research Ethics Committee, which follows UKRI research ethical guidance.

The project was judged to be one involving low risk, as we did not plan to interview any potentially vulnerable people or to share confidential information beyond the consents given. The interviewees were all practice-based 'elite' research participants based either in service delivery, policy or academic environments.

A minor small risk was identified that in talking about service delivery in client cases some practitioners may inadvertently breach confidentiality and/or legal professional privilege, but this did not happen in any of the interviews that were conducted.

Participants were provided with information sheets and consent forms outlining different levels of consent to protect anonymity for those participants who wished not to be identified (while acknowledging and communicating the risk of nonetheless being identifiable). We fully anonymised and redacted transcripts for those participants who wished to remain anonymous. We undertook a data protection impact assessment which was approved by the University of Glasgow College of Social Sciences Research Ethics Committee and drafted a privacy notice, which was provided to all research participants.

Chapter 3: Comparable Models of ILA/ILR Delivery

3.1 Introduction

In this chapter, we outline the key features of comparable systems of ILA/ILR, namely those in Canada, England and Wales, Ireland, New South Wales, Northern Ireland, Queensland and Victoria. These jurisdictions were selected for analysis on the basis that they all have (or have had in the past) an operational system of ILA or ILR and are similar enough to Scotland (in terms of being common law, adversarial systems of criminal justice) to provide useful comparison. At the time that this research was undertaken, only Canada and Ireland provided ILR in relation to sexual history evidence applications. The Australian jurisdictions provided ILR for sensitive records evidence and Northern Ireland and England and Wales provided (or had provided in the past) ILA for complainers in sexual offence prosecutions. These jurisdictions were included in our analysis because the context in which they are offering ILR or ILA is sufficiently similar to ILR for sexual history evidence to provide important learning points.[48]

The analysis in this chapter is primarily informed by the literature review,[49] but it is also informed by the semi-structured interviews,[50] where they provided information about how the various schemes operated that complemented the information available in published sources. Where we refer to information gathered from the semi-structured interviews, this is not attributed to individual sources in the same way as it is in chapters 4 to 9. This is because in order to protect their anonymity, each interviewee was given a code that did not reference the jurisdiction they were from (e.g. "participant 1"). If we used their interview code in this chapter, in the context of the specific jurisdictions, this anonymity would be compromised.

As noted above, each of the selected jurisdictions is in a different position with regard to the availability of ILR. In Canada, the law of evidence is found at federal level in the Canadian Criminal Code, which entitles complainants in sexual offence cases to be represented by counsel in respect of submissions for production of personal records and the admission of such records or sexual behaviour evidence. Although governed by the same evidential provisions, the individual Canadian jurisdictions have each implemented ILA/ILR separately to varying degrees and an overview is provided of British Columbia and Nova Scotia below.

In England and Wales at present there is no provision of ILR in relation to either personal records or sexual history evidence (although such a system has been proposed by the Law Commission of England and Wales).[51] There have been two pilot schemes of ILA provision which will be discussed.

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[48] See further section 2.2.
[49] See section 2.2.
[50] See section 2.3.
[51] See Law Commission (n 47) para 8.183.

Ireland has an established system of ILR in relation to the admission of sexual history evidence. It also provides for ILR in relation to applications to obtain counselling records, although the statutory provision whereby the court can determine applications to disclose counselling records is "seldom used", with it being "the norm" for complainants to waive their right to a court hearing and to instead consent to disclosure.[52] Given the small number of cases relating to ILR at these hearings, the focus of our analysis in respect of Ireland relates to sexual history evidence.

Northern Ireland has a national system of ILA for complainers in serious sexual offence cases. It also occasionally permits an ad-hoc system of ILR in relation to sensitive records applications seemingly based on judicial discretion. At the time of writing, it did not have a more formal system of ILR, but it was consulting on the possibility of introducing pre-trial ILR for complainants in serious sexual offence cases.[53]

The position regarding the three Australian jurisdictions requires a more detailed explanation. Australia has six states (NSW, Queensland, South Australia, Tasmania, Victoria and Western Australia) and three territories (ACT, Northern Territory and Jervis Bay Territory), each of which has its own government and legal system. Legal responses to sexual assault[54] have developed independently in each jurisdiction and, unlike in Canada, each jurisdiction has separate legal provisions on the law of evidence. For this reason, they will be treated as separate jurisdictions in the reminder of the report.

Two Australian jurisdictions – New South Wales and Queensland – have established systems of ILR in respect of applications to access sensitive records. In addition, the Australian Federal Government intervened in this area as part of the National Plan to End Violence against Women and Children 2022-2032,[55] and in 2023 announced funding for pilot programmes in three jurisdictions aimed at improving the justice service in sexual assault cases.[56] The pilots are taking place in Victoria, Australian Capital Territory (ACT) and Western Australia and include funding for ILR in relation to applications to access sensitive records. Only one of these jurisdictions was selected for analysis (Victoria), given time constraints and the fact that, at the time of the research, the pilot was in its early stages, so there was reduced potential for learning

[52] T O'Malley, Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2020) para 6.39.
[53] Northern Ireland Executive Department of Justice (n 47). The closing date for responses was 20 February 2025.
[54] Australian jurisdictions differ in the terminology used for sexual offences. Some jurisdictions (such as Victoria and Queensland) have a specific offence of rape. Others do not (such as New South Wales where sexual intercourse without consent is termed "sexual assault").
[55] Australian Government, National Plan to End Violence against Women and Children 2022–2032 (2022). See specifically the commitment made to provide "$8.4 million for greater access to specialised and trauma-informed services for victim-survivors of sexual violence through a pilot of a new legal service model for victim-survivors of sexual assault" in Australian Government, First Action Plan 2023-2027 Activities Addendum, 55.
[56] Australian Government, Attorney-General's Department, Supporting victims and survivors of sexual violence - piloting new legal services models, media release, 20 September 2023.

compared to that which could be gained from more established schemes. The national pilot will be evaluated to measure its success and inform the development and funding of future legal services for victims and survivors across Australia.[57]

In parallel to the pilots, at the request of the Australian Government, the Australian Law Reform Commission (ALRC) undertook an inquiry into justice responses to sexual violence, aimed at harmonising the law across Australia. The ALRC recommended that ILR be offered in all Australian states and territories "when applications are made to subpoena or inspect materials which may contain a complainant's personal, sensitive, or confidential information (including sexual assault counselling communications)".[58] It stated that at this stage it did "not consider there is a need to go further"[59] and recommend the provision of ILR in relation to applications to admit sexual history evidence. It considered these applications to be more complex because of the complainer's status as a witness and stated that it had "not had sufficient time to consult about the legal implications of extending representation to those applications".[60]The ALRC also recommended that the Australian Government, together with state and territory governments, should fund and support independent legal advisers nationwide to provide ILA to sexual offence complainants.[61]

All of this means that there are, at the time of writing, five Australian jurisdictions that provide ILR for complainants in sexual assault cases. These are New South Wales and Queensland (where ILR is established) and Victoria, ACT and Western Australia (where it has only recently become available as part of the national pilot). In all of these jurisdictions, the provision is only available in relation to applications to access sensitive records. At the time of writing, no Australian jurisdiction provides ILR to complainants in relation to applications to admit sexual history evidence.

Before proceeding, the position of South Australia is worth briefly noting. Here, the Commissioner for Victims Rights can intervene in legal proceedings on a victim's behalf. The Commissioner has a general power under the Victims of Crime Act 2001 to "assist victims in their dealings with prosecution authorities and other government agencies".[62] It is not in any way specific to sexual assault cases or sensitive records/sexual history evidence. As of 2019, the Commissioner had engaged legal counsel to act for victims on

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[57] Government of South Australia Attorney-General's Department, Scoping the Development of Specialised and Trauma-Informed Legal Services for Victims and Survivors of Sexual Assault (2023) 6.
[58] Australian Law Reform Commission (n 46) recommendation 9.
[59] Australian Law Reform Commission (n 46) para 6.86.
[60] Australian Law Reform Commission (n 46) para 6.87. For further discussion of their rationale, see paras 6.86-6.90.
[61] Australian Law Reform Commission (n 46) recommendation 9.
[62] Victims of Crime Act 2001, s.16(3)(b). The power is discussed further in T Kirchengast, M Iliadis and M O'Connell, "Development of the Office of Commissioner of Victims' Rights as an appropriate response to improving the experiences of victims in the criminal justice system: integrity, access and justice for victims of crime" (2019) 45 Monash University Law Review 1 at 7-9.

over 200 occasions,[63] but it does not appear to have been specifically used in the context of sexual assault/sensitive records.[64] The previous Commissioner has stated that these provisions "*augment*" the "entitlement to legal representation available to victims of sexual assault when an application is made to disclose details of a protected communication that happened in a therapeutic context".[65] The reference to the "entitlement" of victims to legal representation here is curious because the rights of the complainant in relation to sensitive records are limited in South Australia compared to other Australian jurisdictions. The court, in determining applications to disclose/admit protected communications, should have regard to "the attitude of the victim or alleged victim to whom the communication relates (or the guardian of the victim or alleged victim) to the admission of the evidence",[66] but there is no requirement in the Evidence Act for the complainant to be notified that an application has been made and the complainant does not have standing to make submissions in relation to such an application.[67] The South Australian Government is at the time of writing in the process of consulting on whether this should change.[68] Notwithstanding, representation via the office of a Victims Commissioner is not a model that is likely to be emulated in Scotland, so will not be discussed further here.

This chapter is primarily descriptive, setting out the manner in which each of these systems operates (or operated), although where available we have outlined analytical literature or data relating to the efficacy of the schemes. Detailed analysis of the advantages and disadvantages of the different systems is contained in chapters 4 to 9.

Finally, it should be noted that while the information in this report was correct at the time of writing, ILR for sexual offence complainers is a rapidly developing area of practice. Almost all the jurisdictions we examined had law reform processes underway which might lead to change in terms of the provision of ILA and/or ILR. That said, this does not affect the learning points that can be taken from the operation to date of the ILA/ILR systems we examined.

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[63] Kirchengast, Iliadis and O'Connell (n 62) at 22; M O'Connell, "Improving access to justice: procedural justice through legal counsel for victims of crime", in J Joseph and S Jergenson (eds) An International Perspective on Contemporary Developments in Victimology, A Festschrift in Honor of Marc Groenhuijsen (Springer Switzerland, 2020) 213.

[64] See M O'Connell (Commissioner for Victims' Rights, South Australia), Victims' Rights: Integrating Victims in Criminal Proceedings (2011).
O'Connell provides several case studies of intervention but none of them relate specifically to our context. The closest is an intervention in relation to the defence wanting to access the contents of an adolescent complainer's laptop – see case F at 9.

[65] Ibid 9.

[66] Evidence Act 1929, s.67F(6)(c) (South Australia).

[67] Government of South Australia, Attorney-General's Department, Review of Sexual Consent Laws in South Australia: Discussion Paper (2023) 34.

[68] Government of South Australia, Attorney-General's Department (n 57). As has already been noted, the Australian Law Reform Commission has recommended change for all Australian states and territories: Australian Law Reform Commission (n 46) recommendation 9.

3.2 Canada

3.2.1 Background and legal framework

Provisions in the Canadian Criminal Code entitle complaints in sexual offence cases to be represented by counsel in respect of submissions for production of personal records[69] and the admission of such records or sexual behaviour evidence.[70] In each case, if the judge has determined that the evidence is capable of being admissible,[71] a hearing is to be held (for personal records) to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge or (for sexual behaviour evidence) to determine whether the evidence is admissible.[72] The complainant is one of the persons who is entitled to appear and make submissions at the hearing.[73] The right to legal representation is "limited to the four corners of these hearings"[74] and does not extend to a subsequent trial. An application is made to the court, but the defence must serve the application on both the prosecutor and the complainant at least 60 days before the hearing takes place, although that time period can be shortened by the court in the interests of justice.[75] The complainant must be informed, "as soon as feasible" by the court that they have a right to be represented at the hearing by counsel.[76]

While these provisions are federal ones, the provision of advice and representation to complainants varies across different Canadian jurisdictions, albeit with similar models being employed. This reflects the fact that the Criminal Code is federal legislation, while the administration of the justice system is largely the responsibility of the provincial and territorial governments. Canada has ten provinces and three territories of various sizes. In order to illustrate the provision of advice and representation in Canada, this section sets out details on two specific provinces: British Columbia and Nova Scotia. This reflects partly the size of these provinces and the extent to which we were able to obtain

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[69] Criminal Code s.278.4(2)-(2.1) (Canada).
[70] Criminal Code s.278.94(2)-(3).
[71] The process is therefore a two-stage one, as noted in e.g. R v GG 2023 PESC 16 at [14] and R v Crawford 2025 BCAA 17 at [36]. An overview of the procedure written for survivors has been published by the Journey Project: Journey Project, "Special procedures and O'Connor applications in sexual assault trials: a guide for survivors".
[72] Criminal Code s.278.4(1) (personal records) and s.278.94(1) (sexual behaviour evidence).
[73] Criminal Code s.278.4(2) (personal records, listing other persons who are so entitled) and s.278.94(2) (sexual behaviour evidence). The Code requires that a hearing be held. Case law on the provisions regularly notes written submissions having been provided to the court in addition to oral argument: see e.g. *R v KT* 2020 ONCJ 496 at [12]; *R v GG* 2023 PESC 16 at [7]; *R v NK* 2022 NSSC 84 at [60].
[74] K Bellehumeur, "Systemic discrimination against female sexual violence victims" (2023) 11 Canadian Journal of Human Rights 131 at 144. See also K Bellehumeur, "A former Crown's vision for empowering survivors of sexual violence" (2020) 37 Windsor Yearbook of Access to Justice 1.
[75] Criminal Code s.278.3(5).
[75] Criminal Code s.278.4(2)-(3).
[75] Criminal Code s.278.4(5)
[76] Criminal Code s.278.4(2.1).
[76] Criminal Code s.278.4(2)-(3).
[76] Criminal Code s.278.4(2.1)

information both from publicly available sources and interviews about the various provinces and territories, although we have drawn on information and interviews from elsewhere in Canada in seeking to understand the Canadian system overall.

A 2004 report noted that Ontario was "the only jurisdiction where legal aid is provided for complainants in applications for third party records", with 40 certificates having been granted in 2003-04 and Legal Aid Ontario believing "that all those who apply and are financially eligible are receiving a certificate".[77] A 2018 report suggested that non means tested legal aid was by that point available in a broader range of jurisdictions (Ontario, Manitoba, Alberta and British Columbia, with means tested legal aid available in Nova Scotia, Prince Edward Island and Nunavut), but without further detail.[78]

Over recent years, many Canadian jurisdictions have developed schemes for providing legal advice to victims of sexual assault, whether or not their cases have been reported to the police. These typically involve a non-means tested right of access to a small number of hours (often up to four hours) of advice from a lawyer, but these schemes do not in themselves involve representation. As detailed below, in 2021 Alberta separately established a scheme where Legal Aid Alberta maintained a panel of roster lawyers who could assist complainants in sexual offence cases with up to ten hours of non-means tested legal advice and support in cases where applications were made relating to their personal records or the use of sexual history evidence.

ILA and ILR services are paid for by a mixture of federal and provincial/territorial funds. At federal level, this funding comes via the Victims Fund, which pays to implement the policy initiatives that come out and that are supported by the Federal Victims Strategy. This includes independent legal advice and legal representation for victims of sexual assault and intimate partner violence. In 2021, the Victims Fund was used to make sure that all states and territories could offer ILA and ILR.

3.2.2 The ILR and ILA schemes

3.2.2.1 British Columbia

British Columbia operates both a system of ILA and ILR. They are administered by two separate organisations.

[77] S McDonald and others, Bill C-46: Records Applications Post-Mills, A Caselaw Review (2004) section 4.8. See also E Craig, Putting Trials on Trial (2021) 135-166.
[78] Report of the Coordinating Committee of Senior Officials Working Group on Access to Justice for Adult Victims of Sexual Assault (2018) para 5.4.5.

The ILA aspect is administered by the Stand Informed service in British Columbia and run by the Community Legal Assistance Society.[79] It was launched in October 2023.[80] Individuals who have been sexually assaulted in, and who live in, British Columbia, are entitled to up to three hours of legal advice. The lawyer can request an additional two hours if necessary. Initial contact is made with an intake coordinator by telephone or email, who will have a short call with the individual and match them with an appropriate lawyer in 1-2 weeks. A letter is then sent to the individual to sign, forming an agreement between them and the lawyer; the lawyer will then contact them to set up a meeting usually within 1-2 weeks after the letter is signed.[81] Advice can be provided over the phone or in-person, depending on the preference of the complainant (and the practicalities of doing so). The majority of complainants are happy with telephone advice, but some do prefer in-person.

The ILA itself is provided either by one of the two staff lawyers at Stand Informed or by private practitioners. There is a roster of private practitioners who can be engaged to do the work. To be on the roster, practitioners have to complete a training programme that includes a component of trauma-informed training. Individual complainants can self-refer to the service or referrals can come via other third sector organisations. Where a complainant is referred by a third sector organisation, Stand Informed often seeks the consent of the complainant for information sharing so that they do not have to tell their entire story again.

The ILR component is administered by Legal Aid British Columbia (LABC), who also administer legal aid services in other criminal and non-criminal matters. It has been in operation since 2020. For sexual offence complainants, it is available for sexual history applications and sensitive records applications. It is not means tested. ILR is provided by a roster of around 50 private practitioners across the province, who have to complete some basic training. A programme of mentoring and shadowing so that new lawyers can shadow a senior lawyer doing an application has recently been implemented using Government funding.

Most referrals to the ILR service come from the British Columbia Prosecution Service (BCPS). The BCPS completes a referral form with contact details for the complainant and information about the case. LABC then assign a lawyer to act for the complainant. Referrals can also come from complainants themselves by phoning a helpline. A lawyer is not assigned until court dates are set.

3.2.2.2 Nova Scotia

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[79] According to a statement by Police Victim Services of BC: "With funding from the Government of Canada through the Department of Justice Canada, CLAS is contracted by the Ministry to provide free independent legal advice to survivors of sexual assault". See Police Victim Services of BC, "Independent Legal Advice for Survivors of Sexual Assault", 2 Nov 2023.
[80] CBC News, "B.C. non-profit now offering free legal advice to sexual assault survivors", 17 Oct 2023.
[81] This description of the system, including the quoted text, is taken from Community Legal Assistance Society, Stand Informed.

Nova Scotia operates both a system of ILA and ILR. As in British Columbia, they are administered by two separate organisations.

ILA is accessed via 211 Nova Scotia, a confidential information and referral service. Victims can contact 211 and will be provided with an information package with a certificate number for two hours of free legal advice, including a list of participating lawyers and details of their experience. A further two-hour certificate can be requested for advice from the same or a different lawyer. The scheme does not provide legal representation in court.[82]

ILR is provided by the Sexual Offence Legal Representation (SOLR) programme, which is delivered in partnership by the Nova Scotia Legal Aid Commission and the Nova Scotia Department of Justice, Victims' Services. It covers applications for sexual history evidence and sensitive records. Most referrals to the ILR service come from the public prosecution service. The prosecution is under a duty to inform the complainant when an application to admit evidence of sexual history or sensitive records is made. When they do this, they ask the complainant if they would like to be legally represented. If they would, the prosecutor completes a referral form to SOLR with contact details for the complainant and information about the case. Nova Scotia Legal Aid will then arrange for a lawyer to be assigned. A roster of around 20 lawyers in private practice exists for these purposes. The lawyer will then contact the complainant. There are some figures available for the number of cases SOLA deals with.[83] In 2019-20 this was 38; in 2020-21 this was 46; in 2021-22 this was 66 and in 2022-23 this was 54.[84]

A pilot programme that will involve a salaried lawyer operating out of Nova Scotia Legal Aid will commence later in 2025[85] – at the time of writing recruitment to this position was in progress.[86]

3.3 England and Wales

3.3.1 Background and legal framework

There is at present minimal provision of ILR in England and Wales. A 2023 Law Commission consultation paper on evidence in sexual offence prosecutions noted one instance where the possibility of ILR arises: "a person who is the subject of an application for a witness summons to produce documents can make representations to

[82] Nova Scotia, Independent Legal Advice for Adult Survivors of Sexual Assault, [accessed 2 Jul 2024]. Participants must be 16 years or older and the assault must have occurred in Nova Scotia. Lawyers can contact Nova Scotia Victim Services to request that they are added to the roster of lawyers providing this service. A short informational video.
[83] Nova Scotia Justice, Accountability Report 2022–23 (2023) 4 (table 1).
[84] For context, the population of Nova Scotia in 2023 was 1,058,694: Nova Scotia Economics and Statistics Department, Nova Scotia Annual Population Estimates as of July 1, 2023 (2024).
[85] Nova Scotia Justice, Accountability Report 2022–23 (2023).
[86] See Staff Lawyer Position – Sexual Offence Legal Representation Program (SOLR) – Halifax.

the court about the application".[87] This procedure is only competent post-charge in a criminal case where consent for disclosure has not been provided by the witness. There is limited information about its incidence in practice, and there is no entitlement to legal aid to permit representation for complainants in this context.[88] The Commission, in that consultation paper, made the following provisional proposals relating to ILR in England and Wales in other contexts:

- That complainants "should have a right to be heard in respect of applications relating to the admission of their personal records or sexual behaviour evidence".[89]
- That complainants "should have access to independent legal advice, assistance, and representation in respect of requests and applications relating to personal records and sexual behaviour evidence".[90]

Against this current background of there being limited scope for ILR, there have been two pilot schemes (one completed and one ongoing) providing ILA to complainants in sexual offence cases, as detailed below.

3.3.2 The ILA schemes

The Northumbria Sexual Violence Complainants' Advocate Scheme. This pilot scheme, funded by the Home Office and running between September 2018 and March 2020,[91] was established with three key aims:[92]

> 1) To offer legally informed advice and support for sexual violence complainants undergoing ABE [achieving best evidence] interview.
> 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.

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[87] Law Commission (n 47) para 8.13, citing Civil Procedure Rules rr 17.5(3) and 17.5(4) and R (TB) v The Combined Court at Stafford [2006] EWHC 1645 (Admin). "Subject" here includes both the record holder and the person who is the subject of the records.
[88] See Law Commission (n 47) para 3.63.
[89] Ibid para 8.137.
[90] Ibid para 8.157. The Commission made further provisional proposals regarding the detail of advice and representation, including representation in court for certain issues being determined pre-trial or during a trial in the absence of the jury, access to documents and engagement with police, prosecutors and defence counsel: paras 8.159-8.162.
[91] Ibid para 8.16.
[92] O Smith and E Daly, Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme (2020) 12.

The third of these aims was, however, abandoned before the project went live.[93] Four legally qualified sexual violence complainant advocates ("SCVAs") were recruited; all were local solicitors who worked in family law.[94] Training included input from a senior partner in criminal law at a local firm and the police and Crown Prosecution Service. A multi-agency oversight group with quarterly meetings included input from third sector organisations, independent sexual violence advocates, police, the CPS, defence solicitors and local barristers, with a judge attending as an independent observer.[95] The nature of the support provided in relation to accessing complainants' personal data was advice and intervention outside of the court process, although there was one case where the SCVA requested a court hearing and instructed counsel to represent the complainant. In the event, the issue was resolved through mediation, but the judge in the case did state that the complainant "has a right to have time to make representations or be represented during disclosure of their personal records".[96]

An evaluation concluded that the pilot had been successful. 83 eligible referrals were made,[97] with complainants engaging with the service in 47 cases (57%).[98] The most common support offered was advice on data requests (38 cases), followed by attending ABE interviews (20 cases) and intervention on data requests (18 cases).[99] The average time commitment by SCVAs per case was 155 minutes at a cost of £725.[100] The House of Commons Home Affairs Committee later recommended that the Government should further pilot the scheme and consider widening it to encompass legal advice on sexual history applications.[101]

The London Sexual Violence Legal Advice Pilot. In June 2024, the Mayor of London launched a free legal advice service for complainants in rape and serious sexual offence cases, with referrals to come via the London Survivors Gateway and (in Hackney and Tower Hamlets) the Metropolitan Police.[102] A pilot had previously been commissioned in February 2023 but had experienced setbacks, primarily with recruitment and retention. The updated model, to run until June 2025, and to be evaluated by the University of Loughborough, was described as comprising:[103]

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[93] See ibid 36. The support that advisers were able to give for ABE interviews was also restricted part-way through the pilot.
[94] Ibid 11.
[95] Ibid 11.
[96] Ibid 44.
[97] Representing approximately 6% of eligible cases reported to the police during that period: ibid 38.
[98] Ibid 7. Most of the complainants who quickly disengaged "did so because they decided not to proceed with the police complaint": ibid.
[99] Ibid.
[100] Ibid.
[101] House of Commons Home Affairs Committee, Investigation and Prosecution of Rape (HC 193, 2022) 55. The Law Commission noted that a Ministry of Justice consultation on the provision of legal advice to complainants in sexual offence cases concluded in June 2022 and that its outcome was awaited: Law Commission (n 47) para 8.22.
[102] N Vickers, "Free legal advice for rape victims starts – mayor", BBC News, 18 June 2024.
[103] Mayor of London, PCD 1538 Sexual Violence Legal Advice Pilot (2023).

a single specialist hub made up of a small team in order to build specialist expertise in this new and niche area of law. The team will consist of two full-time lawyers, paralegal support, legal supervision and training, Counsel's advice, and operational supervision and management.

3.4 Ireland

3.4.1 Background and legal framework

In Ireland, following changes introduced by the Sex Offenders Act 2001, where an application is made under Ireland's rape shield legislation to introduce "sexual experience evidence" other than that to which the charge relates, complainants in certain sexual offences trials are entitled to ILR such as to allow them to be heard in respect of the application.[104] The system of ILR in this context is known as "Separate Legal Representation". SLR/ILR is available in Ireland for charges of rape, certain offences which relate to sexual acts with children and those that lack mental capacity,[105] and certain aggravated sexual assault charges and associated offences such as attempted aggravated sexual assault. The type of offences for which ILR is available was extended in 2024.[106]

Where a sexual experience evidence application is made in a qualifying case, the defence require to give notice of the application to the prosecution, "before, or as soon as practicable after, the commencement of the trial".[107] On receipt of this notice the prosecution require to notify the complainant of their entitlement to be heard in relation to the application and to be legally represented, for that purpose.[108] As further explained below, though, the practical burden of arranging legal representation falls on the Irish Civil Legal Aid Board. As of 2024, complainants are also entitled to be legally represented during the giving of evidence in respect of which leave has been granted i.e. they are entitled to have a lawyer present during evidence in chief and cross-examination itself pertaining to sexual history.[109]

The Act specifies that a judge "shall not" hear a sexual experience evidence application without being satisfied that the SLR provisions have been complied with and also makes provision for the judge to postpone the hearing of the application (and trial if the application is made at that stage) if they are not satisfied that the complainant has been afforded a reasonable opportunity to arrange legal representation.[110]

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[104] By virtue of the Criminal Law (Rape) Act 1981 s.4A.
[105] In terms of the Criminal Law (Sexual Offences) Act 2006 and the Criminal Law (Sexual Offences) Act 1993.
[106] See the Criminal Law (Sexual Offences and Human Trafficking) Act 2024 s.6.
[107] Criminal Law (Rape) Act 1981 s.4A(2).
[108] Criminal Law (Rape) Act 1981 s.4A(3).
[109] Criminal Law (Rape) Act 1981 s.4A as amended by s.7 of the Criminal Law (Sexual Offences and Human Trafficking) Act 2024.
[110] Criminal Law (Rape) Act 1981 ss. 4A(4) and (5).

Finally, it is worth noting that Ireland has a separate system of non-means tested ILA, provided by legal aid, for complainants in certain sexual offence cases where a prosecution has been raised.[111]

3.4.2 The ILR scheme

In Ireland, although both solicitors and barristers have rights of audience, by convention complainers receiving ILR are represented by counsel, who are engaged by the Legal Aid Board. Non-means tested legal aid is available to cover the cost of instructing representation for a complainant in this context by virtue of section 28(5A) of the Civil Legal Aid Act 1995. In Ireland legal representation is practically arranged upon the receipt of notice through the DPP contacting the Head Quarters of the Civil Legal Aid Board, who then in turn assign the case to one of Ireland's regional law centres where a salaried solicitor then takes on the responsibility of communicating with the client and instructing a barrister on their behalf. If the case is being heard outside Dublin then the law centre is selected in respect of its geographic proximity to the court. If the case is being heard in Dublin (where the vast majority of relevant cases are heard) then a list system is operated, and the case is assigned to one of the regional Dublin law centres.

The operation and efficacy of the system of ILR in Ireland has never been the subject of comprehensive empirical review. However, its operation has been explored in a number of reports and research projects that have considered the handling of sexual offences and related matters generally in the jurisdiction. In 2020, Iliadis undertook a small number of interviews with criminal justice professionals and victim support workers (five) and reviewed relevant legislation and reports, concluding that the scheme was a unique response to the problems of admission of sexual history evidence but had several shortcomings. These included the frequently delayed and late issuing of the notice of intention which tiggered the right to ILR, the legal representative's limited role and the inconsistency in judicial discretion in relation to admissibility in terms of the substantive sexual history provisions, which may hinder its capacity to improve victims' procedural justice experiences in ways unanticipated from its introduction.[112]

O'Malley's *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* commented positively generally on the scheme but also noted that there were certain shortcomings. In particular, the Review found that it was almost invariably junior counsel who would perform the role of ILR, receiving instructions directly from the Legal Aid Board, and that Ireland's lack of infrastructure relating to pre-trial case hearings at that time meant that very little notice was being provided to counsel performing this role, often leading to the potential for an inequality of arms between the complainant and the other parties to the application.[113] The

[111] See s.26(3A) of the Civil Legal Aid Act 1995.
[112] M Iliadis, "Victim representation for sexual history evidence in Ireland: a step towards or away from meeting victims' procedural justice needs?" (2020) 20 Criminology & Criminal Justice 416.
[113] O'Malley (n 52) para 5.14.

Review recommended that the Legal Aid Board should endeavour to instruct counsel of a similar level of seniority to those representing the prosecution and the defence.[114] Our research interviews have, however, indicated that parity of seniority is not a practical problem. The concern expressed in this regard relating to the lack of pre-trial case management was also highlighted as problematic in several other contexts,[115] and led to the introduction of preliminary trial hearings in Ireland in 2022. The data we have gathered, however, suggests that significant differences between Ireland and Scotland's systems of pre-trial case management and admission of sexual history evidence, remain.

The O'Malley Report also concluded that SLR should be extended to cover questioning at trial where an application is granted to admit sexual experience evidence, and argued that the system of ILR should be extended to cover all sexual assault offences. These recommendations were brought forward by the government in Ireland and are contained in section 7 of Criminal Law (Sexual Offences and Human Trafficking) Act 2024 that was passed into law in July 2024.

In terms of other available sources of data in respect of operation of the Irish system of ILR, Leahy in partnership with Dublin Rape Crisis Centre in 2021 published a small study examining the operation of rape trials based on interviews with court accompaniment workers and legal professionals. Leahy's work, which predated the introduction of preliminary hearings in Ireland, echoed the findings of the O'Malley Report, with interviewees reporting that the system of ILR then in operation often did not permit counsel sufficient time to explain matters which often led to stress on the part of complainants and an inequality of arms between parties, given the availability of counsel.[116]

Leahy concluded cautiously that the consensus of those interviewed in relation to the rape shield provisions in Ireland (and by the implication the system of ILR) was that it was working well in the sense that only relevant evidence was being admitted, but that further empirical research was undoubtedly required to understand whether this was in fact true or not.[117] Finally, Keane and Convery considered the Irish system of ILR in 2020 and noted that various criminal justice stakeholders that they spoke to were positive about the system of ILR in operation but again noted the impact of lack of pre-trial procedure.[118]

Ireland provides a highly topical example of how a publicly funded system of ILR can be implemented for complainers in respect of sexual history and character evidence applications. As indicated, however, the system has never been the subject of comprehensive empirical analysis, and as will become evident in later sections there

[114] Ibid 84.
[115] See Iliadis (n 112)
[116] S Leahy, The Realities of Rape Trials in Ireland: Perspectives from Practice (2021) 25.
[117] Ibid 26.
[118] Keane and Convery (n 21) 24.

are marked differences in systems of pre-trial case management between the jurisdiction and Scotland.

3.5 New South Wales

3.5.1 Background and legal framework

In New South Wales, ILA and ILR has been available since 2011 in relation to the disclosure of counselling communications. In terms of the relevant legislation, the Evidence Amendment (Confidential Communications) Act 1997 (NSW) amended the Evidence Act 1995 (the amendments commenced on 1 January 1998) to protect the counselling communications of sexual assault complainants. The two key protections include a judicial discretion to allow the courts to exclude evidence of confidential communication and a rebuttable presumption that confidential communications made to a counsellor by a victim of sexual assault should not be admitted into evidence. Sexual assault communications privilege (SACP) provisions were later incorporated into Part 5, Div 2 of the Criminal Procedure Act 1986 (NSW). The scope of the privilege is wide and applies in all criminal cases, including pre-trial proceedings.

Further reforms were introduced in 2010 by way of the Courts and Crimes Legislation Further Amendment Act 2010, which inserted new sections 297–299D into the Criminal Procedure Act. These provisions enhanced complainant participation in several ways: they strengthened the standing of the complainant in criminal proceedings if a document is sought to be adduced that may disclose a protected confidence;[119] required parties to seek leave from the court (ordinarily by subpoena) to compel production of privileged materials;[120] and added to the range of factors that the court must consider before granting leave to disclose records.[121]

When an application is made by the defence to adduce a protected confidence, the prosecutor must ensure that a copy of the application is given to the complainant.[122] The court cannot decide an application for leave until at least 14 days after notice has been given to the complainant,[123] although this rule can be waived by the court in

[119] Criminal Procedure Act 1986 ss.299A and 299C. A "protected confidence" is defined by s.296(1) as a "counselling communication that is made by to or about a victim or alleged victim of a sexual assault offence". Communications can be from "any person who has undertaken study or has experience that is relevant to the processing of counselling persons who have suffered harm" (s.296(4)). This might include, for example, financial counsellors, health professionals, school professionals or social workers. See Judicial Commission of New South Wales, Sexual Assault Trials Handbook (2020) para 9-100.
[120] Criminal Procedure Act 1986 s.298(1).
[121] Criminal Procedure Act 1986 s.299D. For example, consideration of the need to encourage victims of sexual offences to receive counselling; whether disclosure might damage the relationship between the counsellor and the counselled person; and the public interest in ensuring victims of sexual offences receive effective counselling.
[122] Criminal Procedure Act 1986 s.299C(3).
[123] Criminal Procedure Act 1986 s.299C(4).

various circumstances, including where the complainant consents or where there are exceptional circumstances.[124]

Importantly, the new provisions also require the court to ensure that the complainant has been given an opportunity to seek legal advice:[125]

> If it appears to a court that a witness, party or protected confider may have grounds for making an application under this Division or objecting to the production of a document or the adducing of evidence, the court must satisfy itself (or if there is a jury, in the absence of the jury) that the person is aware of the relevant provisions of this Division and has been given a reasonable opportunity to seek legal advice.

Evidence relating to sexual history (termed sexual experience or sexual activity, or lack of sexual experience or sexual activity) is inadmissible following section 294CB of the Criminal Procedure Act 1986. Exceptions apply, for example, if the sexual activity or experience was "at or about the time of the alleged prescribed sexual offence" and "forms part of a connected set of circumstances".[126] It has been noted that the NSW system operates on a "restrictive statutory basis", rather than affording discretion to the trial judge, however, judges do have some limited discretion where the probative value of the evidence might outweigh its prejudicial effect.[127] Unlike the provision of advice and assistance for counselling records, no such state funded provision exists in relation to independent legal advice or representation relating to sexual history evidence in NSW.

3.5.2 The ILR scheme

The changes to the law in 2010 that strengthened privacy protections for victims of sexual assault also introduced a free legal service hosted by Legal Aid NSW. The Sexual Assault Communications Privilege (SACP) Service, established in 2011, provides lawyers for victims in criminal and Apprehended Violence Order (AVO) cases. All sexual assault victims, whether child or adult, who need legal help in relation to the communications privilege can access a free lawyer – the service is not means tested.[128]

The service extends to all "protected confiders", which includes other professionals who may want to prevent or restrict the disclosure of private records, for example, GPs, psychologists, counsellors and education providers. Advice can also be provided to

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[124] Criminal Procedure Act 1986 s.299C(5).
[125] Criminal Procedure Act 1986 s.299.
[126] Criminal Procedure Act 1986 s.294CB(4)(a).
[127] T Kirchengast, "Victim legal representation and the adversarial criminal trial: a critical analysis of third-party counsel for complainants of serious sexual violence" (2021) 25 International Journal of Evidence and Proof 53 at 65.
[128] Judicial Commission of New South Wales, Sexual Assault Trials Handbook (2020) para 9-600.

complainants who "wish to consent to the release of private documents in an informed way".[129]

The majority of referrals to the SACP service come from the Office of the Director of Public Prosecutions (DPP), although some come through other sources, such as the police. Before the DPP makes a referral, they first contact the complainant to seek their consent for this: "[the ILR providers] don't cold call people ever, for obvious reasons". This, it was stated, also "stops people from giving us hospital passes with uncontactable people and then going, oh, we tried to refer them. Because … some complainants are really traumatised, like, they just vanish." Once consent is obtained, the prosecutor completes a referral form that has "all the basic information we need". Once this is received, the SACP service contacts the complainant using the contact details provided on the referral form.

The majority of referrals are dealt with by SACP in-house salaried lawyers – three are employed for this purpose. Where the in-house lawyers cannot assist, either due to a conflict of interest,[130] or capacity issues, Legal Aid NSW can make grants of aid for representation by private practitioners. A panel of practitioners exists for this purpose, who must have completed specialist training. When it is necessary to engage a private practitioner:

> … we just send a text out to all of our panel and just say there's a matter, it's on this day, this is the name of the accused, so they know if they've got a conflict because they might have appeared for this before. This is when it's in court. And the first person to respond gets it.

SACP lawyers themselves have received specialist training to enable them to provide "advice and assistance". They "speak only on behalf of the complainant" and can also "assist the court on the operation of privilege and the complainant's right to privacy".[131] SACP also provide an extensive court guide and legal information on the subpoena process.[132] A separate service exists for children and young people.

Since 2015 New South Wales has operated a fused legal profession. Although there is a single admission process to be licensed as a "legal practitioner",[133] some lawyers register as barristers (or were barristers prior to 2015) and there is a Bar Association. All legal practitioners have rights of audience in all courts. In practice, most ILR is provided by solicitors, with counsel being instructed in complex cases or where the defence has engaged counsel. As one interviewee put it: "I've appeared before and won before against senior counsel on these but the level of deference that's offered to them by the court can be quite annoying."

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[129] Legal Aid New South Wales, Sexual Assault Communications Privilege Service (2021).
[130] This may arise, for example, where Legal Aid is already representing the defendant in the case.
[131] See Legal Aid New South Wales, "Sexual Assault Communications Privilege Service".
[132] Sexual Assault Communications Privilege Service, Subpoena Survival Guide (2016).
[133] Legal Profession Uniform Law Application Act 2014 (NSW).

SACP provision exists both in relation to criminal matters, AVOs and some civil matters. In response to a Discussion Paper published by the Attorney General,[134] the Law Society of NSW proposed an *integrated* service for victims of family, domestic and sexual violence. It was argued that this would provide legal advice that better appreciated the interplay across different areas; and ensure that complainants did not have to unnecessarily repeat their experience of sexual assault.[135]

In terms of numbers, the SACP service dealt with 190 referrals in 2023.[136] Approximately half of the referrals involved legal representation – the others were advice only. It is estimated that around half of these clients are children. There is no publicly available evaluation of the SACP service.

3.6 Northern Ireland

3.6.1 Background and legal framework

Northern Ireland (NI) launched a state funded ILA scheme in March 2021 to assist complainants in serious sexual offences, following a recommendation set out in the Gillen Review.[137] The Gillen Review expressly considered the issue of "separate legal representation" (SLR)[138] and found that it would be "eminently sensible" to introduce a right to SLR to oppose cross-examination on previous sexual history and oppose disclosure of personal medical records. Gillen noted more generally that a "measure of legal advice to explain the complexities of, and the legal developments occurring in, the legal process" should be available from when a matter is first reported to the police up until the commencement of the trial, although not during the trial itself.[139]

The SLR recommendations were made in the context of a proposed enhanced advocacy scheme. Notably, the review strongly recommended that NI Department of Justice advocacy scheme "should borrow heavily" from the Scottish national advocacy service, especially in supporting complainants to understand their motivation for not proceeding with the criminal justice process.[140] However, it also expressed the importance of maintaining a clear distinction between legal and non-legal representation.[141]

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[134] Attorney-General's Department, Scoping the Development of Specialised and Trauma-Informed Legal Services for Victims and Survivors of Sexual Assault (2023).
[135] Law Society of New South Wales, Letter to the Law Council of Australia: Developing Legal Services for Victims and Survivors of Sexual Assault (2023).
[136] For context, the population of New South Wales is 8,484,400: Australian Bureau of Statistics, National, State and Territory Population (2024).
[137] Sir John Gillen, Gillen Review: Report into the Law and Procedures in Serious Sexual Offences Cases in Northern Ireland (2019). Subsequently "Gillen Review".
[138] We note that the Gillen Review does not clearly distinguish advice and representation within the overall terminology of "separate legal representation".
[139] Gillen Review, 13.
[140] Ibid 166.
[141] Ibid 167.

In terms of the legal framework, the Criminal Evidence (Northern Ireland) Order 1999 governs special measures (including video recorded evidence)[142] and complainant's sexual history evidence.[143] The disclosure of medical and other sensitive records is governed by the Criminal Procedure and Investigations Act 1996. The Gillen Review made no specific recommendations for evidential reform in these areas save for general measures to encourage a more "robust judicial attitude to restricting cross-examination of previous sexual history", and wide-ranging proposals to tackle delay and non-compliance related to disclosure.[144]

Practice Direction 2/2019 (*Case Management in the Crown Court including Protocols for Vulnerable Witnesses and Defendants*) sets out the process for the disclosure of third-party material. The disclosure process includes pre-trial hearings for applications made by the defence team for medical records and other personal information.[145] Where the defence wishes to access such records, they must serve a copy of the notice on the prosecution. The prosecution should then "take steps to ensure that the complainant is notified of the application and to advise them of their entitlement to make representations".[146] At this stage, the prosecution also sends the complainant details of the Sexual Offences Legal Advisers Scheme (SOLA) service described below and sets out how the complainant can contact them. In determining applications, it is a matter for the judge to determine what information is relevant and proportionate. The NI Minister for Justice commented in March 2024 that "operationally" there are measures "under review" to limit the scope of material disclosed during rape trials to what is necessary and proportionate.[147]

The Victim Charter of NI gives victims the right to be informed about the progress of relevant proceedings, the outcome of proceedings and any special measures which may be available.[148] The Victim Witness Care Unit aims to provide a single point of contact for complainants, as does the Police Service of Northern Ireland (PSNI) and the Public Prosecution Service (PPS).[149] An advocacy support service has also been available to victims of domestic and sexual abuse since 2020.[150] While the Victim Charter allows for the instruction of counsel in order to gain access to information about the progress of a case, it does not provide standing at trial.

3.6.2 The ILA scheme

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[142] See ss. 11-16.
[143] Part IV, s.28.
[144] Gillen Review, 16-19.
[145] See Pre-Trial Matters, s.6.
[146] Practice Direction 2/2019, s.6.16.
[147] Parliamentary Record, Question answered by the Department of Justice (2024).
[148] Victim Charter of Northern Ireland, Department of Justice. See Justice (Northern Ireland) Act 2015 (Northern Ireland), s.28.
[149] Gillen Review, 163.
[150] ASSIST NI, "About ASSIST NI".

The implementation of the Gillen recommendations is led by the Strategic Justice Group on Sexual Harm, overseen by the Criminal Justice Board of NI. It is worth noting that the implementation plan for the Gillen Review did not expressly mention ILR for protection of complainants' personal records or sexual history. Rather, against the strategic priority area of "separate legal representation for complainants pre-trial" it proposed high level implementation by way of:

- Provision of agreed legal advice pre-trial to ensure complainants have advice in relation to their privacy.
- Provision of representation to ensure complainants are in a position to make informed decisions and understand their rights.[151]

Following this plan, the Sexual Offences Legal Advisers Scheme (SOLAs) was established as a three-year pilot in March 2021. It is delivered in partnership with Victim Support NI with a focus on providing legal advice and support. Three legal advisers were recruited to the scheme who are all qualified solicitors with experience in criminal law and human rights.[152] Service provision is designed to focus on privacy rights with respect to the disclosure of medical records and previous sexual history. In 2022-23 there were 936 referrals to the scheme.[153]

At the time of writing, a Child Sexual Offences Legal Advisers Scheme (CSOLAs) had just been established, with a team of lawyers recruited to provide advice specifically to children and young people.

The current focus is on unregulated general legal advice,[154] rather than representation in pre-trial proceedings. This means that lawyers providing the service as it currently operates do not need to be practising as lawyers nor do they require rights of audience in court. There have, however, been some instances where a judge has exercised discretion to allow written representations from a SOLA with respect to sensitive records, although this appears to happen rarely in practice.

The pilot scheme does not fall within the scope of legal aid provision as this would have required time consuming changes to legislation. It is funded by way of an agreed annual grant from the Department of Justice.[155] Gillen had recommended that legal aid be provided for SLR and that it would ideally not be means tested.[156]

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[151] Gillen Review Implementation Team, Gillen Implementation Plan: The Gillen Review into the Law and Procedures in Serious Sexual Offences in Northern Ireland (2020) 6.
[152] P Lockhart, "The impact of the SOLAs pilot", Victim Support NI Conference: What Next for Victim Rights? (2023), speech.
[153] Victim Support NI, Annual Report 2022-23 (2023) 7. For context, the population of Northern Ireland is 1.92 million: NISRA Statistical Bulletin, 2023 Mid-year Population Estimates for Northern Ireland (2024).
[154] SOLAs are all qualified as solicitors but non-practising to the extent that the provision of advice is not formally regulated by the Law Society of Northern Ireland.
[155] We have been advised that in addition to the core grant of £1.8 million to Victim Support for general support services, the Department of Justice provides approximately £190,000 per year for the SOLA scheme, alongside a pot of funding for cases that may require advice or representation from counsel.
[156] Gillen Review, 179.

ILA is currently available free of charge to individuals (adults) who have (i) reported a serious sexual offence to the PSNI and (ii) the offence is under investigation. The scope of provision includes complaints of historical sexual abuse. A referral is either made by the PSNI, another third-party organisation or an individual can self-refer using an online form on the Victim Support NI website.

Self-referrals require the following information:
- Name, Address, DOB, preferred pronoun;
- Ethnicity & any relevant disability information;
- Preferred method and time of contact;
- Date of incident, date of report to the police; and
- Name of police officer assigned to the case.[157]

Referrals from third-party organisations require:
- Contact information (of referral organisation) and relationship to client;
- Brief overview of the case and whether any time sensitive issues; and
- Details of existing support.[158]

At the time of writing, a public consultation is underway[159] to scope the implementation of ILR in relation to the disclosure of sexual history and private medical or counselling records at preliminary or Ground Rule Hearings, as envisaged by the Gillen Review's recommendation.[160] This is also consistent with the Domestic and Sexual Abuse Strategy 2023-2030, which aims to further provide victims of sexual abuse with information and services to support them through the criminal justice process.[161]

With regards to the more general legal advice scheme provided by SOLAs, Victim Support NI report high levels of engagement with the scheme. Of those clients referred, 86% are said to benefit from the legal support offered. Of those clients who took part in their survey, 100% said that advice "allowed them to have a voice in the criminal justice process" and 75% reported improved confidence in the criminal justice system.[162]

The parameters of the current system in NI, however, appear somewhat unclear in view of ad hoc developments on the ground depending on the needs which arise on a case-by-case basis. Gillen had proposed that, after a period of piloting and analysing the provision of pre-trial ILR, an extension of provision during the trial process might be considered; albeit that it was assumed that existing safeguards on sexual history would

[157] Victim Support NI referral form.
[158] Victim Support NI referral form.
[159] Northern Ireland Executive Department of Justice (n 47).
[160] Gillen Review, 173 & 187.
[161] Northern Ireland Executive Department of Justice, Draft Domestic and Sexual Abuse Strategy 2023-2030 (2023).
[162] Victim Support NI, Annual Report 2022-23 (2023) 7.

make the need for such provision unlikely.[163] Commentators note that the Gillen approach fails to appreciate the way in which protections relating to sexual history and character evidence are commonly evaded during the trial process itself; and that additional mechanisms to access ongoing representation may be required (for example to act as a check on late sexual history applications).[164] Likewise, limiting representation to sexual history and medical evidence may arguably create unfairness given the need for representation in relation to digital communications and other sensitive third-party materials.[165] This view was supported by Dame Vera Baird KC in her consultation response to the Gillen Review, where she noted that complainants are "routinely being asked to sign consent for any and all of their personal records".[166]

It seems that the current system of ILA does not yet offer the level of support envisaged by Gillen, for example, in protecting complainants from intrusive questioning or where defence counsel may seek to lift the 'rape shield'.[167] The limits of the lawyer's role – both in and outside court – remain somewhat unclear and commentators have further criticised the lack of attention given to the need for changes to the law of evidence or the trial process to facilitate reform.[168] This confusion goes some way to explaining the need for the ongoing consultation on the implementation of further provision for ILR under the new Victims and Witnesses of Crime Bill. Notably, while Gillen's SLR proposals were generally widely supported, substantive objections were made by the Northern Irish Bar and there may be continuing concerns about the legal profession's accommodation of further reforms.[169]

Finally, the Gillen Review observed the importance of gathering data to better understand the experiences of marginalised groups in relation to sexual offences in NI.[170] In the context of separate legal representation, the heightened need for representation for certain groups, for example, those with difficulty understanding legal documents, terms and processes was noted.[171] Relatedly, scholars have also pointed to the discrete socio-political context and the gendered impact of violence and conflict in

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[163] Gillen Review, 174 (referencing the Criminal Evidence (Northern Ireland) Order 1999, art.28).
[164] M Iliadis and others, "Independent separate legal representation for rape complainants in adversarial systems: lessons from Northern Ireland" (2021) 48 Journal of Law and Society 250 at 256.
[165] Ibid.
[166] Dame Vera Baird QC, Sir John Gillen Review of Sexual Offences in Northern Ireland: Consultation Response (2019).
[167] Gillen Review, 163.
[168] Kirchengast (n 127) 57.
[169] Iliadis and others (n 164) 258-259.
[170] Gillen Review, 22: "If the law and procedures in serious sexual offences are to be fairly applied to all our citizens, it must embrace those in marginalised communities including, minority black, Asian and ethnic groups, those with physical, sensory and learning disabilities or mental ill health, the LGBT+ community, older people, Traveller communities, sex workers and, purely in the context of serious sexual offences, males who for a number of reasons may be even more reluctant than others to report these crimes and come within the criminal justice system.... We desperately need empirical research commissioned by government to learn the prevalence, extent, nature and experiences of serious sexual offences among these groups."
[171] Gillen Review, 173.

NI, which may have a bearing upon advice seeking behaviours and should be taken into account in evaluating service provision.[172]

3.7 Queensland

3.7.1 Background and legal framework

In Queensland, ILA and ILR has been available since 2018 in relation to the disclosure of counselling records. In Queensland, applications to access a complainant's counselling records are governed by the Evidence Act 1977. A protected communication cannot be admitted in evidence without the leave of the court. A party that wishes to adduce counselling records evidence must provide written notice that they wish to do so,[173] and this must include "a description of the nature and particulars of the protected counselling communication".[174] If the complainant is not a party to the proceedings, the prosecutor must give them a copy of this notice.[175] In introducing the notice requirement provision, the Queensland Government stated that "[i]ntegral to victims and counsellors asserting their rights in relation to the privilege is being aware that an application has been made to the court".[176]

If it appears to the court that the complainant may have grounds for objecting to the application, the court must "satisfy itself the person is aware of the relevant provisions of [the legislation] and has had an opportunity to seek legal advice".[177] The court cannot decide the application until at least 14 days after notice has been given,[178] although this rule can be waived by the court in various circumstances, including where the complainant consents to the release of the records,[179] or where there are exceptional circumstances and it would be in the public interest.[180] It is not uncommon for the notice requirement to be waived. One of our interviewees spoke of a case where they were in court on a Wednesday and were handed an ILR case where the trial was due to start on the following Monday. The court waived the notice period with a view to avoiding the adjournment of the trial. The lawyer reluctantly accepted the case because "you obviously don't want a trial to fall over". If they do not consent to release, the complainant has the right to legal representation in court to prevent or limit the disclosure of their records.

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[172] Iliadis and others (n 164) 253.
[173] Evidence Act 1977 s.14G(2).
[174] Evidence Act 1977 s.14G(3)(b). What constitutes a "protected counselling communication" is defined in s.14(A) of the Act.
[175] Evidence Act 1977 s.14G(4).
[176] Queensland Government, Consultation Paper: Sexual Assault Counselling Privilege (2016) 5.
[177] Evidence Act 1977 s.14K(2).
[178] Evidence Act 1977 s.14G(5).
[179] Where the complainant consents, this must be given in writing: Evidence Act 1977 s.14G(7). There are special provisions for circumstances where the complainant is unable to write.
[180] Evidence Act 1977 s.14G(6).

There is no equivalent provision in relation to the admissibility of sexual history evidence, which is governed by the Criminal Law (Sexual Offences) Act 1978. Such evidence can only be adduced following an application for leave to do so, made outwith the present of the jury. There is no requirement to inform the complainant about any such application and, in fact, an application made at trial can be heard in the absence of the complainant if the accused so requests.[181]

ILR is available in Queensland in relation to applications to access the complainant's counselling records via the Counselling Records Protect service.[182] The sexual assault counselling records privilege was introduced in December 2017, on the recommendation of a special taskforce set up to improve responses to domestic and family violence.[183] It was not originally part of the taskforce remit, but the issue was referred to the taskforce by the Attorney General.[184]

The policy papers leading up to the introduction of the sexual assault counselling records privilege do not discuss ILR at all, but Counselling Records Protect was established alongside the legislation.[185] Following a procurement process, the Queensland Government allocated $1.588 million over 2017–20 to Legal Aid Queensland to run Counselling Notes Protect.[186]

3.7.2 The ILR Scheme

The Counselling Notes Protect service provides legal advice and court representation to sexual assault complainants where an application has been made to admit their counselling records; and educates and trains the community (including counsellors) and the legal profession about the sexual assault counselling records privilege.[187] It is provided on a salaried lawyer basis by two organisations in partnership: Legal Aid Queensland (LAQ) and the Queensland Women's Legal Service (WLS), who work together under a Memorandum of Understanding.

In Queensland there is a distinction between solicitors and barristers, with each having a separate regulatory body. Solicitors and barristers both have rights of audience in all courts, but in the higher courts it is normally barristers who appear.[188] As such, when dealing with applications to admit sensitive records, both LAQ and the WLS normally engage counsel to appear in the actual hearing and help to prepare the case: "[t]he

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[181] Evidence Act 1977 s.4(6).
[182] Legal Aid Queensland, Protecting sexual assault counselling records (2020).
[183] See Report of the Special Taskforce on Domestic and Family Violence, Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland (2015), recommendation 130 and Queensland Government, Response to the Report of the Special Taskforce on Domestic and Family Violence, Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland (2015) 37.
[184] Report of the Special Taskforce on Domestic and Family Violence (n 183) 62.
[185] Women's Legal Aid Service Queensland, Annual Report 2018-19 (2019) 19.
[186] Queensland Government, Department of Justice and Attorney-General, Increasing Privacy Protection (2021).
[187] Ibid.
[188] See Queensland Law Society, "How solicitors and barristers differ".

funding is ensuring that our clients are supported by both experienced solicitors and counsel and it gives them, you know, further support and experience behind them that they're entitled to with the funding in this area". Another interviewee spoke of the expectation that although a solicitor could, in theory, appear: "it wouldn't be something that you would get a solicitor to do with this type of work because the court expects a barrister in criminal matters".

Where LAQ or WLS cannot assist, either due to a conflict of interest[189] or capacity issues, Legal Aid Queensland can make grants of aid for representation by private practitioners, who must be members of a statewide specialised panel of lawyers. In practice, the vast majority of cases are taken by LAQ or the WLS, with very little use of private practitioners having been made: "95 per cent is done by our two teams". The service is not means tested.

Where ILR is provided by a private practitioner, there are figures for the fees payable in the online Legal Aid Queensland Grants Handbook.[190] There is a fixed fee for "advice" ("Aid has been approved for your solicitor to obtain your instructions, read relevant material, provide advice and prepare your matter in relation to protected counselling notes.") There is a fixed fee for preparation for a hearing and a "per half day" fee for court time.

As well as representing complainants, LAQ also provides representation for defendants in criminal cases – indeed the vast majority of its criminal work is of this nature. The WLS is a not-for-profit organisation supported through a mixture of State and Federal funding. Aside from its work on the Counselling Notes protect project, it provides free legal assistance and other support services such as counselling to women in the areas of domestic and family violence, family law.[191] When the CNP service first started operating, LAQ and the WLS each employed one full-time lawyer to work on it. The funding was subsequently increased to support two FTE lawyers in each organisation as demand for the service became greater. In the WLS, the two FTE funding is split over four individuals: two solicitors, a team leader and a practice manager, all of whom do some of the work. Each individual also does work other than CNP work (although one of the solicitors does predominantly CNP work). There are also support staff in each organisation who assist with the administration of the service.

There is an agreement in place between the Counselling Notes Protect (CNP) service and the Office of the Director of Public Prosecutions (DPP), whereby the DPP will refer complainants to the CNP when an application is made to access their sensitive records by the defence. The vast majority of referrals come via this route: "if you're going to put a percentage on it, it would probably be [over] 90 per cent [that] come through the DPP". It is also possible for complainants to contact the CNP service directly if they call the Women's Legal Service Helpline and other third sector organisations can also refer

[189] This may arise, for example, where Legal Aid is already representing the defendant in the case.
[190] Legal Aid Queensland, Sexual Assault Counselling Privilege (Counselling Notes Protect).
[191] Women's Legal Aid Service Queensland, "About us".

complainants to the CNP in this way.[192] Occasionally these are women who are existing clients of the WLS. A small number of referrals come from the police service or directly from the courts, if the issue arises during a case hearing and the court realises that the complainant has not been given the opportunity to seek legal representation.

Before referring a complainant to the Counselling Notes Protect service, the DPP secures the consent of the complainant to do so. The DPP completes a referral form, which confirms that consent to contact has been given, and which contains the information that CNP requires and the complainant's contact details.

It is stated that the service was evaluated in 2020,[193] but the evaluation has not been made public and the researchers, despite their best efforts, have not been able to obtain access to it. That said, there are no plans for the service to be withdrawn or scaled back. The Queensland Government has an action plan to address sexual violence, and this includes "[p]roviding continuing and increased funding for the Sexual Assault Counselling Privilege legal assistance service (known as the Counselling Notes Protect program) currently delivered through Legal Aid Queensland and Women's Legal Service Queensland".[194]

There are some figures on uptake in the annual reports of the Women's Legal Service Queensland. In 2019-20, the CNP Unit provided 147 services and represented 37 women.[195] The report notes that "the Counselling Notes Protect Unit has experienced a gradual and expected increase in demand as the legal profession has become more aware of the legislation".[196] In 2020-21, the service provided 150 legal advice tasks, opened 70 case files and represented 67 women.[197] It is stated that the CNP service:[198]

> … has experienced a 22.7% increase in demand this financial year as the legal profession has become more aware of the legislation, women are more aware of the service and matters where the protection operates are listed in the District Court. The addition of a further lawyer has been pivotal in meeting demand, with the Counselling Notes Protect service always working at capacity.

Subsequent annual reports do not provide any figures and simply state that the service has been "extremely busy"[199] and that there has been a "further increase" in the number of people accessing the service.[200]

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[192] Women's Legal Service Queensland, Counselling Notes Protect (CNP) – Sexual Assault.
[193] Queensland Government, Delivery of Recommendations, Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland (2019) 37.
[194] Queensland Government, Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence Second Action Plan 2023–24 to 2027–28 (2024) 15.
[195] Women's Legal Service Queensland, Annual Report 2019-20 (2020) 19.
[196] Ibid.
[197] Ibid 18. For context, the population of Queensland is 5,596,300: Australian Bureau of Statistics, National, State and Territory Population (June 2024).
[198] Women's Legal Service Queensland, Annual Report 2020-21 (2021) 18.
[199] Ibid 12.
[200] Ibid 10.

3.8 Victoria

3.8.1 Background and legal framework

In Victoria, ILA and ILR is available in relation to the disclosure of confidential communications and protected health records. The confidential communications privilege has existed since 1998,[201] but a process whereby the complainant (or their legal representative) could make submissions about the protected material was only introduced in 2023.[202] ILR for this purpose was introduced in March 2024.

Applications to access a complainant's confidential communications and protected health information are governed by the Evidence (Miscellaneous Provisions) Act 1958.[203] The protected information cannot be adduced in evidence without the leave of the court.[204] Where a party wishes to adduce such evidence, it must make an application to do so. Where such an application is made, the prosecutor must give written notice to the complainant,[205] "within a reasonable time of the prosecuting party either giving or receiving … notice of the application for leave".[206] The notice must include a statement that the complainant "may wish to consider whether to obtain legal advice in relation to the application" and that "information about the availability of legal advice in relation to the application".[207]

The court cannot decide the application until at least 14 days after notice has been given,[208] although this rule can be waived by the court if it is "in the interests of justice" to do so.[209] The court must not grant leave unless it is satisfied that the complainant "is aware of the application for leave" and "has had a reasonable opportunity to consider obtaining legal advice about the application".[210] The complainant is entitled to be legally represented at the hearing and make submissions relating to the grant of leave.

There is no equivalent provision in relation to the admissibility of sexual history evidence, which is governed by the Criminal Procedure Act 2009. Such evidence can only be adduced following an application for leave to do so made in the absence of a jury, but there is no requirement to inform the complainant about any such application and, in fact, an application made at trial can be heard in the absence of the

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[201] It was introduced by the Evidence (Confidential Communications) Act 1998 (Victoria).
[202] By Part 6 of the Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Victoria).
[203] "Confidential communications" and "protected health information" are defined by s.32BA of the Act.
[204] Evidence (Miscellaneous Provisions) Act 1958 s.32C(1).
[205] Evidence (Miscellaneous Provisions) Act 1958 s.32CD(1).
[206] Evidence (Miscellaneous Provisions) Act 1958 s.32CD(2).
[207] Evidence (Miscellaneous Provisions) Act 1958 s.32CD(4)(c) and (d).
[208] Evidence (Miscellaneous Provisions) Act 1958 s.32CC(2).
[209] Evidence (Miscellaneous Provisions) Act 1958 s.32CC(3).
[210] Evidence (Miscellaneous Provisions) Act 1958 s.32D(1A)(a). There are separate provisions covering a situation where the complainer cannot be located and other exceptional circumstances.

complainant if the accused so requests.[211] The Victorian Law Reform Commission recommended in 2021 that complainant notice provisions similar to those that exist in relation to confidential communications be introduced in relation to sexual history evidence,[212] and that ILR should be introduced to support complainants in objecting to sexual history evidence applications,[213] but these recommendations have not been implemented.

ILR for sensitive records applications in Victoria is being funded as part of the Australian Federal Government's pilot programme,[214] and the service commenced on 1 March 2024.[215] The pilot is supported by three years of funding of approximately $800,000 (equivalent to around £408,000) per year.

3.8.2 The ILR scheme

ILR in Victoria is provided under the auspices of the Victims Legal Service, which is a partnership between Victoria Legal Aid and ten other legal services providers. The Victims Legal Service already existed prior to the introduction of ILR in 2024,[216] but its remit was limited to assisting with applications for victim compensation and other types of financial assistance.[217] It was seen as a convenient place for the ILR service to be situated as the infrastructure was already there. As a policymaker involved in the establishment of the service stated:

> A lot of the design work was really just leveraging off what already existed for existing Victims Legal Service and the … referral protocols, the operating guidelines that existed for that. And the design work then focused on what was needed for this particular expansion into service delivery, particularly around training those lawyers and establishing strong referral partnerships with our prosecuting authorities here.

The Victims Legal Service is essentially an umbrella service that takes in initial referrals for ILR. It then passes the case on to one of two organisations who have been funded to deliver ILR: Victoria Legal Aid (VLA) itself and the Victoria Women's Legal Service (WLS), who both employ salaried lawyers to provide ILR. Victoria Legal Aid also represents defendants in criminal cases. The WLS is a not-for-profit organisation supported through a mixture of State and Federal funding. Aside from delivering ILR, the WLS

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[211] Criminal Procedure Act 2009 s.348.
[212] Victorian Law Reform Commission, Improving the Justice Response to Sexual Offences (2021) recommendation 47.
[213] Ibid, recommendation 87.
[214] See further section 3.1.
[215] Victims Legal Service, News Release, 29 February 2024.
[216] It was established in 2021. See Victorian Government, Victorian Budget 21/22, Keeping Women and Children Safe (2021).
[217] Victim of Crimes Commissioner, Submission to Scoping the Development of Specialised and Trauma-Informed Legal Services for Victims and Survivors of Sexual Assault – Discussion Paper (2023) 5.

provides legal services to women in a number of other areas, focusing specifically on victim-survivors of family breakdown and family violence.[218]

The pilot provided funding for three FTE lawyers. One of these is not involved in ILR but delivers a different aspect of the pilot service.[219] The remaining two FTE funding was then split between VLA and the WLS. At VLA it has been used to employ one lawyer, who deals with all of the ILR cases. At the WLS, the funding has been spread across two FTE posts, with both individuals concerned doing a mixture of ILR and other work. One reason for this is in order to provide cover for staff absence:

> If we only provide one lawyer, there'd be very much isolation in terms of their practice area. If they would go on and leave, which people are entitled to do, who covers it? You know, so it creates all those sorts of sustainability issues.

Where VLA or the WLS cannot assist, either due to a conflict of interest[220] or capacity issues, VLA can make grants of aid for representation by private practitioners.[221] The service is not means tested.

Since 2015 Victoria has, like New South Wales, operated a fused legal profession – there is a single admission process to be licensed as a "legal practitioner".[222] In practice, some lawyers register as barristers (or were barristers prior to 2015) and there is a Bar Association. All legal practitioners have rights of audience in all courts. VLA and the WLS differ in the extent to which they engage counsel to appear in sensitive records cases. At the WLS, the solicitor tends to appear in court, unless they are too over-stretched to do so. At VLA, it is more likely that a barrister will be engaged for the court appearance. The reason given for this was the additional expertise that counsel can provide:

> The grant of aid is great because we can brief barristers to appear and help us prepare the case as well, which I've found useful I think because this is such a new area. And, I mean, I've got a criminal law background but within our team, there aren't really other lawyers with a criminal background too. So, I've just found it helpful to have that extra person usually with a criminal background who can, you know, point out things that I might have missed.

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[218] Women's Legal Service Victoria, Our Purpose.
[219] A position at Djirra (the Aboriginal Family Violence Legal Service) aimed at supporting aboriginal women to report sexual violence.
[220] This may arise, for example, where Legal Aid is already representing the defendant in the case. It would not always be possible to pass on the case to the WLS, either because they lack capacity or because the complainant is male.
[221] Queensland Government, Department of Justice and Attorney-General, Increasing Privacy Protection (2021); Legal Aid Queensland Grants Handbook, Sexual Assault Counselling Privilege (Counselling Notes Protect).
[222] Legal Profession Uniform Law Application Act 2014 (Victoria).

If a private practitioner is engaged, they must be a member of what is called the section 29A practitioner panel, which comprises private law firms and community legal centres selected by VLA that are willing to act for people who require a grant of legal assistance in various matters, including indictable crime. They are subject to various professional standards.[223] To date, there has not yet been a case where a private practitioner (other than a barrister) has needed to be engaged, but the service is still in its infancy.

Funding for the scheme is provided by the Australian Federal Government through the Department of Justice and Community Safety.[224] There are figures for the fees payable for legal services available via the online Legal Practitioner Guideline.[225] They are fixed fees, rather than per hour payments.

The Legal Practitioner Guidance states that:

> As this is a pilot program it is unclear what the demand on the service will be and whether the service will be able to meet the demands of all applicants who meet the criteria under the guideline (including satisfying the State Reasonableness Test). Victoria Legal Aid will prioritise the allocation of funding under this guideline in accordance with a prioritisation framework, which can be provided on request, if/when the demand for services exceeds the level of funding available, i.e., where there are multiple applications that meet the guideline but insufficient resources to allocate all of those matters to a lawyer.

As noted above, the Office of Public Prosecutions (OPP) has a statutory duty to notify the complainants when an application is made by the defence to access their sensitive records. At the same time as notifying the complainant, the OPP asks if they wish to have their details passed on to the VLS so that they can be represented in relation to that application. If the complainant consents, the OPP refers them to the WLS. This happens in two stages. First the OPP passes on some very basic details about the case to the VLS, so that the VLS can do an initial conflict check to see if VLA is representing the defendant. If they are not, then the case will be passed to the VLA lawyers. If there is a conflict, or if VLA is too busy to take the case, it will be passed to the VLS (assuming the complainant is a woman). At this stage, the OPP sends more detailed information about the nature of the proceedings, including the complainant's contact details and any details of vulnerabilities, such as disabilities or the need for an interpreter: "it's a two-page referral form, it's quite comprehensive". At both the first and second stage, the OPP provides information using a template agreed between the parties: "everyone knows what information to put in there and it's the same every time, so it just makes it easier, it, kind of, I guess standardises the process". The VLA/WLS lawyer who is taking the case will then contact the complainant using the preferred means of contact they gave to the OPP.

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[223] Set out in Victoria Legal Aid, Victoria Legal Aid Practice Standards (2023).
[224] Legal Practitioner Guideline, Guideline 15 – Confidential communications and protected health information.
[225] Ibid.

It is possible for referrals to come from sources other than the DPP – the pilot was designed on the basis of a "no wrong door approach". The VLS can be contacted by complainants themselves or complainants can be referred via an agency who is supporting the complainant. This can be done by phone or text (there is an online Legal Help Chat link on the VLS website). In the first few months of operation of the service, however, all of the referrals have been via the DPP route.

In terms of the demand for the service since the start of the pilot, interviewees agreed that it had been fairly low: "it's about four or five a month… I think we're up to 24". This figure was compared to figures for the broader Victims Legal Service: "the Victims Legal Service has been operating for 18 months and we've had over 3,000 enquiries".[226] That said, the service is still in its infancy and interviewees agreed that numbers have increased recently. Cases tend to be time consuming: "what we're seeing so far is that the numbers are modest but the intensity of service is significant".

There has not yet been any formal evaluation of the service. There are regular meetings between the Victorian State Government, the organisations delivering the ILR service and the OPP and these have resulted in some tweaks to the operation of the service, for example in terms of the information included in the OPP's referral form. Two formal evaluations are planned in the future. One will be undertaken at Federal level and will evaluate all three pilot sites. The other will be undertaken at State level and will involve academic input. It will be designed in the second year of the pilot and undertaken in the third and final year.

3.9 Summary

In this chapter, we have described in detail the ILR systems that form the basis of this research. Table 3.1 summarises the main features of each.

In the following chapters, we go on to examine some of the key issues relating to ILR provision in more detail, drawing primarily on data from the semi-structured interviews. Chapter 4 examines referral pathways; chapter 5 addresses ILR in court hearings; chapter 6 is concerned with relationships between key stakeholders; chapter 7 considers trauma-informed practice; chapter 8 addresses models of delivery and funding; and chapter 9 discusses evaluation. Chapter 10 presents the research's key findings and conclusions.

[226] For context, the population of Victoria is 6,981,400: Australian Bureau of Statistics, National, State and Territory Population (2024).

Table 3.1: Classification of ILA/ILR systems

Jurisdiction	ILR/ILA[227]	Operational status at time of writing[228]	ILR provided for:	Model of ILR
Canada	ILR	Operational	SR and SHE	Private practice (but administered by Legal Aid)
England and Wales	ILA	Two pilot schemes – one concluded, one operational	N/A	N/A
Ireland	ILR	Operational	SR and SHE	Salaried lawyers located in Civil Legal Aid Office (but counsel always instructed for hearings)
New South Wales	ILR	Operational	SR only	Salaried lawyers located in Legal Aid (counsel sometimes instructed for hearings)
Northern Ireland	ILA and ad hoc ILR	Operational	Ad hoc ILR (written submissions only) for SR.	Salaried lawyers located in victim support organisation.
Queensland	ILR	Operational	SR only	Salaried lawyers located in Legal Aid/victim support organisation (counsel sometimes instructed for hearings)
Victoria	ILR	Operational on a pilot basis	SR only	Salaried lawyers located in Legal Aid/victim support organisation (counsel sometimes instructed for hearings)

SR = sensitive records; SHE = sexual history evidence

[227] As noted in section 1.3, ILR necessarily also includes a component of ILA.
[228] i.e. June 2025.

Chapter 4: Referral Pathways

Key points

- Systems of ILR delivery require to be structured around a 'triggering event'. Rules of professional practice on how solicitors may obtain clients impact the design of referral pathways that follow from that triggering event.

- All the jurisdictions we studied that operated an ILR service assigned initial responsibility to the prosecutor to take action, following the triggering event, to inform the complainer of their rights to ILR. All these jurisdictions also operated a form of direct prosecutor referral, whereby the prosecutor passed on the complainer's details to an ILR provider, who in turn contacted the complainer.

- Direct prosecutor referral has considerable advantages but would not be possible in Scotland, given professional practice rules. The relevant rules on professional practice would not, however, preclude COPFS providing complainers with information about a dedicated service of ILR provision for complainers at section 275 hearings, assuming the complainer then took the next step of instructing a solicitor at that service directly. This would be a similar model to that operating in Northern Ireland, albeit in the context of ILA, not ILR.

- Regardless of the referral mechanism utilised, swift action by the prosecutor in terms of contacting the complainer following the triggering event is of the utmost importance to the effective operation of an ILR scheme, especially given the time parameters within which ILR must be provided.

- There is no way to ensure consistent and effective representation of docket witnesses via consistent referral pathways under the system of ILR proposed in the Bill, other than by amending section 274 of the 1995 Act to ensure such individuals are now protected by this provision.

4.1 Introduction

This chapter discusses the issue of referral pathways – the manner in which a complainer becomes aware of their right to ILR and of the relevant ILR provider(s). It starts by setting out the referral mechanisms used in the international comparable jurisdictions, both for ILR and ILA, as both have important learning points for the proposed Scottish system of ILR. It then considers how referral might best operate in Scotland, given the relevant professional practice rules.

4.2 Referral pathways

4.2.1 The 'triggering event'

The right to ILR is normally triggered by the defence making a specific form of application or indicating an intention to make a specific form of application, for example to obtain certain material relating to the complainer or to lead sexual history evidence in court. We call this step for the purposes of the report the 'triggering event'. In all of the jurisdictions we examined, where a triggering event takes place, there is a statutory duty on the defence to notify the prosecution of such an application, which in turn sets in motion the process of establishing that the complainer would be eligible for ILR and offering legal representation to them.

What is important to realise at the outset is that the professional ethical rules which govern how lawyers may obtain clients in a particular jurisdiction dictate the contours of what is possible in terms of the precise way in which referral mechanisms operate. All of the international jurisdictions in our sample that provide ILR employed a form of direct prosecutor referral, whereby the prosecution passes on the complainer's details to an ILR provider, who in turn contacts the complainer. This would almost certainly not be possible in the Scottish context. The Law Society of Scotland's rules on professional conduct, whilst allowing the advertising and promotion of a service, expressly forbid one solicitor from approaching another solicitor's client with a view to soliciting business. The relevant rule states that:[229]

> You shall not make a direct or indirect approach whether verbal or written to any person whom you know or ought reasonably to know to be the client of another regulated person with the intention to solicit business from that person.

In our view, as we outline below, the operation of this provision, and the related guidance, means that a system whereby an ILR lawyer is assigned to a complainer, with that ILR provider then contacting the complainer seeking instructions, would be professionally problematic.

That said, it is still worth briefly setting out how direct prosecutor referral operates and the advantages it brings, because there are important learning points for Scotland, especially in terms of possible pitfalls that need to be avoided in the system that Scotland does adopt.

4.2.2 Referral mechanisms in the comparator ILR services

As noted above, in all of the comparator jurisdictions that operate ILR, a form of direct prosecutor referral is used. While the basic outline of this is the same, there are some differences in detail. In all three Australian jurisdictions, when the triggering event occurs, the prosecutor notifies the complainer of the application and asks for the

[229] See rule B.3.2 of the Law Society of Scotland Practice Rules (2011).

complainer's consent for their details to be passed on to the organisation providing the ILR service (which in the Australian jurisdictions is a provider employing salaried lawyers). Assuming the complainer does give consent, the ILR provider then contacts the complainer using the details given to them by the prosecutor.

In the two Canadian jurisdictions that we examined (British Columbia and Nova Scotia), the process is similar, but there are two differences. The first is that the complainer's details are passed on to a lawyer in private practice, rather than to a provider that employs salaried lawyers. The second is that there is no requirement for the complaint's consent before referral is made, although the prosecution will sometimes speak to the complainer before doing so.

In Ireland, the process is similar again. Following the triggering event, the prosecutor contacts the Irish Civil Legal Aid Board, who engage counsel to represent the complainant. The consent of the complaint is not required for their details to be passed on to the Legal Aid Board or to counsel.

In all of these jurisdictions, it would be possible for the complainer either to refuse legal representation entirely, engage and pay for a lawyer of their own choosing, or request a different (state funded) lawyer to the one assigned to them. The last of these, while theoretically possible, rarely occurs in practice. As one interviewee stated: "we would probably honour [the complainant choosing their own lawyer] unless there was, you know, an issue. But for the most part, I don't think we've really encountered that before."[230]

Interviewees noted two advantages of referral to ILR being done directly by the prosecution. First, prosecution referral was considered likely to lead to a higher uptake of the service: "when we were setting up [ILR] we decided that a warm referral pathway was better than, you know, for example, just providing some numbers for the victim to call".[231] Secondly, provided consent to share information was obtained, this could reduce the risk of re-traumatisation: it "minimises the need for a victim to, you know, repeat their story".[232]

Other interviewees noted practical difficulties that can arise with direct prosecutor referral. Issues can arise, for example, of ensuring that the complainer was kept appropriately informed:

> Some issues have come up just in terms of making sure the complainant's actually aware a lawyer's been assigned because sometimes that was, kind of, a bit of an issue before. We've tried to express it's important that they know that

[230] Participant 1.
[231] Participant 25.
[232] Participant 25.

> they're going to be getting a call from a lawyer because sometimes that can come as a bit of a surprise.[233]

Some ILR providers address this by requiring confirmation that the complainer was aware of the referral before they would make contact: "we'll just flatly refuse to talk to someone if the prosecutor hasn't already talked to them or the police haven't already have told them that we're going to call … We're just not going to cold-call someone."[234]

Another interviewee noted that in "the vast majority" of ILR cases in their jurisdiction, when notified of cases in which a right to ILR arose:

> We do not get any details, contact details for the complainant. We get their name and that is it … In practical terms, you actually wouldn't want to meet with the complainant too early, [you would] have the separate … representation ready to go.[235]

In the jurisdiction in question, however (Ireland), because of the timing of the triggering event, the lack of details provided is less problematic than it might at first seem due to the fact that consultation and representation occurs primarily at court, and the system of ILR has been structured around that reality.

4.2.3 Referral mechanisms in the comparator ILA services

Whilst the focus of this report relates predominantly to models of ILR provision, there is insight to be gained by consideration of how referral pathways operate in systems of ILA provision. The most relevant jurisdiction is Northern Ireland. Here, where an application is made by the defence to obtain the complainant's private records, the prosecution must take steps to notify the complainant of the application and advise them of their entitlement to make representations at the hearing. At this stage, they also provide the complainant with details of the Sexual Offences Legal Advisers Scheme (SOLA) service, but it is left to the complainant to contact the service. While the SOLAs are there to provide ILA, rather than ILR, the referral mechanism is one that could potentially operate in Scotland.

ILA providers also promote their service to complainers more widely than ILR providers do. Signposting complainers to ILA cannot be entirely contingent on the prosecution providing details of the service, as ILA may be relevant in a much broader range of circumstances, including where no report has been made to the authorities. The effective provision of ILA therefore requires a broader strategy of public awareness, with for example a Northern Irish interviewee noting that they had worked on "build[ing] more awareness … on the back of bus posters and things, just to pick up a bit more".[236]

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[233] Participant 1.
[234] Participant 14.
[235] Participant 12.
[236] Participant 18.

A Canadian interviewee noted the wide range of ways in which complainers could become aware of ILA provision:

> We did some promotion when we launched last year in the fall, and we had some media coverage. And we also promote to social media and through the networks that we have through our other programmes that we have. In any case, a lot are through victim support organisations or counselling organisations. And then there are a couple of key organisations here [who] have a number of programmes to provide free legal advice. So, they're pretty well-known so they often get calls and refer people to us. So, it's … quite a mix. Sometimes private bar members [i.e. lawyers] also refer.[237]

The provision of ILA across different Canadian provinces also illustrated differences in approach, with one interviewee noting how in two neighbouring provinces a complainant could contact a general government support line, which would provide a list of lawyers (with biographical details of the lawyers) from whom a complainant would choose who they would contact for ILA, while in the other the complainant could contact a legal support navigator who would be able to discuss with them what their needs were and establish which lawyer might be a good match.[238] Another factor worth bearing in mind in terms of the distinction between referral pathways for ILA and ILR is that the former need not necessarily be provided by a practising solicitor. This means that professional guidance related to rules prohibiting approaching others' clients do not come into play.

4.2.4 Avoiding delay

Irrespective of the exact nature of the referral process, one issue that was mentioned by almost all interviewees was the difficulties that arise from late referral. Short turnaround times were repeatedly emphasised as a particular problem, for example:

> … often when we're receiving these referrals, we're talking about a turnaround time of four days to draft an affidavit and to obviously introduce yourself to a woman who's a complainant of a sexual assault matter, which comes with … you know, they don't just turn up with this one discreet issue that nothing bad has ever happened and this hasn't affected their life and whatnot. So, you have to meet the women where they're at, at that point, which can be very distressing. And so, one of the issues is the delay in the referrals getting through to us. And so, the turnaround times have been very tight. And … that's also obviously difficult on lawyers who are having to digest really distressing information in a short period of time and, kind of, as well as dealing with that, also trying to draft documents and get them ready for court and whatnot.[239]

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[237] Participant 2.
[238] Participant 6.
[239] Participant 27.

> I think the initial agreement was that we would definitely be getting the referral immediately, so we assumed that we would have at least the full [notice period before the hearing]. But the reality has been we're often getting, you know, less than [this], sometimes less than a week. So that's, yeah, definitely something that's added difficulty into the process.[240]

Another research participant observed in relation to a specific case that "[the complainer's] lawyer … I think he got notified at 8am one morning that he was due in court at 9. And he didn't even know [the complainer's] name at that stage."[241]

ILR cases can be complex and the complainers can be vulnerable. As such, late referral can make it very challenging for the ILR provider to establish a relationship with their client and provide effective representation.[242] As one interviewee put it:

> It might take the [prosecutor] a week to get in contact with the client, you know, they might just not be answering their phone or whatever it is. So then by the time it gets to us, we don't really have a lot of time to prepare, and it does take a bit of time to, kind of, build a rapport with the client and prepare properly.[243]

This can lead to ILR providers having the difficult decision to make about whether to seek an adjournment in order to secure more time to prepare their case. The downside of doing so, of course, is that this can delay the trial, which can be stressful for the complainer in an already stressful situation.[244] If the court is not receptive to adjournment requests, however, this causes its own difficulties, as one of our interviewees noted:

> So, I haven't seen that the substantive matter has had to be adjourned because of this. I mean, I've had one recently where it's been cutting it a bit fine, but the court is reluctant to adjourn a trial date where something's been put down for a trial and a judge has been allocated because of something like this.[245]

This, they stated, put a significant degree of pressure on the ILR provider to work excessive hours to avoid adjournments and increased the risk of burnout.

In the jurisdictions that were examined, it was common for there to be legislative requirements in terms of ensuring that a certain period of time must elapse between application submission/notification and the hearing. In New South Wales, for example, the court cannot decide an application for leave until at least 14 days after notice of the application has been given to the complainant and the court must satisfy itself that the

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[240] Participant 24.
[241] Participant 15.
[242] See further chapter 7 on trauma-informed practice.
[243] Participant 27.
[244] Participant 24.
[245] Participant 24.

complainant has been given a "reasonable opportunity" to seek legal advice.[246] In Queensland, the prosecution must give notice to the complainant of a relevant application "as soon as practicable" and the court cannot decide the application until at least 14 days after notice has been given.[247] There are also legislative provisions requiring the complainant to, for example, be informed of their right to be legally represented and provided with information about the availability of legal advice.[248] In none of the jurisdictions examined, however, were there any legislative requirements relating to the timing of provision of information to complainers about the service (or for direct referrals to be made where that was possible in the jurisdiction).

4.3 The Scottish context

4.3.1 The role of the Crown

In terms of the Scottish provisions, the Bill in line with all of the other adversarial jurisdictions we considered, envisages that COPFS will assume responsibility for notifying the complainer that a section 275 application has been made, providing them with an explanation of what is proposed in terms of the application, and giving them information about their rights (including the right to make representations) in relation to this.[249]

As we have indicated, the present rules of professional practice in Scotland dictate that direct prosecutor referral, whilst clearly more straightforward, would be professionally problematic for the solicitors providing ILR and the Bill clearly recognises this in terms of its drafting. The relevant rules on professional practice would not, however, preclude COPFS providing complainers with information about a dedicated service of ILR provision for complainers at section 275 hearings, assuming such individuals then took the next step of instructing a solicitor at that service directly.[250] This would essentially be very similar to the model used in Northern Ireland to notify complainants about their right to seek legal advice from the SOLA service in relation to applications to access their private records, albeit that SOLA is an ILA service, not an ILR service. In terms of ensuring good uptake of the service, a system like this, where information about the specific legal provider or providers who operate ILR is given to the complainer by the prosecution, is preferable to a system where the complainer is notified about their right to ILR, but is left to find their own legal representative.

It is clear, then, that COPFS will have a pivotal role to play in the referral pathway process, given their proposed role in making complainers aware of their rights in this area following the 'triggering event'. Whilst undeniably significant progress has been

[246] Criminal Procedure Act 1986 s.299 – see further section 3.5.1.
[247] Evidence Act 1977 s.14G(4) and (5) (Queensland).
[248] See e.g. Evidence (Miscellaneous Provisions) Act 1958 s.32CD(4) (Victoria); Criminal Code s.278.4(2.1) (Canada); Evidence Act 1977 s.14K (Queensland).
[249] As per s.64(2) of the Victims, Witnesses, and Justice Reform (Scotland) Bill.
[250] As provided for by rule 3.3 of the Law Society of Scotland's Practice Rules (2011).

made by COPFS in terms of how they communicate with complainers, research conducted in Scotland has also highlighted issues in terms of effective and trauma-informed processes of communication,[251] and this should be acknowledged and borne in mind by policy makers. This factor, as we outline in further detail in chapter 9, underlines the importance of ensuring effective Government evaluation of the service proposed for ILR at section 275 hearings.

In view of the importance of the Crown's role in terms of the effective operation of the referral pathway for the service, we explored with Scottish stakeholders their perspective on this issue, and they agreed with the proposed approach in the Bill. As one participant noted, communication by the Crown about eligibility for ILR at section 275 hearings made sense given that:

> … from the victim's point of view, again, it makes it simpler … something from the Crown, rather than something different from another organisation. I mean, it would be, I imagine, such a daunting experience for somebody anyway, without then getting … communication from multiple different people, you know, it could be quite overwhelming.[252]

We also asked COPFS directly for their perspective on their ability to perform this task efficiently:

> Our practices and processes are geared to contacting complainers when [section] 275 applications are lodged. I appreciate that there has been previous criticism about how that is currently or previously been undertaken in terms of ensuring it's done in a trauma-informed manner, ensuring that … it's done in a way that is beneficial to the complainer being able to fully understand the process and how that works … but we are currently undertaking that obligation.[253]

This quote alludes to the fact that, in Scotland, the Crown currently has a legal obligation at common law to consult a complainer and take their views on the contents of a section 275 application.[254] This raises issues relating to the sharing of information between parties that we pick up on in chapter 6.

Our data from other jurisdictions indicates the vital importance of effective intimation of the right to ILR following the 'triggering event' in the criminal justice process. Failure to have an efficient referral pathway can lead to matters being dealt with at the last minute in court, as one participant told us:

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[251] See e.g. S Brindley, "Exploring effective participation as a means to address re-traumatisation of complainers of sexual crime in Scotland" [2024] Crim LR 305.
[252] Participant 37.
[253] Participant 40.
[254] As established in *RR v HM Advocate* [2021] HCJAC 21, 2021 JC 167 (where it is reported as *RR, Petitioner*). See further section 1.1.4.

> [it's] not uncommon for me to appear and be talking to the judge immediately before jury selection about these sorts of issues. And it's the legal argument immediately prior to trial commencing, it's actually gotten to the point now where I'll appear and if the court doesn't serve notice and I'll say, you know, there's a sexual assault communications privilege issue. And there's just this slightly haunted look in the judge's eyes.[255]

In Scotland, the Bill envisages extending the period of intimation for a section 275 application (the triggering event) from 14 to 21 days, with a view to enabling complainers sufficient time to instruct a legal representative. The first thing to note is that whilst this is no doubt a sensible measure, its success is contingent on the Crown and the defence being adequately prepared and drafting applications in good time. It is worth noting that research in Scotland has indicated the pressure that the criminal justice system in Scotland is under generally and, specifically, the pressure that the defence bar has been under in recent times.[256]

In the Scottish context, as we analyse further in relation to the potential disclosure of information, and in respect of the importance of trauma-informed practice, there is going to be, even with the revised timelines for imitation of section 275 applications to 21 days (the triggering event), little room for delay by the Crown in terms of informing complainers of their right to ILR, if the whole system is to work effectively. Equally, cases involving the scheduling of other evidential processes, such as evidence on commission, will require careful consideration and prompt action by COPFS in order to facilitate intimation of ILR timeously.

As noted above, research has also identified concerns in relation to how COPFS communicate with complainers.[257] It is understood, however, that systems have been implemented under the stewardship of the current Lord Advocate to communicate more effectively with witnesses. What requires to be borne in mind is that the entitlement to ILR at section 275 hearings extends beyond the High Court cases where many (but not all) of the improvements and systems seem to be focussed. COPFS will need to ensure that they have effective systems in place for dealing with intimation of ILR rights to complainers across both summary and solemn procedure. In this respect it is worth noting briefly the concession made by the Crown in the case of *Corrins v BM*,[258] relating to their failure to act properly in a sensitive records case, prosecuted at summary level, following the triggering event:[259]

> In appearing for the appellant, the Lord Advocate candidly accepted that the Crown neither intimated the application to the complainer nor discussed it with her. They did not seek the complainer's views. Contrary to the advice and

[255] Participant 14.
[256] This is noted throughout Cowan, Keane and Munro (n 5) e.g. 13, 18, 42, 78, 104-109, 149-150.
[257] See Brindley (n 251).
[258] *Corrins v BM* [2023] SAC (Crim) 12, 2024 SC (SAC) 23.
[259] At para 38.

> instructions given to procurator fiscal deputes, the Crown had not done that which they should have done in this case. The apology was, in our view, properly made and we propose to say no more on this aspect of the hearing of the application before the summary sheriff.

As we note, the Crown has made significant progress in terms of how it communicates with complainers and is confident in its ability to provide information in the context of section 275 hearings through pre-existing channels of communication. The above case, however, does underline the importance of service wide training, awareness and processes.

4.3.2 ILR and docket witnesses and complainers

The final matter that needs to be considered in the context of referral pathways is how the system of ILR at section 275 hearings proposed by the Bill might extend to docket witnesses, and complainers in prosecutions under the Domestic Abuse (Scotland) Act 2018 (hereafter 'the 2018 Act'), matters we were expressly asked to give consideration to.

As set out in chapter 1, a docket witness is a person who is alleged to have been the victim of wrongdoing specified in a docket attached to an indictment or complaint in a Scottish criminal case.[260] A docket allows the prosecution in sexual offence cases to give notice of their intention to lead evidence of a crime (or other behaviour) not charged. This may, for example, allow the prosecution to lead evidence of wrongdoing which cannot be the subject of prosecution because it occurred in another jurisdiction, or where prosecution is time-barred, but where the evidence in question can serve as corroboration of an offence with which the accused is charged.

The first thing to note in this context is that such witnesses are not, as a matter of law, entitled to the protections contained in section 274 of the 1995 Act. Whilst Crown practice has changed in recent years, such that they opt to make section 275 applications to cover such witnesses in what they perceive to be appropriate circumstances, there is no legal obligation on the defence to do so.[261]

As one participant told us:

> [Section] 274 does not apply … in relation to a docket witness … Although [COPFS] do make applications. There is no prohibition on the defence from asking questions outwith the general relevancy prohibition in terms of the evidence itself. So, whilst the Crown do make [section] 275 applications, the defence don't require to, and the defence are perfectly entitled and do ask questions that would otherwise be struck at by [section] 274.[262]

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[260] See section 288BA of the 1995 Act.
[261] Cowan, Keane and Munro (n 5) 34.
[262] Participant 40.

Another potential issue that arises in this context concerns complainers who are giving evidence in relation to charges under section 1 of the Domestic Abuse (Scotland) Act 2018. It is competent in this context to specify sexual offending, including rape, in a narrative charge constituting the substantive offence of abusive behaviour towards a partner or ex-partner.[263] However, the prohibition in section 274 does not extend to section1 of the 2018 Act.

This raises a clear problem in terms of structuring the system of ILR around a triggering event (i.e. a section 275 application) that will be consistent for all such witnesses. It also raises issues in terms of the current wording in the Bill, which explicitly refers on multiple occasions to the rights of complainers, in the context of ILR.

We were told that, "in terms of how the Crown approach a docket witness, it is and should be in exactly the same way as we approach a witness on a substantive charge".[264] Therefore there is, we were told, in operation the same modes and manner of communication with such witnesses at COPFS. As such, in our opinion should the Government wish to extend ILR provision to docket witnesses and complainers in cases prosecuted under section 1 of the 2018 Act, via a reliable and consistent referral pathway, the terms of section 274 should be amended so as to include individuals giving evidence in respect of a docket. At the time of writing of this report, the Scottish Government has proposed to being forward such an amendment at Stage 3 of the Victims, Witnesses and Justice Reform (Scotland) Bill which will address the potential issues raised by us in this context.

4.4 Chapter summary

Systems of ILR delivery require to be structured around a 'triggering event'. Rules of professional practice on how solicitors may obtain clients impact the design of referral pathways that follow from that triggering event. All of the jurisdictions we studied that operate an ILR service assigned initial responsibility to the prosecutor to take action following the triggering event to inform the complainer of their right to ILR. All of these jurisdictions also operated a form of direct prosecutor referral, whereby the prosecutor passed on the complainer's details to an ILR provider, who in turn contacted the complainer.

Interviewees saw direct prosecution referral as having two particular advantages: it was considered likely to lead to a higher uptake of the service and with appropriate information sharing could reduce the risk of re-traumatisation. However, direct prosecutor referral would not be possible in Scotland, given the present professional practice rules. The relevant rules on professional practice would not, however, preclude COPFS providing complainers with information about a dedicated service of ILR

[263] See s.2(4) of the Domestic Abuse (Scotland) Act 2018 and *inter alia CA v HM Advocate* 2023 JC 8.
[264] Participant 40.

provision for complainers at section 275 hearings, assuming the complainer then took the next step of instructing a solicitor at that service directly.

As such, we would endorse the proposed approach envisaged in the Bill relating to the role of the Crown in intimating rights of ILR to complainers, whilst suggesting ongoing scrutiny of their performance in this respect once ILR becomes operative. This is a similar referral mechanism to the one that operates in the context of Northern Ireland, where the prosecutor provides details to the complainer of the available legal assistance service (albeit this is ILA rather than ILR).

Delay was consistently identified as a problem in the practical operation of all types of referral mechanism. Swift action by the prosecutor in terms of contacting the complainer following the triggering event is of the utmost importance to the effective operation of an ILR scheme, especially given the time parameters within which ILR must be provided. Failure to do this timeously is likely to lead to further complainer re-traumatisation.

We were asked to consider the position of docket witnesses in relation to section 275 applications and ILR and other categories of witness who may require ILR in this context but who are not protected by section 274. The interview data indicates that there is no way to ensure consistent and effective representation of such witnesses via consistent referral pathways under the proposed system of ILR other than by amending section 274 of the 1995 Act to ensure such individuals are now protected by this provision.

Chapter 5: ILR in Court Hearings

Key points

- ILR can be defined as a process whereby a party is granted the legal right to participate in proceedings via a legal representative. This can be distinguished from ILA whereby a party receives legal advice in relation to a matter. ILA can, however, also involve legal advocacy whereby a legal representative contacts another party to advance their client's position.

- ILR can take three forms generally. It can involve (a) written submissions which outline a party's view on matters and/or the applicable law, (b) oral submissions whereby a party's representative makes oral submissions to the court on the same matters, or (c) a combination of both. In Scotland, we consider there is potential for complainers' interests to be adequately protected in some instances where a section 275 application is uncontentious and well-founded through the provision of written submissions only. This suggestion does, however, require further input from stakeholders.

- In the jurisdictions we analysed, the role of ILR was sometimes performed by solicitors alone and sometimes with solicitors instructing a class of independent specialist pleaders, such as barristers. Whether the system used one or the other depended on the court in which ILR was to be provided, the complexity of matters, and the status of the legal profession in that jurisdiction. Cultural norms relating to the status of representation expected in court were also influential.

- The advantage of involving a specialist independent pleader in a system of ILR was the added expertise and ability that such a lawyer brings to the service. The involvement of such individuals, however, came at both a logistical and financial cost. In Scotland, because of the rules on who may appear in the High Court of Justiciary, any service of ILR provision will require the instruction of advocates or solicitor advocates (although some change may be brought about by the creation of the specialist sexual offences court). Policy makers should give consideration to whether in future a service could utilise an employed number of solicitor advocates. Regardless of the type of service delivery adopted, it must protect complainers' choice of representation as far as possible and have capacity to utilise other independent specialist pleaders where appropriate.

- Codes of professional practice and rules of professional ethics generally seek to guard against the risk of coaching of witnesses for those providing ILR. There already exists appropriate rules and guidance in Scotland on this matter. Those providing ILR will need to comply with their professional obligations and carefully follow rules, but there is nothing to suggest that practice in this area will be especially problematic.

- Where ILR is to be provided after a trial has begun, there is increased pressure on those delivering the service and the potential for delay of proceedings. Scottish stakeholders were split on the viability of facilitating ILR at trial, but some of these issues can be ameliorated via the model of ILR delivery chosen. A salaried model of provision (potentially with an in-house solicitor advocate) should be able to act quickly in these circumstances, although it becomes more difficult if the complainer wishes to instruct a different lawyer of their choosing.

- The issue of a right to appeal for complainers in respect of section 275 rulings raises difficult issues for policy makers. It is worth noting, though, that the Bill seems to adopt an arbitrary approach to this issue, and this may need to be amended.

5.1 Introduction

This chapter begins by setting out the important distinction between those models where lawyers for complainers have a right to participate in court proceedings as those they act for have been granted party status in respect of a certain matter (systems of ILR) and those where they do not, but where they nonetheless may consult a lawyer for advice generally (systems of ILA). It then distinguishes the types of ILR in each jurisdiction studied. It explores common issues we observed in models of ILR delivery, including how lawyers deal with complex cases and capacity issues. The chapter discusses findings in relation to perspectives on the requirements to amend rules of evidence and procedure and issue codes of practice. Finally, it sets out some of the key lessons learned in relation to the implementation of ILR in the different models we have analysed, offering thoughts on potential issues in Scotland in light of the interview and other data. It should serve as an important insight into some of the practical issues that require to be addressed in the provision of any proposed system of ILR in Scotland at section 275 hearings.

5.2 The distinction between ILA and ILR

A critical distinction between systems of ILA and ILR, as we outlined earlier in the report,[265] relates to whether a complainer is granted the formal status of a party to the proceedings, in respect of the matter on which the entitlement to legal representation is based. In ILR, the complainer is entitled to make legal submissions to the court about the matter being adjudicated upon. In ILA, the complainer is provided with legal advice relating to their rights and responsibilities. ILA often also entails legal advocacy, in other words writing to other parties such as the defence or prosecution in order to advance the complainer's position or rights in relation to a specific matter or generally. Any system of ILR – i.e. any system that entails the right to make legal submissions in relation to a specified legal matter – necessarily also entails a degree of ILA, as any

[265] See section 1.3.

advisor will require to provide guidance on the matter on which the legal submissions are to be based.

Our research has shown that clearly understanding and setting the parameters of the right to advice and representation is of the utmost importance for policy makers. This is because to ensure that the right to representation can be effectively utilised, related amendments are required to codes of professional practice and rules of evidence and procedure. The scope of the right to representation also raises difficult questions relating to the right of appeal for witnesses and how to arrange representation mid-trial if required. There are also issues relating to the status of the lawyers performing the work of ILR that are contingent on the scope of the right to ILR. All of this might sound self-evident, and the right proposed in Scotland is narrowly defined. However, as the work in this chapter shows, thorny practical issues can arise in respect of the effective delivery of ILR even in instances even where the right has been so defined, by virtue of the unpredictable nature of criminal justice, resourcing issues and the complex needs of those receiving legal representation.

5.3 Form of submissions in systems of ILR

In the jurisdictions we analysed which provided a system of ILR to complainers, it is important to acknowledge that the form that legal submissions took differed. These differences are set out in table 5.1.

Table 5.1 Forms of ILR in jurisdictions where a right of ILR is provided

Jurisdiction	Form of ILR	Subject Matter
Ireland	Oral submissions only	Sexual History; Sensitive Records
Northern Ireland	Written submissions (with some instances of oral submissions at discretion of judge).	Sensitive Records
Queensland	Written submissions for 'consent referrals'; written and oral submissions for contested applications or complex matters.	Sensitive Records
Victoria	Written submissions for 'consent referrals'; written and oral submissions for contested applications or complex matters.	Sensitive Records
New South Wales	Written submissions for 'consent referrals'; written and oral submissions for contested applications or complex matters.	Sensitive Records
Canada	Written and oral submissions	Sexual History; Sensitive Records

Understanding these differences is necessary because the manner in which representations are provided has a significant impact on resourcing and logistical issues in the criminal justice system in question. As a result, the data from schemes

with forms of ILR that do not entail legal representatives entering appearance at court needs to be handled carefully in considering its relevance to the Scottish proposal, although as we note below, we believe there is capacity in Scotland to utilise solely written submissions in certain instances.

One scheme largely confined the right to make representations to written submissions provided to the court in advance of its decision (Northern Ireland). The vast majority of schemes permitted the complainer's legal representative to enter appearance in the specified legal hearing itself and make oral submissions to determine the matter for which ILR was granted if this was necessary (Ireland, Queensland, Victoria, New South Wales, British Columbia and Nova Scotia). Some schemes had elements of written and oral representations in respect of the relevant hearings (New South Wales, Victoria and Queensland). One jurisdiction (Ireland) has recently legislated to permit the legal representative acting for the complainer to be present during the part of the trial where the complainer was being asked questions about the matter for which ILR had been previously engaged.[266]

Northern Ireland was the jurisdiction where we observed the most fluidity in terms of the form of the scope of the right to representation. As outlined earlier in the report,[267] the jurisdiction implemented a system of ILA for complainers in 2021. The jurisdiction also permits a limited form of ILR for complainers in sexual offences and certain other defined class of case in respect of opposition to pre-trial applications by the defence relating to the potential disclosure of third-party material (such as e.g. counselling or social work records). The jurisdiction has not, however, explicitly provided that those who undertake the role of Sexual Offences Legal Adviser (SOLA), or any other legal representative, should be granted the right to appear on behalf of the complainer at said hearings and make oral submissions, and there is accordingly no entitlement to legal aid in this context. The vacuum that exists has resulted in divergence between judicial approaches, as narrated by one of our interviewees:

> Generally, I would email the court to say, can you send them [third party disclosure application] on, so we can make [contact with the witness] … and I got in contact with one particular court and they said, no, you haven't got the authority to receive this, … and they refused … But I do know there have been cases, instances where the judge has been aware of the SOLA involved in the case and has invited the SOLA to make submissions orally … but it is few and far between, on less than one hand you can count the number of [those submissions].[268]

[266] See s.7 of the Criminal Law (Sexual Offences and Human Trafficking) Act 2024, amending s.4A of the Criminal Law (Rape) Act 1981.
[267] See section 3.6.
[268] Participant 18.

At the time of writing, there is an ongoing consultation about the extension of ILR in Northern Ireland.[269] Whilst in Scotland the legislative proposal confines ILR to a discrete part of the criminal justice process, nevertheless as the rest of this chapter outlines, the data we have gathered suggests that the reality of the nature of legal practice for complainers, even in respect of schemes of ILR for discrete issues, often defies neat categorisation. The area also demands that policy makers pay close attention to the regulatory and evidential context in which their schemes operate (or shall operate), given the thorny issues that potentially arise when a witness (here the complainer), is granted party status in respect of a hearing, in a criminal justice system structured around adversarialism between the prosecution and the defence.

The Scottish Bill appears to envisage that a complainer's legal representative will be present in court for the section 275 hearing to provide oral submissions advancing the complainer's views (whether that occurs in advance of the trial or, in exceptional circumstances, after the trial has begun). As outlined elsewhere, there are obvious logistical and operational consequences that flow from this requirement that are unavoidable. Where a section 275 application is contentious, by which we mean where it is opposed by one of the parties to the case, or where the court itself deems it to be ill-founded, then clearly specialist legal representation is required to protect the complainer's interests, including representation at court.

It seems to us, however, that there are instances whereby the complainer's position and interests may be adequately protected by the provision of written submissions only. This might be the case where, for example, the section 275 application relates only to a position advanced by an accused in respect of the special defence of consent put forward in a police interview, instructions have been received not to oppose the application, and it is clear to those advising that the application is well founded in law. In such instances the complainer's representative could be given the opportunity to provide views in writing and there would be little to be gained from also facilitating a lawyer to attend on their behalf. We say this being mindful of the fact that the Appeal Court has stated that the lack of opposition to a section 275 application is not determinative of the matter.[270] So it may be the case that the court itself determines an application to be admissible or inadmissible notwithstanding the position of the parties (including the complainer). However, we suggest that there should be trust in the ability of lawyers acting in this context to identify straightforward applications where written submissions alone may be appropriate. Of course, as mentioned elsewhere, agency is also vital in this context, but assuming specialist legal expertise was provided, then policy makers may wish to give consideration to facilitating a system (which might entail leaving the matter to be addressed in court rules) whereby the complainer can opt to instruct written submissions alone in individual cases. This point was also picked up by one of our interviewees:

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[269] Northern Ireland Department of Justice (n 47).
[270] *RN v HM Advocate* [2020] HCJAC 3 at [4].

> You know the important part of ILR is that there is independent representation who can provide the court with the views of the complainer on the application there, whether that's provided orally or in writing? … There shouldn't be a requirement for the complainer to have a representative present if the court is satisfied that they have received the views of the complainer.[271]

We are aware that at least in the High Court of Justiciary, currently most Preliminary Hearings where section 275 applications are considered are held online and so the attendance of the ILR could in most instances be facilitated virtually. We recognise that further input from stakeholders is required in relation to this matter.

5.4 Rights of audience and regulatory issues

In jurisdictions like Scotland, where there is a split profession consisting of generalist legal practitioners who deal with clients directly, such as solicitors, and some form of lawyers who are specialist legal advisors and courtroom pleaders, such as advocates, any proposed model of ILR requires to be mindful of the professional distinction between the two groups and the regulatory context within which they both operate. In the Scottish context, it is important to bear in mind that the vast majority of cases where the ILR provisions will come into play, at least in the short to mid-term,[272] will occur in the High Court of Justiciary, a court where only advocates and solicitor advocates have rights of audience. This will therefore necessitate that a solicitor instructs either a solicitor advocate or advocate to appear at the hearing on behalf of the complainer. Many of the jurisdictions we considered did not have courts where appearance was restricted to certain classes of lawyers in this way. Our data nonetheless revealed interesting and diverging approaches to the instruction of specialist courtroom pleaders for complainers of relevance to the proposals in Scotland.

In Ireland, by convention, counsel are instructed to perform the role of separate legal representation (SLR) for complainants at the relevant hearings, most of which occur in the Central Criminal Court in Dublin. This, naturally, comes with financial and broader operational consequences, some of which are detailed below. This is an interesting feature of the Irish scheme given that legislative reform in the jurisdiction in 1971 permits solicitors to appear in their own right in all courts. In other words, there is no *requirement* for counsel to be instructed in SLR cases in Ireland. When asked to comment on *why* counsel were still instructed regardless, one interviewee stated that the amendment had not led to any fusion of the two arms of the profession generally and:

> In terms of the Legal Aid Board and SLR, specifically, our work is generally on the civil side, and in the areas of family law, public law, child care, and international protection particularly. Solicitors employed by the Legal Aid Board may not have had a chance, particularly if their career has been wholly or mostly in the Board,

[271] Participant 40.
[272] This may change if the specialist sexual offences court comes into operation.

> to gain experience in criminal matters, and that is why Counsel would be instructed in those cases.[273]

As outlined in later sections of the report, however, the instruction of barristers in Ireland comes with a financial cost in that the scheme requires to provide and set rates of pay to these lawyers additional to the costs associated with the solicitors who undertake the work. Further, the involvement of barristers also has logistical implications in that these lawyers require to be available to accept instructions in relevant cases, often at very short notice, and the efficient running of the system of ILR is therefore contingent on their availability. As one Irish interviewee observed:

> I had a case recently where we were in the middle of the trial and I got a call at seven o'clock in the evening from my counsel to say, they're going to make a section 3 application tomorrow, can you get on the phone now and get someone in court tomorrow morning? … Funnily enough, it happened. I couldn't believe it. It just all, you know, fell into place and there was a solicitor and a barrister there the next morning and there was no delay to the trial. And, of course, I was praised by the judge because I'd managed to pull that off. But it wasn't me, I just made phone calls. It's the other practitioners, the Legal Aid Board solicitor and barrister who made themselves available and dropped whatever they had in their diaries for the next morning. They are so busy in their offices. And they just came, just dropped everything and came to court for this complainant.[274]

As the above quote makes clear, it should be remembered that the instruction of specialist pleaders in any given case involving ILR entails added administration for the solicitors providing the service, in that they will require to instruct these lawyers and provide them the necessary documentation in order for them to familiarise themselves with the case and meet the complainer. As we discuss in other chapters of the report, where adequate notice is provided of the fact of an application in respect of which ILR is to be engaged, it should be relatively unproblematic for the complainer to meet with their legal representatives in a manner which, at least in terms of the circumstances surrounding its occurrence, is properly trauma-informed. However, when such an application arises late, especially after the empanelment of a jury, then the requirement to instruct a specialist pleader becomes an added complexity in an already time-sensitive situation. This general finding is clearly relevant in the Scottish context, where there are general issues pertaining to the availability of advocates, as we explore specifically in the next section.

In Queensland, funding was provided for the instruction of barristers, but solicitors were also entitled to appear in relevant hearings to determine disclosure of sensitive records. Interviewees spoke to a scheme whereby barristers were regularly instructed regardless because of the added expertise they brought, the fact that funding was available and

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[273] Participant 11.
[274] Participant 13.

due to the court's expectations surrounding those who would appear. As one interviewee remarked:

> The funding is ensuring that our clients are supported by both experienced solicitors and counsel and it gives them, you know, further support and experience behind them that they're entitled to with the funding in this area.[275]

In Victoria, a more mixed situation pertains. Solicitors are entitled to appear at the relevant hearings for complainants, with ILR provision split between two providers. One of these providers favours the use of solicitors generally at the relevant hearings whereas the other opts to instruct barristers. The reason given for the instruction of barristers at the latter service was that some of the solicitors based at that provider do not have the level of requisite expertise in criminal law in an area that is relatively new, given that ILR only became available in the area as part of a federally funded pilot in 2024.

In Western Australia, where a system of ILR provision in respect of sensitive records has also only recently been piloted, we were told that despite solicitors having the necessary rights of audience to appear in the relevant court, there have been occasions where barristers have been instructed to appear, again the reason being the advantage to be gained by bringing added expertise on board in relation to a case.[276]

In the Canadian jurisdictions on which we focussed (British Columbia & Nova Scotia), there exists a fused legal profession whereby even though the terms barrister and solicitor are still used, there is no separate system of professional regulation, and the term barrister simply denotes a lawyer who appears in court (and who is also a solicitor). This means that matters relating to rights of audience and associated logistical issues do not feature.

As we have already indicated, Northern Ireland is unusual in that the potential for ILR is largely limited to written submissions in relation to sensitive record applications, although there appears to be variance in practice with oral submissions sometimes being permitted by individual judges. Interestingly the state funded scheme of ILA provision established in 2021 in that jurisdiction also allocated funds (£55,000) such as to permit the instruction of barristers if required. This was raised as important by an interviewee from the perspective of equality of arms, however, we were also told that to date these funds have not been used:

> I think one of the big things is equality of arms that we've talked about before. So, number one, there's three of us and there's hundreds of cases on our books. So,

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[275] Participant 23.

[276] "My understanding is that … in the protected comms case that I mentioned that we've recently been involved in, we did brief counsel for that. And so, there's definitely that capacity. I don't know whether that capacity came out of the pilot funding or whether it was taken out of Women's Legal funding." (Participant 31)

> in order to advise properly, we probably need the assistance of counsel … And we have sort of, baked in counsel funding to our overall project, but we haven't used any of it yet. I think maybe we've asked for some pro bono advice … but I think they envisaged maybe that would be a bigger part of our role.[277]

An obvious point that arises in the context of the schemes that do use specialist independent pleaders, is that the quality of the provision of representation depends on those performing the role. As we outline in chapter 8, it is easier, for various reasons, to monitor and control the quality of representation through a core funded salaried model of legal representation provision by solicitors. Clearly, when the scheme of ILR involves the instruction of specialist independent pleaders, who accept instructions on a case-by-case basis, then a different approach requires to be taken in order to ensure the quality of legal service delivery. The approach adopted in Ireland is to utilise a panel system, whereby only barristers who are already selected as appropriate for instruction by the relevant instructing body, here the Civil Legal Aid Board, are instructed in ILR cases. One interviewee spoke of the crucial importance of the expertise of the barrister involved:

> What works well is having an experienced junior who practices criminal law. Don't let a family law practitioner near these cases. With the greatest respect to them, the reason why barristers have specialist areas is the law is different and the rules of evidence in a criminal case are vastly different from the rules of evidence in a family law case. And we've ended up with some bad law because of family law practitioners.[278]

As we have set out, the Scottish context requires that independent specialist pleaders with appropriate rights of audience are part of the system of ILR given that a large number of cases where the right is engaged will call in the High Court of Justiciary.[279] The data tells us that schemes that involve the instruction of barristers or some form of independent specialist pleader benefit from the added expertise of highly qualified lawyers who are experts in court room representation and advocacy. This undoubtedly is a positive feature of these schemes. In some instances, convention dictates that such individuals appear in the relevant courts within which cases involving ILR are being heard. In others, a professed lack of expertise from the solicitors dealing with the cases necessitates the instruction of such individuals, especially in relation to cases with added complexity or newly developing areas of legal practice. However, the involvement of independent specialist pleaders comes at both a financial and logistical cost in that it adds expense to the ILR scheme and generates additional work in terms of the instruction of these individuals. It also introduces further capacity for delay, given that they require to be present for hearings in which they are instructed to appear.

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[277] Participant 17.
[278] Participant 12.
[279] See Cowan, Keane and Munro (n 5) 40, noting data from 11 Jan-11 April 2016 during which 57 section 275 applications were made, of which 52 were in the High Court and 5 in the Sheriff Court.

Our data collection sought to identify whether, and to what extent, research participants perceived issues arising from the availability of Scottish advocates and solicitor advocates to act in relevant cases. Previous research has shown that issues in relation to the availability of counsel has impacted at times how section 275 hearings occur.[280] One participant identified problems in the past in relation to the availability of criminal advocates, but stated they did not perceive there to be an issue such as to impede the running of the proposed system of ILR now, especially given the ability to run Preliminary Hearings virtually, which is the administrative hearing that would be used in the majority of cases in which ILR will be required:

> Things are improving. If we had this conversation 18 months ago, then there was a hard felt shortage. But last year and then this coming October, we will have big intakes of dedicated criminal practitioners and that will help a great deal. There's not a lot of spare [capacity] at the moment but I'm not encountering situations where trials have to go off due to a lack of counsel. We were in that situation, as I say, 18 months ago, two years ago, even 12 months ago but we're not in that situation now. So, my suspicion is that what is anticipated here is that preliminary hearings will have an extra face on the computer screen. So, we do preliminary hearings now virtually in all cases, except where a plea of guilty is to be tendered and accepted.
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> And that in itself helps a great deal. You will know that it was always the case that preliminary hearings were held in person and then COVID came along. And then after COVID, we had a shot at returning to in-person but the practicalities of having 10 preliminary hearings in court seven and, therefore, 10 sets of counsel or more waiting outside court seven wasn't practicable. So, the fact that we've moved to an online default position means that … I think, [there] will be an extension of the preliminary hearing process, it'll be dealt with virtually as well I think. And I would be confident that there will be people to cope with the requirements here.[281]

Another participant commented that they believed solicitor advocates and advocates (counsel) would be available to accept instructions:

> In relation to counsel, I think there would always be counsel and sol-ads available because you know … there's always people keen to do the work. So it's whether they would be able to do it on short notice, you know, and get up to speed. But counsel, I think always take on cases. If someone's busy then someone else takes on the work … and sol-ads do a similar thing.[282]

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[280] See ibid 104-106.
[281] Participant 38.
[282] Participant 41.

These views were not shared by all the participants we spoke to, with one stressing they thought there would be issues in terms of finding advocates available to take instructions due to the limited pool of those available and pre-existing commitments:

> One of the major problems are public inquiries. You've got the Sheku Bayoh inquiry, you've got the child abuse inquiry, you've got various other ones, the COVID inquiry. All of those have seven, eight, nine, ten interested parties, all of whom have to be represented by counsel and quite often are represented by senior and junior counsel. So, when you're taking from what is a relatively limited pool [of counsel who do criminal work] 20 to 25 counsel out for six weeks at a time, it will make a difference.[283]

This participant also thought there would be issues with the availability of solicitor advocates too:

> I mean, the difficulty is, you've got a relatively limited pool and there's a lot of demands on them. And because of the financial context … people are doing other things … I mean, there are more advocates deputes than there used to be. I know of two friends of mine who are solicitor advocates with similar experience to me who have left private criminal defence practice and become advocate deputes. As I said, I'm a solicitor advocate. The last time I appeared in the High Court was before COVID. I can't get away from my Sheriff Court practice to get the time to get in the High Court.[284]

Our data collection has also shown that the use of specialist pleaders naturally entails additional financial cost. One research participant outlined their perspective on how the work might be costed:

> I would have thought that there would be a fee for the consultation, which is a fixed fee. So, at the time of speaking to you, my fees for a consultation I think are about £280. For junior counsel, it's about £210. You would then have a hearing fee. If it's a miscellaneous hearing fee, for senior counsel it's something like £460, maybe £360 for junior counsel. The preliminary hearing fee is a bigger fee but then that includes a component of trial preparation and all sorts of other stuff. So, I'm not sure that's a direct comparison. So maybe a fee can be created akin to a miscellaneous hearing fee. I suppose we'll need to have a better idea of what is going to be asked of them in terms of preparation for that. And others can find the closest equivalent fee.[285]

A participant also noted that due to the professional rules which govern the instruction of advocates in Scotland (but not, it should be noted, solicitor advocates), then

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[283] Participant 40.
[284] Participant 40.
[285] Participant 38.

members of the Scottish bar would require to make themselves available for the work, regardless of the fee set:

> In terms of making it [financially] attractive, the advantage of an independent referral bar is, you don't need to make it attractive in the sense that somebody will be available. The faculty … the office bearers, if necessary, will direct somebody to be available.[286]

The issue of the availability of those with appropriate rights of audience should be a key concern for policy makers in Scotland when thinking about how the ILR provisions will operate in court, and practice generally. We analyse the research data with respect to models of delivery in more detail in chapters 7 and 8. These chapters engage with the concern in the context of solicitors available to accept instructions and deliver any system of ILR in a trauma-informed fashion. Any proposed system of ILR in Scotland will entail the instruction of specialist pleaders in the vast majority of cases. This is an advantage and a challenge. The data shows that where such expertise is utilised effectively in systems of ILR, then service users, and indeed the criminal justice system generally, benefits. However, the involvement of such lawyers entails logistical and financial consequences, especially in a context where there is only a limited number of days within which instructions require to be taken and a position advanced on behalf of vulnerable witnesses.

The issue of ILR at trial following late applications potentially raises acute issues and we explore this in the section below. Given that solicitor advocates may, unlike advocates, be employed directly by an organisation, and thus salaried, there is at least the potential for policy makers to explore whether a model that involves employment of those with appropriate rights of audience in Scotland may ameliorate some of the difficulties identified in this chapter. One participant at the Scottish bar said they would be completely satisfied that such individuals had the requisite expertise to perform the role:

> For someone to have passed the professional requirements to become a solicitor advocate, that should, in itself, be sufficient satisfaction that they can do that particular role. So, I don't see that there's a particular difficulty with that concept.[287]

Other participants did observe that the recruitment of such an individual to a specialist service set up to deliver ILR may be somewhat difficult as it would require someone to effectively be dedicated solely to ILR as an area of practice.[288] As one participant noted:

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[286] Participant 38.
[287] Participant 38.
[288] It is worth noting that attempts are being made at the University of Glasgow Law School, at which the co-authors of this report are based, to take positive steps to instil in young lawyers an interest generally in the realm of complainers' rights, although such initiatives are still in their infancy.

> Who are the people who would want to … who would be wanting to do this all the time, have the rights of audience but only use it for this one dedicated area?[289]

Much would clearly depend on matters such as rates of pay and conditions, as we explore further in chapter 8. It should also be noted that even if this position was adopted, then the solicitor advocate based 'in house' still requires to be formally instructed by another solicitor in the High Court of Justiciary, even if based at the same ILR service and Legal Practice Unit. Special care, and amendment of rules of guidance may be required too to protect the agency of complainers, and ensure that they understand that they may make 'an informed choice' about representation, in the knowledge that other specialist pleaders are available, if they prefer to use them.[290] Further, if any service does utilise the expertise of 'in-house' solicitor advocates, there should be additional financial provision made so that the service itself may instruct other advocates and solicitor advocates when required in cases of acute sensitivity or complexity. It is worth bearing in mind too that there is value to be found in "the independence of mind" in involving specialist pleaders, as one participant told us:

> Well, it partly looks back into a concern I had about the notion of keeping this entirely in-house. If it became … if there was a, sort of, creeping militancy in the minds of those who did it, just with the best will in the world, seeing vulnerable and distressed people in front of them could only reasonably lead towards that. Then you might have a situation where any decision which is taken which is contrary to what the complainer wanted is, therefore, appealed … It may very well be that that with a good selection of employed in-house people [that independence of mind is retained].[291]

The final issue to raise in relation to rights of audience in Scotland relates to the proposed introduction of the specialist sexual offences court. As the Bill is currently drafted it is proposed that at some point in the future a new court will come into effect that will have jurisdiction to deal with sexual offences generally. This proposal has been controversial.[292] The provisions in the Bill in relation to rights of audience may have an impact on the proposed system of ILR. Notwithstanding that cases with a charge of rape and/or attempted rape will still require either an advocate or solicitor advocate to appear, more generally there may be classes of case involving sexual offences currently prosecuted on indictment in the High Court of Justiciary which will fall under the jurisdiction of the sexual offences court. In these cases, solicitors with ordinary rights of audience, having completed a mandated programme of trauma-informed practice, would be entitled to appear.[293] Clearly, were this to occur in the context of cases

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[289] Participant 35.
[290] Albeit provided in a different context, in this regard see the comments of Lord Gill in the case of *Addison v HM Advocate* [2014] HCJAC 110, 2015 JC 107 at [25] and rule 8.4 and the associated guidance on instruction of representation by the Law Society of Scotland.
[291] Participant 38.
[292] See generally Criminal Justice Committee, Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report (SP Paper 560, 2024) 97-126.
[293] See s.47 of the Victims, Witnesses, and Justice Reform (Scotland) Bill.

involving a section 275 application, then the requirement for an independent specialist pleader would no longer be necessary in these cases.

5.5 The influence of the substantive law and procedural context

This section of the report will present and analyse the data in relation to common substantive issues that arise in practice in respect of the jurisdictions that offer comparable schemes of ILR. The first obvious point to note from the data is that the complexity of the substantive law applicable to the hearing in respect of which ILR is provided, alongside the relevant procedural context in which the hearing occurs, has a vast influence not only on the nature of the issues which arise, but also on the effectiveness of the provision of legal representation. Whilst this is an obvious point, it is crucial to bear in mind, given that the proposal in Scotland relates to a discrete part of the criminal justice process (i.e. section 275 hearings) with its own procedural timeline and legal issues. Notwithstanding the fact that the information presented here relates to discrete legal jurisdictions with their own nuances and mechanisms, the data we have obtained provides valuable insight into issues that may also arise in the Scottish context and things that require to be considered. Where appropriate we provide analysis of these issues in that context utilising the views of Scottish stakeholders.

5.5.1 The complexity of the legal issues

Turning first to the issue of the impact of the substantive law, it is clear that in most of the jurisdictions we examined, the legal context in which ILR was being provided is relatively straightforward and the issues are often resolved via consent. As one Irish interviewee told us:

> At that stage [the time of the hearing at which ILR is provided], it will be clear whether the victim/complainant is consenting to that obviously within the parameters of what has been sought. And usually, the matter … actually in my experience, I struggled to think after we spoke initially or emailed, of any circumstance under which there was actually a contest. Which I know sounds unusual but, in most cases, my interpretation is that if the matter is fairly and squarely in the case that counsel for the victim or complainant says, look, you can object but it may be that the judge will overrule or something like that.
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> So, I'd say in 95-plus per cent it's not actually contentious on the part of the complainant. Now I'm assuming the reason for that is because people have thought in advance clearly to do what they want. And also, because I think the good sense of the people who advise the relevant victim/complainant.
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> So that's the way in which it normally goes and I've never known a judge to refuse an application where it is indicated orally at the hearing. So, at the hearing, therefore, the defence would stand up and say, we have filed notice for an application, we understand the complainant is aware of her rights. The counsel

> for the victim/complainant stands up and says, that's so. And the judge, well, in 95, 99 per cent says, very good but please note what the parameters are.[294]

Equally we were told by another interviewee of some applications that did face opposition but again the fact that lawyers agreed the terms of the application themselves prior to the hearing was stressed as important:

> And then other ones, you would have a bit of … there would be inter-counsel discussions and they would come to an agreement. And then they would just formally look for a ruling from the court that we're all happy with this, are you happy, yes, we're happy, carry on, you know.[295]

In New South Wales, a similar dynamic can be observed, in that the substantive law applicable to the context in which ILR is provided – as in in other jurisdictions – shapes the manner in which the ILR provision operates. In that jurisdiction, the ILA and ILR service delivery is structured around sensitive records, namely sexual assault communications privilege. Evidence which attracts this privilege can only be obtained via consent of the holder (which is defined in statute, and requires independent legal advice to be tendered as a prerequisite) or via the leave of the court, which in effect issues an order requiring the evidence to be produced if satisfied of its probative value. Accordingly, the work of the lawyers involved in the ILR scheme varies in complexity, as one interviewee remarked of the cases where consent to disclosure is to be provided:

> It's pretty boilerplate. It could certainly be done by a paralegal supervised by a lawyer, who would just review the advice, which would be more efficient … it's the same advice every time. I did it twice today. And then it's just like writing out the letters and sending off the forms and they'll get it back to you when they get it back to you.[296]

This is in distinction, however, to the more contentious applications where leave is sought:

> But the complicated ones are when leave is sought because then you've got to subpoena, you've got predictive elements, you've got legal arguments, like, regularly, sort of, five to 10-page pages of submissions, written submissions for these arguments. They usually proceed on the papers. They'll also often take, like, half a day. It's hours of legal argument. And ultimately, it's, sort of, quite challenging because again, it's that predictive element.[297]

A similar effect of the substantive law could be observed in the remaining jurisdictions operating models of ILR. In Victoria we were told by an interviewee that notwithstanding

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[294] Participant 9.
[295] Participant 13.
[296] Participant 14.
[297] Participant 14.

that the pilot programme is in its infancy, judicial oversight of the applicable law, and the restrictive interpretation of same, meant that the cases in which legal representatives were acting for complainers tended to be straightforward:

> We haven't had any really complex ones … we nearly had a really complex one this week but it was sorted before it got to us in the end. And I think it would have been complex because it involved a child who was under the age of 14. So, it just gives rise to things that we haven't had to consider before.
>
> But they're not normally that complicated. I've found that a lot of the time, they're, kind of like, fishing expeditions for the defence. So, they're making … they're difficult because you don't know what's in the notes, but the applications are usually so broad that they can't show that the documents will have substantial probity of value to the issue. So, there's a lot of back and forth between the bench and the applicant about that. And normally the bench will, kind of, push them into narrowing the application. But the case law is pretty settled, I don't think there's really been anything recent, any appeals recently that cover the new parts of the legislation.[298]

In Queensland we were told by interviewees that despite the narrow focus of the right to ILR relating solely to the potential recovery of sensitive records, a considerable degree of expertise was required in the area, and individual cases often generated large amounts of work due to complexity but, equally, that informed legal advice could lead to consent to applications:

> So, there's a lot that goes into it. And the size of the records a lot of the time will determine the level of preparation. But then, you know, for example, we have matters where … I had one today where we've gone back and looked at the same set of records, there's about 11 or 12 different sets of records in this one matter. And as a new line of enquiry or a new line of the defence was established, there was then a reopening application to go back and look at the same records again.
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> So, it just varies from matter to matter. I think it's a really important point that [the other interviewee] raised in relation to that sort of higher threshold and ensuring that clients are aware of that … And there are some circumstances where, with proper advice and being able to give informed consent and understanding what that means, some clients might waive privilege.[299]

In British Columbia interviewees spoke to how the involvement of lawyers for complainants in the context of sensitive records and sexual history applications could in some instances, given the state of the law in the jurisdiction, avoid the need for unnecessary opposition:

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[298] Participant 24.
[299] Participant 23.

> … it might require the defence counsel to more specifically frame the issue because the complainant's counsel's going to need more information and more disclosure to do their job properly. So, I think one lawyer said, you know, it was really helpful, like, the more information I get from defence counsel the better because sometimes I can just agree, right. So, it, kind of, reduces that adversarial nature of it. You know, sometimes like the defence is making an application for a good reason and the application should be allowed. And so, for the complainant's counsel to look at all that information and say, yeah, you know, it makes sense to agree with this [and] explain to the client why it makes sense to agree to it.[300]

As we go on to explore in further detail in chapter 10, the Scottish context in which the model of ILR will operate is distinct. An analysis of relevant case law and associated guidance, along with empirical research, tells us that section 275 applications are a complicated area of legal practice, which has undergone significant change in recent years. It is fair to say that the approach of the senior judiciary in the High Court of Justiciary is a restrictive one. As was noted by one of our participants speaking about the impact of ILR in practice:

> I think that the courts take the role, the gatekeeping role so seriously just now, I wonder whether there will be a practical effect. But I'm conscious that even if the practical effect is to provide reassurance to worried people, to complainers and the like, so that they understand better what's happening, then that has a value even if the outcome remains the same because the courts are already vigilant, highly vigilant to the privacy and dignity of the complainers in these cases.[301]

It is also clear, however, that the parameters of section 275 applications are still being tested in practice.[302] On the basis of recent research,[303] it is safe to assume that the model of ILR delivery in Scotland will entail a considerable number of applications that are opposed by those acting for complainers.[304] Whilst, of course, some cases may also entail more straightforward applications for which no opposition is provided, it is clear that the Scots law and practice in the area remains relatively contentious and there is a high level of expertise required. These are matters that we further explore in later chapters.

5.5.2 Witness coaching

A substantive issue that needs to be considered in the context of how the system of ILR will operate in practice in Scotland relates to the prohibition in the jurisdiction on the

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[300] Participant 5.
[301] Participant 38.
[302] See e.g. the analysis of a case considered in Cowan, Keane and Munro (n 5) 116-118.
[303] Cowan, Keane and Munro (n 5).
[304] ibid 11.

coaching of witnesses by lawyers. The relevant professional guidance from the Faculty of Advocates states:[305]

> Under no circumstances should Counsel do or say anything which suggests to a witness that he should give evidence other than in accordance with the honest recollection or opinion of the witness. An advocate must avoid doing or saying anything which could have the effect of, or could be construed as, inducing the client or a skilled witness to "tailor" his evidence to suit the case.

This rule is replicated in the professional guidance for solicitors which states:[306]

> You must not do or say anything which could affect evidence or induce a witness, a party to an action, or an accused person to do otherwise than give in evidence a truthful and honest account of that person's recollection.

The risk of coaching witnesses was flagged by participants in Ireland who stated that their service delivery of ILR was alive to the matter and as a result those involved were guided by the prosecution as to what was appropriate:

> That's a massive balance that we have to … like, it's a tightrope we're walking that we're not interfering with the case at all. The prosecution and the defence will be very live to that concern, so we will have to be very careful. And we'll have to have a good relationship with the DPP. And also … I suppose in terms of when we would have that conversation, when we would link in with the victim, we will be guided by the DPP and we will be guided by knowing are there things we need to know about, are there any particular vulnerabilities.[307]

In Northern Ireland we were also told by a participant that the risk of coaching was one of several factors that was considered in the design of their model of ILA, and led to the use of at least initially non-practising solicitors who do not discuss the offence whatsoever.[308]

We explored with Scottish stakeholders the risk of coaching and how the ILR service could be delivered. One participant warned: "I think there's a fine line between giving somebody advice on the procedure and coaching a witness. And I think that's something that would have to be watched."[309] They also spoke to the fact that those providing the service would have to be alive to the danger that the service could lead to the *impression* at trial that coaching had occurred, and to be mindful that any advice they offered which was incorrect could be raised by the witness themselves during proceedings:

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[305] The Faculty of Advocates Guide to the Professional Conduct of Advocates Rule 6.3.9.3.
[306] Law Society of Scotland Practice Rules (2011), rule B1.13.
[307] Participant 11.
[308] Participant 18.
[309] Participant 40.

> There is a concern that there is the possibility of the impression of coaching being raised during future proceedings. But also the possibility of the position of complainers who may be told something incorrect or inappropriate by an ILR … and they are then cross examined on something else and are in a position where they say "I was told I wasn't going to be asked that" or "I was told by my lawyer X&Y" and that that potential for you know additional distress at the point of giving evidence [for them] … and a presentational issue … how that presents to a jury.[310]

Multiple participants, whilst alive to the danger, believed that with appropriate professionalism from the lawyers involved and adequate knowledge and understanding of criminal law and procedure, these matters could be adequately dealt with.[311] As one participant remarked:

> This is a conversation that I've had in different forums to do with generally having greater legal contact between complainers and lawyers. My feeling is that, at the moment, there is a lamentable gap in what complainers are told and how they are prepared for it. I don't mean prepared in terms of what they say in their evidence, that's their business. But I think that there is a shortfall in how they are advised and how they have things explained to them about why we do things the way we do things. Because by and large, things that are done in courts are done for good reasons. And so, I think that would be understood by the solicitors and the advocates or solicitor advocates who are speaking to them. And that would be the focus. I would have thought that there's a natural enormous reluctance on the part of lawyers to start being drawn into questions about what if I said this? From the defence point of view, I deal with that fairly commonly with an accused who wants advice about that. And you just shut them down, explaining that's not my job, the facts are their business.[312]

Another participant agreed and linked proper practice in the role of ILR to adequate expertise and clear rules of professional practice, including those on the use of disclosure:

> Again, I think that is why there's a degree of importance that they [those providing ILR] are aware of criminal proceedings and criminal processes and what may be appropriate to discuss and what may be inappropriate to discuss … And again the requirement for there to be proper rules and guidance in terms of disclosure and the use of disclosure and how it can be used.[313]

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[310] Participant 40.
[311] Participants 38 and 41.
[312] Participant 38.
[313] Participant 40.

Another simply stated that they "hoped any lawyers wouldn't entertain that … It doesn't benefit the lawyer to coach someone or get them to say something, you know, because you're just reflecting the client's position."[314]

Whilst the risk of coaching witnesses is recognised in other jurisdictions in the context of advice delivery to witnesses, given what is proposed in the Bill in Scotland, there is a particular need for those who are performing the role of ILR to tread carefully due to the nature of their advice and representation relating to a matter of considerable importance in sexual offences trials. That said, as several of the participants indicated, professional rules of conduct already exist to guide conduct relating to engagement with witnesses. Lawyers in Scotland are expected to behave appropriately in this respect, and there are professional consequences if they do not. Further, the Appeal Court has long ago held that there is no unfairness arising from a complainer being told about the content of a section 275 application.[315] Given that the Bill envisages a system where a complainer's views will be sought on a section 275 application by legal professionals, and submissions made on whether an application will be granted or not, it would be natural and understandable if such an individual sought views about both matters. Indeed, research has shown that under the current system of the Crown taking complainers' views on section 275 applications practice varies in terms of the provision of information about the law relating to the application by Advocates Depute, and indeed the task of taking views itself is performed by case preparers who may not be legally qualified. Complainers have spoken to this as causing uncertainty and frustration.[316]

Those who perform the role of ILR will have to take instructions on section 275 applications and should be able to provide complainers with a professional opinion on the law relating to the practice in the area. Policy makers should give consideration to engagement with all stakeholders, including the judiciary, as to how best to achieve both aims.

It would appear that one straightforward way in which a professionally appropriate level of legal advice could be given in the context of ILR delivery would be for the lawyers acting to ensure that they take instructions from the complainer as to their factual position on the assertions in the section 275 application, *before* offering any view on the likelihood or otherwise of the application being granted by the court, or broader law relevant to the area.

Finally, one related concern pertains to the fact that those performing the ILR role may receive information from a complainer that is exculpatory in relation to the charges the accused is facing, but clearly would be unable to disclose this information given that it

[314] Participant 41.
[315] *Moir v HM Advocate* 2005 1 JC 102 at [51] and [52].
[316] Cowan, Keane and Munro (n 5) 86.

would be privileged (and confidential) in terms of the lawyer/client relationship.[317] This matter was raised indirectly by one participant who remarked that exculpatory material provided by a complainer during discussions with a COPFS case preparer, which currently fell to be disclosed by the Crown under their general duty of disclosure when taking a complainer's views on a section 274 application, would no longer fall to be disclosed if ILR was introduced as set out in the Bill.[318] We have considered this matter carefully and accept that it is possible that some exculpatory material may be revealed by complainers to those performing the role of ILR and that this material will not fall to be disclosed to the defence or anyone else. This is clearly not ideal but equally there are myriad other instances in which classes of exculpatory information may currently be disclosed to individuals during the criminal process that also never fall to be disclosed (including of course when a complainer instructs their own legal representative). The same applies to incriminatory material disclosed by the accused to legal professionals. Ultimately, we would trust those performing the ILR role to offer appropriate advice to a complainer about the importance of taking appropriate steps themselves were they to disclose any exculpatory information.

5.5.3 Facilitating ILR close to the start of the trial/after the trial has commenced

An issue that arose in our data collection was the provision of ILR in a context where applications to lead sexual history or sensitive records evidence are made either very close to the start of the trial or after the trial has commenced. This was a particular issue in Ireland, where multiple interviewees spoke to the fact that late timing of the triggering of the right to ILR led to considerable logistical issues. The legislation in Ireland provides that the right to ILR is engaged once the defence provide notice of their intention to make an application for leave to introduce sexual history evidence.[319] The legislation states that the notice seeking leave shall be provided before or "as reasonably practicable" after the trial has begun. The interviewees we spoke to stated that due to external factors in the Irish criminal justice system the vast majority of these applications were made after trials had begun. As one interviewee remarked candidly:

> You might be on day two or day three [of trial] before you get the notice or any word of it [the section 3 application] … In my personal experience, I would say five per cent are happening in advance.[320]

We sought to explore the rationale behind the late timing of applications with some Irish interviewees. One explained as follows:

> I can tell you exactly why it's happening because … and this is probably a bit slanderous, but I don't … defence counsel aren't really engaging with the papers

[317] See e.g. the rules on client confidentiality contained at B1.6 of the Law Society of Scotland's Professional Conduct Rules for Solicitors. See also *Scottish Legal Complaints Commission v Murray,* [2022] CSIH 46.
[318] Participant 41.
[319] See section 3.4.1.
[320] Participant 13.

> until they know the trial is getting on, you know. And I can understand why because there are so many briefs being swapped around because the lists are all overloaded and barristers are coming out of cases so frequently that they just … and they probably don't want to tie someone into a ruling if they're not 100 per cent sure they're definitely going to do the case. So … nobody's really looking at it in any great detail, until they know they're starting their case tomorrow.[321]

In New South Wales, again the procedural context surrounding the matter for which ILR is available was of vital importance to the manner in which the representation was provided. Here too, notwithstanding the statutory timeframe for when applications should be intimated which trigger the right, often things were happening late in the day in the run up to the trial due to pressure of the criminal justice system. As one interviewee commented:

> … there's notice provisions. They're [the complainants] supposed to get two weeks' notice, very rarely actually do. Preparation for trials is probably pretty similar where you are as it is here, which means everybody panics in the last two weeks before the trial. So, it's not uncommon for me to appear and be talking to the judge immediately before jury selection about these sorts of issues. And it's the legal argument [being provided] immediately prior to trial commencing.[322]

Similarly in Victoria we heard an account of how the 14-day notice period required to be given to complainants in law relating in respect of the defence seeking access to their protected communications, in reality was placing those acting for complainers under considerable pressure often leading to motions to adjourn proceedings which those acting felt were not in their interests:

> So, we've had to seek a few adjournments from the court or just, like, I've, yeah, had to really sometimes drive out pretty far to meet these clients and, you know, get things done in time. Because it's … a balance of having enough time to prepare but also not wanting to make the process longer, if that's not really in the interests of the client … So yeah, I would say it's probably, yeah, good to have a longer, kind of, notice period just to take that into account.[323]

A similar position was observed in Queensland, where we were told by interviewees that, notwithstanding the 14-day notice period, sensitive record recovery applications that triggered ILR were being made late for various reasons, placing added pressure on the lawyers involved:

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[321] Participant 13.
[322] Participant 14.
[323] Participant 25.

> The court can waive [the notice period]. I think the shortest turnaround I've had is I went to court on Wednesday, was handed a bunch of documents and had the hearing that afternoon for a trial that was starting on the Monday.[324]

Again, it was highlighted to us that this produced a tension for complainers between exercising their legal rights and wanting the criminal proceedings to conclude without delay:

> And the thing that is probably quite difficult for them, though, is that they have conflicting interests in wanting things to be done quickly but wanting these criminal proceedings to be done. And so … if an application is brought at, you know, the last minute, then having time for them to properly consider their position versus wanting the criminal trial to happen now rather than in six months can be quite challenging. And that's the other reason that I often pushed back on it is we need to … they need to have time.[325]

This tension was also picked up on in Nova Scotia which provides a right to ILR in respect of both sensitive record and sexual history applications:

> … there's been times when if an application comes in … like, we encourage the Crown to submit them as quickly as they can, as soon as they have an awareness. But that doesn't always happen, people don't always know. We know the criminal justice system is, kind of … you think you're ahead of it but you're not really, right, it can change on a dime. So, we have seen times if … that they can't find anybody for the dates, for the court dates, so they're like … Legal Aid will come back and say we don't have anyone to assign on this date. And then we're going back saying can you please go and ask for another date? And then do you know what I mean? Like, we don't want to re-victimise anybody, we don't want to cause harm. If you think of it from the client's perspective, they're going through enough, it's another court date changed … So that can be challenging.[326]

The fact that applications are occurring which trigger the right to ILR late in the day obviously influences the way in which ILR is provided, not least to the extent as to whether it could properly be considered to be trauma-informed, and places considerable stress on the mechanics of the administrative process and the lawyers involved, in order to facilitate the representation of complainers. Whilst in Scotland, as we explore elsewhere, the legislative provisions governing the area are more exacting in terms of the timeframe within which section 275 applications must be intimated, nonetheless there are valuable lessons to be learnt in terms of design of service delivery from the context of the other jurisdictions studied, as there will inevitably be instances whereby ILR requires to be facilitated for a complainer, at short notice, and/or after the empanelment of a jury.

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[324] Participant 22.
[325] Participant 22.
[326] Participant 7.

Indeed, the prospect of having to arrange ILR in the context of late applications or a decision to revisit the terms of a section 275 application by a trial judge (and rights of appeal for complainers in the same) requires careful thought. The Senators of the College of Justice have flagged the lack of judicial discretion as to whether ILR was required following an application made once a trial has begun as being a matter of considerable concern to them as in their words, delay in this context would cause "extraordinary and unacceptable level of distress to the complainer for what may be of no real advantage. It would be the very antithesis of a trauma-informed approach."[327]

These concerns were shared by one participant that we spoke to, who stated:

> Separately, I've referenced 275(9) but there's also the concern that there's no power for there to be judicial discretion if an application is made in the course of a trial … And I think the biggest concern is the implications on the complainer too. Because if they're in the midst of giving evidence, is it the best opportunity for them to have to stop? Then face the stress of appointing a solicitor and having that discussion. And that's where there has to be further consideration, I think.[328]

This participant pointed out that the Crown's common law duty to take a complainer's views on an application and present them to the court would remain in such circumstances.[329] Another participant agreed that there should be judicial discretion for late applications as ILR may not always be required in such cases.[330] Other participants, however, argued against the restriction of ILR in this way, or did not perceive that there were insurmountable issues in arranging representation in this context.[331] One participant noted:

> I don't think from a policy point of view … that you can deprive a complainer of their right to ILR based on the timing of the application … It runs the risk … of the defence ensuring that [section] 275 applications aren't therefore made until the trial commences.[332]

They further suggested that a potential solution lay in the model of delivery selected and seeking to ensuring there were lawyers available to act:

> [If] there is an identified cadre or an individual organisation, or, you know, embedded within an organisation to which the court can instruct someone to come from to provide advice there and then, that might provide a slightly more achievable solution … I just think that you might run into difficulties if you're

[327] Supreme Courts of Scotland – Senators of the College of Justice Consultation Response to the Victims, Witnesses, and Justice Reform (Scotland) Bill.
[328] Participant 34.
[329] Participant 34. On this duty, see section 1.1.4.
[330] Participant 41.
[331] Participants 38 and 40.
[332] Participant 40.

> relying on a defence agent to pick up and say, well, yeah, I'm going to, I'm going to pick up an ILR [section] 275 application mid-trial.

Another participant suggested that whilst the issue would raise logistical issues, a potential solution lay in the use of technology:

> It's definitely going to be a bump in the road if that arises because I can't imagine there's any tolerance for funding representation to be on standby during the trial. I don't think we've got the resources. Sorry, by we, I mean the Faculty of Advocates, never mind the Scottish Government, to do that.
>
> So, if you're then trying to call somebody else in. I think it would be reasonably straightforward for the senior judiciary to issue guidance that, if, for example, I have been involved at an earlier stage in representing a complainer and there is the need for it, that if I'm engaged in a trial, I can be excused from that for 30 minutes for a video call and that could deal with the question. So, I think we could find a way of making that work. And so, with sensible accommodation from them to release the people who are tied up somewhere else, just for the sake of a video call, that would make sense. I mean, if I physically had to go to wherever the trial is, that sort of thing's going to be a problem, that will put a trial down for a day or so. And that's not going to be welcome.[333]

The issue is certainly one that is delicately balanced, and one can appreciate the conflicting tension in this area between seeking to avoid disruption to proceedings, which may be traumatic for witnesses, whilst also ensuring that said witnesses are not precluded from exercising their right to legal advice and representation merely because an application has been made late. It appears that the experience of Ireland shows that, with adequate financial provision and resourcing, ILR systems can deal with late applications although obviously there are drawbacks in relation to how advice and representation is provided in that context, as the data shows. It would appear to be antithetical to the aims of the Bill to preclude witnesses from obtaining legal representation merely because to do so would cause logistical problems, especially when those problems do not seem to be insurmountable.

Further, depending on the model of provision of ILR delivery, it is not implausible that lawyers could be available and ready to act on extremely short notice in appropriate cases where applications are made late, although again this is a matter of resources. In a system, for example, where there is adequate provision of salaried solicitors and/or solicitor advocates performing the role of ILR then delay should be minimal. Equally a system whereby solicitors are appointed to a rota system or similar to cover relevant courts would again seem to mitigate against some of the issues with potential delay. However, it does need to be acknowledged that if a system of ILR is set up specifically to deal with late applications that involves the provision of salaried solicitors or a rota system, naturally this may cut against the choice of complainers to instruct their own

[333] Participant 38.

legal representative. We acknowledge in chapter 8 that the agency that comes through choice of representation is an important factor generally in any scheme of ILR. The problem of course is that in this specific context, once a trial has begun, the impact of delay on all concerned is considerable and it seems neither feasible nor fair to expect a trial to be adjourned for a potentially prolonged period of time whilst the solicitor and counsel of choice of the complainer become available to consult and appear. As has been outlined above, the data we obtained from interviews indicates that complainers generally are content with representation provided from the established ILR schemes. We also heard some constructive proposals about the use of technology that may assist matters at least in so far as counsel is concerned. These matters should be explored further with stakeholders.

In the circumstances, we conclude ultimately that the reality of matters is that a complainer's choice of representation in an ongoing trial may need to be somewhat curtailed. Should they wish to instruct their own legal representative and not opt for the representation provided by the ILR scheme during an ongoing trial, this is a matter that will require to be canvassed before the presiding judge, who we suggest will be well placed to determine whether an adjournment should or should not be provided for these purposes in light of information about the likely delay, the specific section 275 application in question, any submissions previously provided in respect of same, and the views of other parties.

5.5.4 Rights of appeal

The final matter to be considered in this chapter, which is also relevant to the matter of potential delay in proceedings, relates to the exercise of rights of appeal by complainers in respect of section 275 decisions. The Bill envisages that complainers, or to adopt the unusual wording of the Bill, "their legal representatives", will be able to exercise a right of appeal in respect of decisions in relation to section 275, in accordance with section 74 of the Criminal Procedure (Scotland) Act 1995, which specifies certain procedure in respect of the granting of leave for preliminary matters generally in solemn cases. Participants generally suggested that the provision struck the right balance.[334] There was limited assistance that could be drawn from the international jurisdictions we considered in respect of the right of appeal. We were told, however, in respect of one jurisdiction (NSW) that appeals were rare in respect of subpoena decisions,[335] although as we have noted much of this will depend on the substantive law at play in the jurisdiction in question.

One participant in the Scottish context stated that one benefit of involving independent specialist pleaders was that 'militancy' in the exercise of rights of appeal could be avoided and "that if there's an independence of mind of people who can say, there isn't

[334] See e.g. participants 38 and 40.
[335] Participant 14.

really a basis for an appeal here, then that should remove just a reactionary appeal with all the complications that has attached to it".[336]

It is worth noting, finally, what the Bill does not do in the context of appeal rights for complainers. Keane and Convery argue that there should be statutory provision to enable complainers to seek leave to appeal a section 275 application that is made after the empanelment of a jury. However, no provision to accommodate such appeals has been made to date, which is especially concerning in view of the disparity that exists in terms of rights of appeal available in summary cases.[337]

5.6 Chapter summary

This chapter has outlined the common issues that arise in respect of ILR provision in court proceedings. It has considered the form that ILR submissions can take, and suggested that written submission may be appropriate in some instances. It has also examined the various factors that bear on the rights of audience required for lawyers in various jurisdictions who perform the role which include the complexity of matters, the status of the legal profession and cultural factors. It has found that the advantage of involving a specialist independent pleader in a system of ILR was the added expertise and ability that such a lawyer brought to the service. The involvement of such individuals, however, comes at both a logistical and financial cost. In Scotland, because of the rules on who may appear in the High Court of Justiciary, any service of ILR provision will require the instruction of advocates or solicitor advocates (although some change may be brought about by the creation of the specialist sexual offences court in respect of certain cases).

The chapter has revealed that there is perhaps less of a concern about the capacity of advocates and solicitor advocates to perform the work required than there once was. There is scope too for policy makers in Scotland to adopt a model which involves salaried solicitor advocates, but care must be taken to protect the complainer's agency and choice of representation as far as is possible. Further, the independence that arises from the use of specialist independent pleaders is a valuable attribute generally. The danger of coaching witnesses in providing ILR was also considered. In light of practice in the international jurisdictions and the applicable rules in Scotland, it was concluded that lawyers providing ILR will need to do their job carefully, but that there is nothing to suggest that practice in this area will be especially problematic.

Finally, the chapter considered the difficult issue of ILR in the context of ongoing trials and the rights of appeal for complainers, noting that both issues reveal a tension between not wanting to cause further delay in criminal proceedings and ensuring that complainers may access their right to legal advice and representation effectively.

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[336] Participant 38.
[337] See Keane and Convery (n 21) 31 and 33.

Chapter 6: Relationships with Criminal Justice Stakeholders

Key points

- Facilitating effective communication between criminal justice stakeholders in respect of the design and operation of systems of ILR is a matter of vital importance, which can lead to the early identification of potential problems and improvements in the performance of such systems.

- The involvement of service users, i.e. victim/survivors of sexual violence, in these processes of design and oversight can provide policy makers with valuable insight.

- The proposals in the Bill relating to the disclosure of evidence as currently drafted risk overcomplicating matters, creating delays and creating unnecessary work for the Crown. A simpler system would be for the ILR provider to apply to the court for a ruling on disclosure – in those cases that require it – and intimate that application to the Crown and defence within a specified period of time such as seven days of receipt of the section 275 application or later on cause shown. The Crown and defence should have the opportunity to object to disclosure within a specified time period. If this occurs, the matter will require to be determined by the court at the administrative calling of the case with consideration of the substantive section 275 application continued.

- There is a danger of over-crowding of the space if different agencies are all involved with the complainer, which has the potential to confuse and further traumatise. There is a need to clarify the roles of the different parties involved in interacting with complainers and to ensure that all parties (and complainers) understand this delineation.

6.1 Introduction

This chapter examines the relationship between ILR providers and other key criminal justice stakeholders. Three issues are considered: the importance of good channels of communication between all stakeholders; facilitating effective disclosure of evidence; and the importance of delineating different roles to avoid confusion or overlapping of responsibilities.

6.2 Relationship building and collaboration

6.2.1 The general importance of collaborative working

There are various different stakeholders in the criminal justice system that might interact with an ILR service provider, including the Government (assuming that this is the funder of the service), the prosecution, the defence, the judiciary and other victim-related service providers. Research participants were asked about their interactions and relationships with all of these stakeholders. Interviewees mostly had little to say

about their relationships with the judiciary and the defence, other than to note that they were generally good and that judges, in particular, were supportive of ILR, seeing it as beneficial to complainers and the court. Interviewees also commented positively on their relationships with Government, the prosecution and with other victim-related service providers, but stressed that in relation to these key stakeholders in particular, regular communication during both the design and the implementation phase is key to an effective ILR service. This is consistent with existing research, where the importance of communication and collaboration between different stakeholders is a common theme.[338]

Interviewees noted the benefits – once the service is up and running – of having regular meetings between the ILR providers, the prosecution and the civil service. One commented that:

> We have a community of practice that meets bimonthly as well, where we discuss some of these issues but just also broader issues with the [ILR service]. Which I think has been very helpful because it's that sort of information-sharing and you have … I guess you can identify trends and issues that are cropping up for clients across the board, which I think is really helpful having that.[339]

Whilst these meetings obviously cannot entail the discussion of client confidential materials, their value was nonetheless emphasised to us by participants. Another participant spoke of the benefits of regular inter-agency meetings for monitoring and evaluation purposes:

> We meet quarterly … we make sure that our objectives are being met, that, you know, the feedback from service users is positive, that they're increasing their confidence in the criminal justice system, that we're meeting the engagement rate [targets], monitoring the live cases, the hours per case. So, to just meet all these objectives.[340]

Some interviewees pointed to the particular importance of complainers being involved in the design and monitoring process, such as this policymaker, who spoke in the context of establishing an ILR service:

> We had a couple of victim-survivor representatives who were in the meetings they'd set up for service design and were consulted throughout the process. Which I think is an important part of it because they could bring that lived experience to the design of the service.[341]

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[338] See e.g. A Wegrzyn and others, "Rape crisis victim advocacy: a systematic review" (2023) 24 Trauma, Violence, & Abuse 1966 at 1979; E Daly and O Smith, Scoping Review: Legal & Non-Legal Advocacy for Rape Complainants in Adversarial Jurisdictions (2020) 32.
[339] Participant 24.
[340] Participant 18.
[341] Participant 28.

As a result of this involvement, changes were made to service design in respect of the referral pathway, an issue that the interviewee thought may have been missed if complainers themselves had not been involved in the design process. Once a model of ILR delivery has been selected, it is evident to us from the data that there is clear and obvious value in policy makers facilitating effective communication between criminal justice stakeholders at both the design and the post implementation stage in Scotland.

As an indication of the potential dangers that can result from the failure to ensure that representatives of all parties communicate and understand the logistical processes relating to ILR, it is apt to note again the position that developed in Scotland following the introduction of ILR for complainers in respect of opposition to sensitive record applications that we referred to earlier in the report.[342]

In this context, the change in procedure was implemented by judicial decision and not legislation, therefore giving policy makers and criminal justice stakeholders far less capacity to plan. It is still hard to come to any other conclusion, however, that the situation which pertained thereafter was distinctly sub-optimal, and that a lack of communication between relevant parties seems to be a feature of that position. Whilst there is limited empirical data available, one participant noted to us in relation to take up of the service:

> The numbers are very small, there's not a lot of take-up. I get the impression that there's not a high amount of awareness … I think more specialist agencies perhaps have their referral routes.[343]

Furthermore, in the Sheriff Appeal Court judgment of *Corrins v BM,*[344] the court was critical of the lack of a clear process of intimation of applications at summary level, and the failure of various parties, including the Crown and the sheriff at first instance, to facilitate a complainer's right to ILR. The court felt itself compelled give direction to SCTS and the Crown about what it deemed to be the appropriate way to handle matters.

In the context of ILR at section 275 hearings, whilst obviously there is clear legislative assignation of the referral pathway as mentioned in chapter 4, the data we have gathered clearly suggests the value in relevant stakeholders communicating in respect of the design and the ongoing running of the service.

6.2.2 The key relationship between the ILR provider and the prosecution

The interview data makes it clear that the relationship between the prosecution and the ILR provider is the crucial relationship that contributes to the smooth running of an ILR service. One research participant commented, for example, that "the best thing that

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[342] Following the decision of the Court of Session in *WF v Scottish Ministers* [2016] CSOH 27, 2016 SLT 359. See further section 4.3.1.
[343] Participant 36.
[344] *Corrins v BM* [2023] SAC (Crim) 12, 2024 SC (SAC) 23.

protects a complainant is victim support and good communication with [the prosecutor]".[345] Another stated that "relationship management between people running the [ILR service] and the [prosecution service] is really important".[346]

The relationship between the two parties is not entirely straightforward. The introduction of complainer representation into the criminal trial has sometimes been seen as controversial on the basis that the trial is a matter for the State and the accused.[347] The role of the State is to represent the interest of the public – including the complainer – in securing the conviction of offenders. In terms of ILR for sexual history and private record evidence, however, one of the main justifications is that the complainer has a specific privacy interest in terms of the admission of the evidence that – although it will often coincide – is distinct from the interests of the State.[348] In Scotland, it will be recalled that in proposing ILR for complainers in sexual offence cases, the Dorrian Review acknowledged the tension that exists between the role of the Crown as public prosecutor and advancing the interests of the complainer.[349] One interviewee spoke of maintaining a "healthy tension" between victim representatives and the prosecuting authority: "if there wasn't that slight tension, we wouldn't be doing our job".[350]

Because of this distinct interest, interviewees often stressed the importance of maintaining independence from the prosecution, while at the same time developing a good working relationship with them. One commented that "it's important to really make sure that we're not stepping on anyone's toes while still, you know, providing good advocacy".[351] Another noted that:

> I think [the prosecution] need to be on board with victims having appropriate standing or else you're going to just create a triangle of conflict. We've had examples where there has been, kind of … conflict's probably too strong a word but there has been things done on the victim's behalf that the prosecuting authority didn't necessarily agree with or found challenging. And that's part of the story perhaps of providing victims with a participatory right in the process … But I think starting from the very beginning, getting the prosecuting agencies on board with the why and having a sense that they'd be a supporter rather than a detractor is probably pretty critical.[352]

This was a point that was also made by a prosecutor:[353]

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[345] Participant 21.
[346] Participant 26.
[347] T Kirchengast, "Victim lawyers, victim advocates, and the adversarial criminal trial" (2013) 16 New Criminal Law Review 568 at 568.
[348] See e.g. T Kirchengast (n 127) 70. This was also an issue raised in the Dorrian Review, para 4.36.
[349] Dorrian Review, paras 4.38-4.39.
[350] Participant 17.
[351] Participant 26.
[352] Participant 29.
[353] Participant 20.

> Obviously, [ILR providers] are a representative for the victim and, you know, should put forward any points that the victim might have. But where it becomes very confrontational, I don't think that's helpful … I think it is a bit of a danger, that kind of role has to be clearly defined.

ILR providers noted that this was sometimes a difficult balance to maintain. One interviewee admitted that "we've crossed paths [with the prosecution] many a time, simply because we were pushing the victim perspective from the start".[354] Another commented that:

> You really do need your prosecuting agency on side and understanding why [we provide the ILR service]. Because the interest of a victim and what they might want won't necessarily line up with the interests for the state's prosecution of a charge. And that's … a fine line to tread around our role.[355]

A similar comment was made by another research participant, who stated that:

> It's a constant balance and sometimes that balance might hit one direction and maybe go too far, maybe we get a bit too cosy with the [prosecution]. I think just being careful to manage that relationship and make sure that we don't become overly-cosy with either any of our criminal justice partners because our priority will always be the victim.[356]

6.3 Disclosure of evidence

With our earlier comments about the value of effective communication between stakeholders in the effective design of systems of ILR in mind, we turn to examine the proposals in Scotland that relate to the disclosure of evidence. This issue highlights the need to think carefully and manage a (complex) series of relationships between the ILR lawyer and various parties. The Bill currently envisages that the Crown will apply to the court for authority to disclose evidence to the ILR relating to the section 275 application. This process envisages that the ILR lawyer, as well as the defence and the Crown, will thereafter be able to make submissions about the potential disclosure of evidence (should they so wish) prior to the court making a ruling on the application.

The provision has clearly been drafted with the understandable rationale of ensuring that there is a clear legal basis for the exchange of information, and is mindful of the fact that there may be complicated issues relating to the exchange of information in any case that might require judicial oversight. That said, the participants we spoke to raised concerns about the Bill as currently drafted. One participant suggested that the process

[354] Participant 16.
[355] Participant 28.
[356] Participant 17.

envisaged by the Bill would inevitably cause delay in the scheduling of business, and struggled to understand why it was necessary:

> Our principal concern is that a process has been created in the Bill that's called a disclosure process. And we feel it is convoluted, unintentionally, and will cause churn and delay and will be the complete opposite of the intentions of ILR … And that is because a disclosure process has been introduced whereby the Crown has to identify documentation, then make an application to the court for a judge to decide whether it should be disclosed to the complainer's ILR. Then obviously they, understandably, will need time to review that. And then the application itself will have to be heard.[357]

It was stated that this would lead to a situation whereby consideration of section 275 applications would require to be continued to an additional hearing as the issue regarding disclosure would need to be determined at the preliminary hearing (or first or intermediate diet as the case may be). In this respect the issue we have previously discussed regarding the impact of further delay on vulnerable complainers should be borne in mind.[358] These concerns relating to the timetabling of business were also echoed by the Senators of the College of Justice in their response to the Scottish Government's pre-legislative consultation.[359]

Another participant noted that the proposal seemed paternalistic, in that it placed control in the hands of the Crown, with no potential for the ILR provider to request information. They stated that:

> … it tends to then leave it again on the Crown as being almost paternalistically, supervising what you can and can't have, and the ILR has no means of requesting additional information or saying that's not exactly what I want.[360]

We were also informed that the proposed system would have resource implications for the Crown and result potentially in a system that only provided incomplete information:

> For the Crown [the proposed system of disclosure] is potentially problematic on two levels. There is the practical side of the Crown having to effectively review the entirety of a case to identify what we think is relevant to an ILR application and then provide it to the ILR so that we would need to be building some ability for that to be resourced within our service in the time frame that's available. We would also, however, not have access to any information that the defence or evidence the defence may have at that stage, and if it's a defence application, they may have defence witnesses or other defence evidence that they believe is

[357] Participant 34.
[358] See section 4.2.4.
[359] Senators of the College of Justice, "Scottish Government Consultation Paper – Improving victims' experiences of the justice system. Response from the Senators of the College of Justice" (2022) 14 (response to Q54).
[360] Participant 40.

> relevant to the 275 application for which the Crown would have no access to at that time, because there's not a duty of disclosure from the defence on so it would potentially be an incomplete … disclosure from us.[361]

These concerns were also raised at Stage 1 consideration of the Bill by COPFS.[362] As we have set out above, it was stressed to us by participants that we spoke to from jurisdictions outside of Scotland that an effective relationship between national prosecutors and those providing ILR was especially important to the efficient running of the service, as were effective relationships between parties generally.

In light of these concerns, we sought to reflect on both the data we had gathered from international participants relating to the disclosure of information, as well as seeking to explore with Scottish criminal justice stakeholders what evidence they thought would actually need to be disclosed with section 275 applications. In respect of international practice, given that the vast majority of the jurisdictions we considered related to ILR in systems of recovery for sensitive records, the issues relating to wider disclosure tended not to arise. This is because in these systems it is the records themselves that are the subject of a ruling on admissibility and the party's consideration tends to be limited to the evidence that is being sought.

Ireland, which as outlined earlier has a closer comparable system of representation, given that it provides ILR in respect of the admission of sexual history evidence, also provides somewhat limited insight. This is because there is no requirement to make an application which states the basis for the admittance of such evidence in writing and because, as explained in chapter 5, these matters are being determined largely once the trial has begun. It appeared that discussion and exchange of information in relation to these matters largely occurred on a counsel-to-counsel basis through a culture of practice and not on a statutory basis. As one participant told us, referring to the basis for the exchange of information between the ILR and other parties:

> I'd say it's a culture of practice probably. There's no … legal basis in our criminal justice system. There's a legal basis for disclosure to the defence. There's what's known as a book of evidence that's served on the accused before the case is sent forward for trial in the trial or indictment scenario. To share with the victim? No, there's no legal basis for that.[363]

Another participant remarked that the prosecution would share information with the ILR in so far as that was possible, but again the manner in which the system operated made that difficult:

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[361] Participant 40.
[362] See Criminal Justice Committee, Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report (SP Paper 560, 2024) 141.
[363] Participant 11.

> So, if I knew what the application … the detail of the section 3 application, [if] I knew where it was coming from because it was in the papers, like the case papers, then I would provide the Legal Aid Board with that, so that they have an idea of what they need to advise their client on.[364]

Despite these issues, as previously mentioned, one participant spoke nonetheless to the effective operation of the scheme, commenting that:

> So, for instance, supposing a rape case is starting at 11 o'clock tomorrow morning which I'm involved in, let's say, as a prosecutor. I will already have been approached by the junior counsel, [asking] was I there for [the case for which ILR is being provided]? I, insofar as I know anything, will have filled them in on any relevant details. They will then appear tomorrow morning just in answer to the court do they appear in such and such a case for the complainant-victim? And then there will be some indication on the basis that everybody at that stage knows what is being sought, the limits of what's being sought, the reason why and stuff like that. If it's one that can be comfortably done at that stage, the judge might indicate that he … the judge will rule at such and such a time and hear the parties.[365]

Whereas the operation of any system of ILR, as noted in chapter 5, is clearly shaped by the national context within which it operates, the situation as it pertains in Ireland clearly should not be replicated in Scotland, as policy makers have correctly identified. The Bill provides an opportunity to design a system that appropriately regulates the relationship between key stakeholders and provides legal certainty. We note, however, that complainers would be entitled to seek to obtain information via commission and diligence procedure regardless of the statutory position. When we asked Scottish participants to consider what information they thought needed to be shared in respect of a section 275 application, none identified any obvious matters that would not in the usual run of things be mentioned in the application itself. As one remarked:

> Other documents. I suppose I can't immediately think of common other types of documents which would be relevant to [section] 275 applications is the truth. Maybe if … let's imagine it's forensic reports to do with the presence of biological material here or there. That would have been obvious even without the documents from the tenor of the [section] 275 application … So, I don't feel any sense of dread about that. Again, I would trust the solicitors and the counsel and solicitor advocates involved. And I don't foresee it being anything beyond the [section] 275 application and the statement in the ordinary course of events. And maybe the charges on the indictment. But again, it's hard to see why the complainer couldn't see the charges that relate to him or her on the indictment anyway.[366]

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[364] Participant 13.
[365] Participant 9.
[366] Participant 38.

This view was reflected by another Scottish stakeholder:

> Often when you read a properly framed [section] 275 application, you may not need any additional disclosure because everything is within the [section] 275 application.[367]

Finally, another participant noted:

> I personally struggle with the extent to which disclosure is needed. Because if we take a step back and if we don't have ILR, we currently have a process whereby, after *RR, Petitioner*,[368] the Crown has to consult with the complainer. What are the Crown disclosing to the complainer to allow them to represent the complainer's views?[369]

We canvassed views on a potential solution to the issue of disclosure, in view of practice elsewhere, with participants suggesting that the process should be simplified so that the onus is placed on the ILR provider to request any such information additional to the section 275 that they thought was necessary, in order to act. One participant stated that:

> Maybe there's a process by which those who are to represent the complainer can ask for more material … You know, so you've got an assumption that they will get [the section] 275 application [and] all of the statements of the complainer. And if there is a need for more documentation, they can make perhaps a brief, written application to the court, which can be circulated and either go through without opposition or give rise to a hearing.[370]

Another participant agreed:

> A more structured … way of doing it is to provide the ILR with the provision to apply for the disclosure that they think they require.[371]

Having considered the matter, it appears to us that the disclosure provisions in the Bill do need reform. The data we collected from elsewhere make clear the importance of an effective relationship between the prosecutor, the provider of ILR and all other parties. Research has shown that the quality of drafting of section 275 applications has improved in recent years.[372] Whilst obviously there will be individual instances whereby applications are not drafted to a high standard, as indeed will there be occasions when

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[367] Participant 40.
[368] *RR v HM Advocate* [2021] HCJAC 21, 2021 JC 167 (where it is reported as *RR, Petitioner*). See further section 1.1.4.
[369] Participant 34.
[370] Participant 38.
[371] Participant 40.
[372] See Cowan, Keane and Munro (n 5) 11, 16, 70-71, 81 and 139.

the ILR feels like additional disclosure is required in order to perform their role, these instances should be, we think, relatively uncommon. Therefore, a revised system of disclosure should be considered which reflects this position and does not place unnecessary extra pressure on the Crown or the courts in respect of the scheduling of business.

Whilst the precise terms of the revised disclosure procedure will require thought, it strikes us that a system whereby the provider of ILR is asked to state what it is they require in writing to the court, and to intimate that application to the Crown and defence, is sensible. If there is no objection, the matter should be capable of being disposed of, on the papers, by a single judge who can then issue a relevant interlocuter specifying the disclosure to be made. It would seem to us that the current provisions in the Bill stating the threshold for disclosure should be replicated i.e. judicial discretion to refuse or order disclosure, with any conditions the court deems appropriate "when it is in the interests of justice" to do so. Discussions will need to occur with stakeholders as to what is feasible in this respect, but we tentatively suggest that the independent legal representative acting for the complainer should be required to advance this application within seven days of receipt of the section 275 application or another specified period. Any application later than that should be permitted only on cause shown.

As one participant noted:

> I would anticipate [that in] a majority of cases, if not all of the cases, there will be no surprises in terms of what the ILR would wish to have disclosure of to fully examine. So, it could be a paper exercise in a lot of cases, because it is simply what is within the [section] 275 application.[373]

The Crown and defence should be required to intimate any objections to disclosure within seven days of receipt of the application (or another specified period), or later on cause shown. The court should, absent any opposition, deal with the matter administratively in a similar fashion as to how it deals with vulnerable witness applications. Of course, we acknowledge that, even under a revised system, there may be instances whereby the issue of disclosure, if contested, will lead to delay, because it seems in these instances, the preliminary hearing or other administrative diet will require to be continued post the ruling on disclosure to facilitate consideration of the substantive section 275 application (in light of the complainer's views). In this regard, as we have mentioned, the number of cases whereby disclosure seems necessary strikes us as small and hearings will only be required where the request is opposed. The requests if uncontentious could be dealt with in much the same way as vulnerable witness applications are. That said, some additional resourcing and logistical costs are unavoidable in the context of seeking to provide ILR. The judiciary and the Crown should be consulted about the proposal for disclosure and ongoing evaluation is required.

[373] Participant 40.

The final matter that is relevant in the Scottish context in this respect relates to the regulation of the use of evidence that is disclosed to the ILR lawyer. As was flagged by Scottish stakeholders,[374] the legislative regime that covers the use of Crown disclosure applies only to the defence. For good reason, the use of such evidence is tightly regulated by law and professional guidance.[375]

Given that Crown disclosure contains highly sensitive information, we propose that the relevant rules on disclosure are amended, so that they extend to those who act for complainers in this context. As one participant noted:

> The requirement to return the disclosure, the confidential nature of the disclosure, all of those I think would have to be mirrored for ILR to ensure that there wasn't a gap in terms of the duties and obligations of a solicitor when receiving disclosure from the Crown.[376]

6.4 Clarity of roles

A further theme to emerge from the interviews was the need to clarify the roles of the different parties involved in interacting with complainers and to ensure that all parties (and complainers) understood this delineation. Research participants spoke of the danger of over-crowding of the space if different agencies are all involved with the complainer.[377] This has the potential to confuse and further traumatise complainers, as several of our interviewees noted:[378]

> I just think we need to be maybe careful about introducing a proliferation of different people into the victim's life. You know, because each person, I guess they have to tell their story, what happened and where they're at.[379]

> I think a lot of the people that we encounter deal with … mental health issues and more generally have chaotic lives. And they have no idea who's phoning them sometimes, do you know, and they could speak to us five times and they go, where are you from again? It doesn't help that there's … various support organisations in place … So, people get us confused quite a lot.[380]

> [Complainers] don't want to go to four different shops to have … their needs met, they want it in one place. And quite rightly … especially given the subject matter of what we're dealing with … I mean, it would be, I imagine, such a daunting experience for somebody anyway, without then getting multiple communication

[374] See e.g. participants 38 and 40.
[375] See e.g. s.162 of the Criminal Justice and Licensing (Scotland) Act 2010 and article 11 of the Law Society of Scotland's Code of Conduct for Criminal Work.
[376] Participant 40.
[377] This was also an issue raised in the Dorrian Review, paras 4.17-4.18.
[378] On this issue, see also chapter 7 on trauma-informed practice.
[379] Participant 20.
[380] Participant 17.

> from multiple different people, you know, it could be quite overwhelming. And you can see the risk of disjointedness as well, the more people who are involved.[381]

It was also seen as important to make sure that all the parties involved in interacting with the complainer understood the role of the ILR provider. This was not always the case, especially in those jurisdictions where ILR provision was at a pilot stage:

> I think one thing that we need to work on is doing more information sharing with the [prosecution] about the service and just ensuring that we're receiving all the referrals that we need to be. I've, kind of, found that when I'm speaking one on one with [a prosecution] solicitor, sometimes they're not really aware of the extent of our representation and they assume that we speak to [the complainant] and then pass them back to the [prosecution]. Where, you know, we actually give them representation right up, including our court hearings. So, I think that's one thing we've realised we need to maybe work on.[382]

In Northern Ireland (in the context of ILA provision), this possible confusion was addressed by developing "guidance manuals [and] a memorandum of understanding basically of the roles and responsibilities of each stakeholder and partner in the system".[383]

A practical issue that arises in this context of the clarity of roles in Scotland relates to the Crown's common law legal obligation to take a complainer's views on a section 275 application following *RR*.[384] Clearly post the introduction of ILR, assuming that a complainer instructs an ILR lawyer, then the role of the Crown is no longer necessary. However, one cannot assume that every complainer will want to instruct an ILR and if that occurs, the Crown's common law duty remains. Therefore again, effective communication between the relevant parties involved is key. As one participant noted:

> For us we have a concern that we would be unnecessarily recontacting complainers. And so we would limit our recontact cases where we haven't heard and that may be, they say "oh no, I have instructed", but in cases I haven't, we could then explore with them what requires to be explored [in terms of our common law duty] so that it was our sort of first area of where we see there being room for a redesign or a better development of the of the system to put a duty on ILR to intimate their instruction and obviously intimate their withdrawal as well if they were no longer acting.[385]

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[381] Participant 35.
[382] Participant 25.
[383] Participant 18.
[384] *RR v HM Advocate* [2021] HCJAC 21, 2021 JC 167 (where it is reported as *RR, Petitioner*). See further section 1.1.4.
[385] Participant 40.

A stakeholder also raised the fact that the provisions as drafted contained no requirement for the ILR to indicate to the court itself that they were acting.[386]

6.5 Chapter summary

Several themes can be drawn from the research. First, collaboration between all stakeholders was seen as key, both in the design and implementation of ILR. The importance of involving complainers in service design was stressed.

Secondly, ILR providers spoke of the delicate balance that needs to be maintained between providing independent advice and representation, while also maintaining good working relationships with prosecutors.

Thirdly, research participants suggested that the proposals in the Bill relating to the disclosure of evidence as currently drafted risk overcomplicating matters, creating delays and creating unnecessary work for the Crown. A simpler system would be for the ILR provider to apply to the court for disclosure – in those cases that require it – and intimate that application to the Crown and defence. This application should be made within seven days of receipt of the section 275 application (or another specified period) or later on cause shown. The Crown and the defence would be required to state any objection to disclosure also within a specified time period allowing the court to deal with the matter administratively if no such objection is received.

Interviewees raised other issues with the Bill as presently drafted. First, the legislative regime that covers the use of Crown disclosure applies only to the defence. Given that Crown disclosure in a sexual offences case contains highly sensitive information, there is a need that the relevant rules on disclosure are amended, so that they extend to those who provide ILR for complainers. Second, there is presently no requirement for the complainer's legal representative to indicate to the court itself that they are acting.

Finally, there is a danger of over-crowding of the space if different agencies are all involved with the complainer, which has the potential to confuse and further traumatise. There is a need to clarify the roles of the different parties involved in interacting with complainers and to ensure that all parties (and complainers) understand this delineation.

[386] Participant 34.

Chapter 7: Trauma-Informed Practice

Key points

- Trauma-informed practice is vital to meet the needs of complainers in cases of sexual violence and to minimise the risk of re-traumatisation.

- The key components of trauma-informed practice in the context of ILR that emerged from the research conducted for this report were:

    - Clear timelines that minimise delay so that there is adequate time to build the trust and confidence of complainers.
    - Ensuring that information is conveyed in ways that are alive to the impacts of trauma and that communication styles are adjusted accordingly.
    - Bespoke training and ongoing reflective practice drawing upon multidisciplinary expertise.
    - Managing expectations about the limitations and extent of the provision of ILR and signposting to other support services if necessary.

- There is a heightened risk of vicarious trauma and burnout for lawyers providing an ILR service. This risk can be lessened through allocating resource and time to peer support, the provision of breaks and reflective supervision.

7.1 Introduction

This chapter addresses trauma-informed practice in the context of ILR provision. Issues related to trauma-informed practice featured heavily in our data collection with most research participants engaged in service delivery noting its value and importance specifically in relation to complainers in sexual violence cases. The chapter briefly summarises the principles of trauma-informed practice before turning to the research findings on what it should look like in relation to the delivery of ILR. This concerns issues such as communication skills and the importance of reflective supervision. The chapter also considers perspectives on how to minimise re-traumatisation of complainers and reduce burnout and/or vicarious trauma of lawyers.

7.2 Summary of principles of trauma-informed practice

In recent years, there has been a considerable increase in knowledge and awareness of trauma-informed approaches both across the UK and internationally. Trauma-informed principles are frequently relied upon to minimise the negative impact of trauma and better support positive mental and physical health. Developments in this area build upon pioneering work that has sought to draw attention to the social and systemic

context of trauma.[387] Trauma-informed practice now spans areas of public service provision including prisons,[388] social care,[389] healthcare[390] and youth justice.[391] In the specific context of sexual violence, trauma-informed approaches have been found to play a key role in minimising re-traumatisation and creating safety.[392] Some studies also stress their importance for better tackling gendered aspects of criminal justice and the specific mental health needs of women.[393]

For the purposes of this chapter, trauma can be defined as follows:

> Trauma results from an event, series of events, or set of circumstances that is experienced by an individual as harmful or life threatening. While unique to the individual, generally the experience of trauma can cause lasting adverse effects, limiting the ability to function and achieve mental, physical, social, emotional or spiritual well-being.[394]

In Scotland, the guiding principles for trauma-informed practice have been set out in relevant guidance to the Victims, Witnesses, and Justice Reform (Scotland) Bill as follows:

1. **Safety:** helping people feel physically and emotionally safe.
2. **Choice:** giving people meaningful choices, and a voice in decisions that affect them.
3. **Collaboration:** asking people what they need, and involving them in considering how their needs can be met.
4. **Trust:** being clear so that people know what to expect and doing what you say you will.
5. **Empowerment:** validating people's feelings and supporting them to take decisions.[395]

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[387] See e.g. J Herman, Trauma and Recovery: The Aftermath of Violence (2015); J Herman, "Recovery from psychological trauma" (1998) 52 Psychiatry and Clinical Neurosciences S98.
[388] KM Auty and others, "What is trauma-informed practice? Towards operationalisation of the concept in two prisons for women" (2023) 23 Criminology & Criminal Justice 716.
[389] J Levenson, "Trauma-informed social work practice" (2017) 62 Social Work 105.
[390] E Emsley and others, "Trauma-informed care in the UK: where are we? A qualitative study of health policies and professional perspectives" (2022) 22 BMC Health Services Research 1164.
[391] A Day and others, "The effectiveness of trauma-informed youth justice: a discussion and review" (2023) 14 Frontiers in Psychology 1157695.
[392] S Covington, "Creating a trauma-informed justice system for women", in SL Brown and L Gelsthorpe (eds), The Wiley Handbook on What Works with Girls and Women in Conflict with the Law: A Critical Review of Theory, Practice, and Policy (2022) 172.
[393] See e.g. M Petrillo, "'It made my mind unwell': trauma-informed approaches to the mental health needs of women in the criminal justice system", in J Winstone (ed), Mental Health, Crime and Criminal Justice (2016) 131.
[394] UK Government, Office for Health Improvement and Disparities, Guidance: Working Definition of Trauma-Informed Practice (2022).
[395] Scottish Government, Victims, Witnesses, and Justice Reform (Scotland) Bill Factsheet (2023).

These principles also underpin a knowledge and skills framework developed by NHS Education for Scotland. In this framework, the aims, and outcomes of a trauma-informed justice system for victims and witnesses are described as follows:

1. **Recognises impact:** understanding that witnesses and members of the workforce have been exposed to trauma and that they can be impacted by this in different ways.
2. **Minimises harm:** the potential for risk of re-traumatisation is understood, identified and avoided where possible.
3. **Supports recovery:** where possible witnesses experience relationships [with justice agencies] that support their recovery, ability to give best evidence and engagement.
4. **Enables effective participation:** practices are adapted to the impact of trauma so that witnesses can participate fully and give the best evidence they can.
5. **Supports workforce resilience:** recognising the impact of working with traumatic material and witnesses affected by trauma and that workers are supported, reducing the impact of vicarious trauma.
6. **Trauma-informed leadership and systems:** that justice leadership and management of organisations and systems support the first five aims.[396]

NHS Education for Scotland describe "being trauma-informed" as:

> The ability to recognise when someone may be affected by trauma, collaboratively adjusting how we work to take this into account and responding in a way that supports recovery, does no harm and recognises and supports people's resilience.[397]

As a step further, being trauma-informed is underpinned by the following principles:

1. **Realising** how common the experience of trauma and adversity is.
2. **Recognising** the different ways that trauma can affect people.
3. **Responding** by taking account of the ways that people can be affected by trauma to support recovery, and recognise and support **Resilience**.
4. Opportunities to **Resist re-traumatisation** and offer a greater sense of choice and control, empowerment, collaboration and safety with everyone that you have contact with.
5. Recognising the central importance of **Relationships**.[398]

It is noted that while the Scottish guidance is underpinned by five principles (safety, choice, collaboration, trust and empowerment, as described above), some other jurisdictions rely on six. The UK-wide framework, for example, lists cultural

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[396] C Bruce, S Petersen and S Ferguson, Trauma-Informed Justice: A Knowledge and Skills Framework (2023).
[397] NHS Education for Scotland, National Trauma Transformation Programme (last updated 22/08/2024).
[398] Ibid.

consideration as a sixth guiding principle.[399] It is also clear that the principles overlap and might be described in different ways, as explained by one interviewee when asked about the operation of guiding principles in practice:

> So, as we know, this varies. So, for me, the six principles are safety, choice and control, supporting coping, facilitating connections, responding to identity and context, and building strength. So those would be the, sort of, six principles that I would use. And most of them overlap with somewhere else. So, all of them are about safety, all of them are about choices, all of them are about supporting coping. And then there's some specific ones in there about how do we build those connections with other people and then how do we withhold those assumptions and be curious about what it is that's happened to them and what they want?[400]

When discussing trauma-informed practice with interviewees as part of this research, it was clear that the application of the principles involves reflection and thereafter embedding changes to legal practice as a result:

> I mean, trauma-informed has become such a buzzword … a lot of the time, it amounts to, oh, you know, some people have trauma and are sensitive to that … which is nice but it's not trauma-informed. You know, it's like, well, how are you going to change the way you interact with people? How are you going to change what you require of them? How are you going to change what you offer them and the way you offer it? How are you going to change the way you phrase things? And that's all experience.[401]

Trauma-informed lawyering has developed in recent years as a way of better supporting clients, ensuring that legal advice provision is sensitive to their needs and helping lawyers to better understand the impacts of trauma on, for example, matters related to evidence and trial procedure. The importance of developing and applying trauma-informed lawyering skills is well established.[402] This includes, for example, recognising the trauma responses of clients; adjusting to those responses in communication and litigation strategies; practicing non-coercive client-centred lawyering; and being attentive to the risk of re-traumatisation and secondary trauma.[403] The next section discusses the ways in which interviewees consider that a trauma-informed approach might be implemented in practice in the specific context of ILR provision.

7.3 Communication style and legal skills required

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[399] UK Government (n 394).
[400] Participant 33.
[401] Participant 14.
[402] S Katz and D Haldar, "The pedagogy of trauma-informed lawyering" (2016) 22 Clinical Law Review 359. See also Law Society of Scotland, Trauma-informed Lawyer Certification Course.
[403] J Kinghan and others, Designing a Trauma-informed Approach to Clinical Legal Education (2024).

We encountered a variety of delivery approaches across the different models studied, although most combine in-person and remote delivery (by telephone or online) depending on the nature of the case, the needs of the complainer and the geographic location of the complainer and/or relevant court. It seems well established that at least some element of in-person delivery is preferable, where possible, to establish rapport and build the trust and confidence of the complainer.

For example, when considering the necessity of in-person provision one interviewee, based in Australia, noted: "Preferably in person as well, I think it just helps to build a rapport. I've done a few over, kind of, a video call and that's usually at the client's request. But yeah, face to face is better."[404] That said, several interviewees acknowledged that in-person advice and representation can be challenging in more remote geographic areas. In Ireland, an interviewee observed: "We would generally use the victim suites in the courthouse … Obviously, they're in the CCJ, that's great, there's generally no difficulty getting the use of them. But around the country where those facilities aren't available, it can be more difficult."[405]

When asked for a perspective on effective trauma-informed practice, several lawyers discussed the importance of adjusting communication style to meet the needs of the complainer depending on the nature of the case. This includes ensuring that information is conveyed in different ways and being available to explain complex evidential matters:

> We get a lot of calls from victims having received the correspondence saying, what is this? Even though it's all in the letter. But a lot of people, they can't take it in, you know, especially when you're traumatised anyway. And I know for myself, you know, [when] you receive very formal correspondence, sometimes you just want to speak to a human being.[406]

An important part of adjusting communication style to meet the complainer's needs concerns creating choice. For example, when positively describing the skills of a lawyer in the Australian context, one interviewee noted:

> She … meets victims wherever they are at. She's like, I can come to you, you can come here, we can meet at a third location, you know, you can pick the space that you feel most safe in. She'll never call, like blind call, she'll always text or email to organise a call.[407]

A trauma-informed expert also commented in this context:

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[404] Participant 24.
[405] Participant 11.
[406] Participant 20.
[407] Participant 15.

> So, I think it's about choices as much as possible, where can those choices be introduced into the process? I also think it's about being very clear about what the process will look like and what support can be put in place through the process.[408]

The importance of never 'blind' or 'cold' calling clients was also highlighted in the Northern Irish context, where processes are in place to ensure referred complainers are adequately put on notice about the service and can exercise agency in terms of choosing whether to take it up.[409] That said, the other side of ensuring that complainers exercise agency and make choices as appropriate to their circumstances is that they may not feel able to discuss matters relevant to the trial and/or take up the service being offered to them. One interviewee observed that it is often those clients who "fall through the net" who are those who may need the service most:

> They're the ones not answering the phone, they're the ones not responding to emails. The phone calls that we have with them are very short, very concise. They say, thanks very much for the information, that's all I need, no questions. Those are the ones who need the help because maybe they don't understand what's happening and they just can't deal with it at that particular moment in time.[410]

Lawyers may therefore need to experiment with several types of communication (phone, email, in-person) to see which is most appropriate for the complainer. Relatedly, several interviewees also focussed on the need to be client-centred and to have empathy for complainers, which demands a different approach than private practice, and relates to the need to adjust communication style:

> Whereas here, you, sort of, have to be more sympathetic, empathetic and you have to realise that everything you're doing is for them and everything you're doing is for the greater, wider, sort of, circle of victims.[411]

> I think one of the things that struck me starting this role was the importance of empathy, the ability to communicate and adjust your ability to communicate, depending on who you're speaking to.[412]

Alongside empathy, another interviewee described the "special skills" needed to be able to "deliver news sensitively and authoritatively as well".[413] This relates to the principle of safety, where a trauma-informed approach will involve a heightened need to be realistic and honest with complainers about the criminal justice process:

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[408] Participant 33.
[409] Participants 16 and 17.
[410] Participant 17.
[411] Participant 16.
[412] Participant 17.
[413] Participant 20.

> I guess it's being really clear about what the role is there to do and what it can't do and being very clear about what will happen when it gets to a place where the legal professional can't do any more, what that will look like? But I think it's also about being realistic that safety is a process, so you won't ever achieve safety with somebody who's been through trauma but what can the legal professional do to make it more safe for somebody to start to build some of that trust?[414]

A trauma-informed approach should also, as far as possible, explain clearly what the beginning and end point of the lawyer-client relationship will be and who is involved in the process.[415] For example, in Ireland, initial engagement may be between a paralegal and the complainer once the solicitor has instructed counsel:

> So, there's an instructing solicitor but in terms of who would be meeting with the complainant and who would be in court, in practical terms in the vast majority of cases, in Dublin in particular, that would be done by a paralegal.[416]

Clarity around distinct roles at different points, as well as "what the potential outcome is and how you exit"[417] is particularly important in terms of building trust and safety. However, one of the most prevalent issues that arose in relation to this point was the challenge of complainers seeking legal advice and/or representation outside of the confines of the lawyer's role in ILR provision. As one interviewee noted: "what we're seeing is that these women actually need far more support than the discrete assistance of the [ILR service]".[418] As discussed further in the next chapter, ILR services situated in third sector settings have the advantage of relying on other services, such as social work and counselling, to help overcome this issue. One interviewee reflected on the need for holistic trauma-informed service provision in considering possible models in the Scottish context:

> I think for me, it would be things like a trauma-informed service, that's a given. So how would you design a system that is a, sort of, wraparound system for people? How can it integrate into advice and services that they might already be accessing I think is one of the things for me, is that sort of seamless process for people.[419]

A key issue arises in this context, which is highly relevant to the delivery of trauma-informed ILR, in relation to the boundaries of provision. On the one hand, there is the need for the complainer to exercise choice, feel well-informed and confident in their legal representative, matters we have commented in the context of choice of representation in chapter 5. On the other hand, the confines of the role risk undermining principles of trauma-informed practice where clients have expectations

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[414] Participant 33.
[415] Participant 33.
[416] Participant 12.
[417] Participant 33.
[418] Participant 26.
[419] Participant 36.

that are not able to be met by the service. In this respect, managing expectations, setting out clearly the various stages of the criminal justice process and not straying into areas where advice and representation cannot be provided is said to be critically important. This is especially relevant in Scotland given the narrow scope of the right to ILR proposed by the Bill. This is well explained by the following interviewee in the Australian context:

> The client usually has questions about the, kind of, broader criminal proceedings, which we don't … can't always necessarily answer … And we've, kind of, determined that we're not the most appropriate person to answer those questions a lot of the time because we're not party to those proceedings, we don't have all the information to answer in an appropriate way. I mean, I can give procedural advice and I do that sometimes … saying that you'll give evidence and the prosecution, you should contact them to find out more information about that … clients are always anxious to know, like, when things are going to finish and how much longer it's going to take or that kind of thing. So yeah, … I'm careful not to, kind of, give advice about that.[420]

A level of frustration about the limitations of service provision was expressed by several interviewees.[421] One noted, in the Australian context, that only being able to provide representation in relation to sensitive records and not sexual history evidence was challenging and hoped they might be able to "build a more comprehensive service" in future.[422] Another observed that "we don't have legal standing in any other part of the prosecution … there continues to be a lot of noise raised and rightly so in terms of the assistance that victim-survivors need in that process".[423]

Related to the boundaries of the provision of ILR, as discussed elsewhere in this report,[424] there may be other service providers and individuals providing support to the complainer. It is important for lawyers delivering ILR to therefore consider whether they need to facilitate connection to ensure that their legal advice and representation does not operate in a vacuum. As one research participant commented:

> I'd always be looking as well, even from the outset, of who else can you bring into this to support the person? Where's their family, where's their friends, who is a trusted other person that you can get to know and bring into this, that facilitating connection?[425]

[420] Participant 24.
[421] See e.g. participants 24, 25, 16 and 17.
[422] Participant 24.
[423] Participant 22.
[424] See section 6.4.
[425] Participant 33.

As part of this process, as discussed above, determining the availability of different services to complainers and how they work to complement each other's roles is important.[426] This was observed in the Northern Irish context:

> [We] were a little bit unsure, well, what is the difference between an ASSIST NI advocate and a SOLA? Okay, the legal qualification is the main difference. But in terms of practically, what do they do differently? And what if a victim has an ASSIST NI advocate and a SOLA and a prosecution counsel plus PPS plus police? It seems to be it could be overkill, you know. And are everybody's roles defined or is it just a mess?[427]

Regardless of the type of delivery and other support roles involved, there was broad consensus that effective trauma-informed lawyering rests upon building trust between the complainer and the lawyer, which often involves taking time to get to know the complainer and the way in which they might be affected by trauma. As one research participant commented:

> I think to be trauma-informed … to even think about being trauma-informed, you need to be able to build trust with your lawyer and vice versa. So that's why I think it needs to be for a longer amount of time, not just as the need arises.[428]

Having time for clients should underpin the delivery of trauma-informed advice and representation, yet is a key challenge identified by interviewees engaged in service provision. For example, in the Australian context, one interviewee noted that "you've got to build a relationship with them and everything. That's a very short period of time to do that in. Yes, it's been a bit challenging, I'll say that."[429]

In terms of the more general background experience and skills needed to do the job, the most prevalent experience mentioned was criminal law. Regardless of background experience, it was acknowledged that "there's still a whole lot to learn because when you're advising from the victim's side, it's a different approach to the law and there's different types of guidance and there's different legal arguments and issues that come up".[430] The requirement for specialist training over and above experience, as outlined further below, was made clear. As one interviewee put it, "an average criminal defence lawyer sitting in private practice, if they're given one of these cases, if they agree to take it, won't really know what they're doing".[431]

Likewise, in the Australian context, while a background in criminal law was considered beneficial, further training was again said to be required to develop a "victim-centred" approach consistent with trauma-informed practice:

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[426] A point that was also made in the context of relationships with stakeholders: section 6.4.
[427] Participant 20.
[428] Participant 15.
[429] Participant 24.
[430] Participant 8.
[431] Participant 8.

> So, both of [the providers] ended up recruiting lawyers with criminal backgrounds. So then having said that, there's had to be time investing [in the] capability of them, you know, upskilling their lawyers in victim-centred practices where a criminal lawyer normally wouldn't have that kind of background or training necessarily.[432]

It was observed that lawyers may need to consider being "collegiate, rather than confrontational"[433] given the unique space occupied on behalf of a victim in an adversarial system. An Australian lawyer similarly commented that some lawyers had not been suited to the role where they had an overly combative approach.[434] A trauma-informed expert interviewee similarly noted a shift is often required for lawyers in terms of taking a victim-centred approach. This involves having the skill to recognise where "they might miss what the victim's agenda" is, either because they are "pursuing their own agenda", or because assumptions are being made about what the victim's agenda, and relatedly their needs, might be.[435] This point was echoed from the Crown's perspective:

> [Y]ou know, victims are not some amorphous massive thing that all think and feel the same. They're all different … victims think and feel differently on a case-by-case basis. And I think you have to be agile and respond to their actual needs and not throw solutions at them that might be addressing problems they don't have. And it might not be what they want at all.[436]

7.4 Training and supervision

The importance of specific trauma-informed training was repeatedly highlighted by those engaged in the provision of ILR. The provision of training, and having some form of accreditation as well as relevant experience to provide ILR, were perceived to be interrelated in our data collection.[437] Across all models of delivery, lawyers had received some form of training in the effects of trauma and/or discrete issues in relation to taking a trauma-informed lawyering approach. Indeed, several interviewees highlighted the importance of combining knowledge and awareness of trauma responses with practical training on how this might arise in a legal context and what the appropriate approach would be in different scenarios.[438] This involves a multi-disciplinary approach:

> Lawyers in this space need to draw on reflection in counselling and social work. It's not like normal legal supervision where you just look at cases and outcomes,

[432] Participant 28.
[433] Participant 20.
[434] Participant 26.
[435] Participant 33.
[436] Participant 20.
[437] Participant 40.
[438] Participants 31, 33 and 25.

> you also have to look at the process and at yourself and what you're bringing to the space and learning from your own practice.[439]

The data collection shows that trauma-informed training should include different ways of communicating to people with varying needs from diverse backgrounds, especially for example considering the different impacts of sexual violence with respect to culture and faith communities, and on those with different levels of education.[440] This also includes ensuring that training covers shame, and the complex impacts of shame, so that lawyers understand how it might affect a complainer's approach or decisions they make throughout a case.[441]

The importance of reflective practice arose as a key theme in relation to supervision. Reflective practice can "nurture a strong professional commitment to access to justice and ethical action",[442] and has been found to minimise the likelihood of vicarious trauma.[443] As one interviewee highlighted, reflective practice embraces the ability to reconsider actions in hindsight and think about what might be done differently in future:

> So maybe having some kind of feedback loop from the people that they're working with to say how was that, what could have been done differently, what did you need, what was helpful, what wasn't so helpful?[444]

In terms of barriers in relation to the provision of training, as one interviewee commented in the Irish context, it is more difficult to have oversight of independent counsel and, in such circumstances, it was important to make training a prerequisite for appointment to the panel of counsel.[445] Compulsory training for lawyers delivering ILR is also a requirement in Canada, as another interviewee commented in the Canadian context:

> Our minimum is that the lawyers have to participate in a half-day training on trauma-informed practice and specifically on how to apply those principles, to working with survivors. So, we offer that in-house, it's one that we've developed and can facilitate ourselves.[446]

Nonetheless, it appears more challenging to engage in ongoing monitoring and or embed reflective practice in non-salaried models (roster system or private practice) as compared to salaried models, as we explore further in chapter 8. One way of

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[439] Participant 31.
[440] Participant 17.
[441] Participant 33.
[442] M Leering, "Conceptualizing reflective practice for legal professionals" (2014) 23 Journal of Law and Social Policy 83 at 84.
[443] J Fleck and R Francis, Vicarious Trauma in the Legal Profession: A Practical Guide to Trauma, Burnout and Collective Care (2021).
[444] Participant 33.
[445] Participant 10.
[446] Participant 6.

overcoming this is to allocate experienced mentors so that junior lawyers can shadow more senior lawyers, which is a scheme that has been recently scoped in Canada.[447] Another way of mitigating any risk to the quality of the service provision is to have a relatively small pool of lawyers delivering the service:

> So, we've had some issues of reports of concerns. And so, we are trying to organise some added training and then also perhaps some more oversight in the role so that we can make sure that it's the right people doing the work. But we've basically just, kind of thinned out our roster of lawyers doing the work to make sure that it's a good quality of representation as well.[448]

In the context of the amount of training and supervision required, another interviewee commented on the levels of funding needed to ensure that lawyers with a "decent skill level to conduct these matters" and who are also "relatively accomplished advocate[s]".[449] In this respect, the interviewee raised an equality of arms issue given the skill and experience of advocates who might be opposing their submissions in court:

> [A]s you know, our role as an ILR lawyer, coming up against experienced trial advocates in the [prosecution] who they want to win, the defence want to win. And then somewhere in between we're saying, you know, what about the victim? So, you need to be fairly strong-willed and able to go … and that's in the backdrop of pretty confronting information that you're reading.[450]

A final challenge in relation to training is the risk that it is perceived as something to be completed rather than being effectively implemented in practice. Although one interviewee highlighted the importance of standards being "achieved and maintained"[451] with respect to trauma-informed practice, another pointed to the danger of it just becoming another box-ticking exercise.[452] Such an approach would fail to sufficiently embed trauma-informed practice into the culture of organisations.

7.5 Minimising re-traumatisation

There is a higher risk of re-traumatisation for complainers in sexual violence cases where they feel out of control of the process and issues are not properly explained to them.[453] Re-traumatisation also has the potential to adversely impact upon the ability of complainers to provide best evidence at trial,[454] and can increase the risk of complainer

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[447] Participant 1.
[448] Participant 1.
[449] Participant 27.
[450] Participant 27.
[451] Participant 40.
[452] Participant 33.
[453] See e.g. C Sulley and others, "'At least they're workin' on my case?' Victim notification in sexual assault 'cold' cases" (2021) 36 Journal of Interpersonal Violence 4360.
[454] A Cossins, Closing the Justice Gap for Adult and Child Sexual Assault (2020) 533.

withdrawal from the criminal justice process.[455] Many of the interviewees engaged in service delivery were alive to the way in which a trauma-informed approach might help to minimise the risk of re-traumatisation.

As a first step, interviewees noted the importance of recognising vulnerability. Many of the trauma-informed lawyering skills depend on this as a first step in order to appropriately adjust to the needs of the complainer. This involves an awareness of the impacts of sexual violence at both individual and systemic level:

> And I think in this particular case where women are being legally compelled to expose parts of their history or exploration or discussion in court, I think it's the recognition of that vulnerability. And so, I think anything that a legal professional can do to acknowledge that vulnerability and how uncomfortable it must feel and to be constantly asking what do you need to feel more comfortable.[456]

Another interviewee observed that the recognition of vulnerability needs to be throughout the life of the case to ensure that any risk of re-traumatisation is identified and minimised at each stage of the process. Again, the importance of reflective supervision was highlighted in this context:

> We do that also through case supervision, through talking, centralising the client and the work we do, talking about the things … even how they're presenting at appointments, how they're presenting on the phone, talking about the impact of trauma on that.[457]

The importance of clients not feeling out of control and having information available to them was also observed in the context of minimising re-traumatisation. In this respect, one interviewee stressed the need for consistency:

> It's all about the importance of being predictable to the clients, planning things. If you're going to call at four o'clock, you call at four o'clock. If you can't call at four o'clock, you let them know. You know, the consistency of your own behaviour and all of that.[458]

One interviewee highlighted that lawyers providing ILR should ensure they only ever ask for information that is needed.[459] This relates to the need to also minimise the number of times a complainer is asked to tell their story, which can be better managed when lawyers have adequate time to prepare for cases and where referrals are made with sufficient notice.[460] Another highlighted the importance of considering the risk of re-traumatisation when sending written correspondence and commented on the need to

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[455] Iliadis and others (n 164) 272.
[456] Participant 33.
[457] Participant 27.
[458] Participant 27.
[459] Participant 15.
[460] Participant 15.

achieve a balance and to think carefully about drafting: "We definitely want to keep victims posted on what's happening with their case, but you don't want to overwhelm them either." [461]

In some jurisdictions, particularly Ireland and Australia, interviewees discussed the problem of late referrals and/or the delayed sharing of information by the prosecution as a barrier to the effective implementation of trauma-informed practice.[462] As discussed above, it is important to build trust and confidence, which can help to minimise re-traumatisation so that a representative is alive to the issues in the case. This is especially challenging in non-salaried lawyer models:

> Some of them are Friday evening for Monday. So, what happens, then they're scrambling around, trying to get a barrister to do it. It's not fair on the victim. Now, fair enough, when the barrister comes, they'll do as good a job as any but in reality, you can't … the reality of it is, if you have … the shorter time you have with a vulnerable witness, the shorter time you have to build a rapport with them.[463]

Finally, an interviewee observed the importance of understanding that re-traumatisation cannot necessarily be prevented: "It would be naïve of us to assume that we could prevent re-traumatisation because otherwise we would need an overhaul of the whole legal system."[464] The key is to work to minimise trauma as much as possible, while recognising that there are aspects of the trial process that will inevitably be re-traumatising for complainers, and providing, or signposting to, support as appropriate in the circumstances.

7.6 Minimising vicarious trauma

Lawyers working with vulnerable clients tend to disproportionately experience stress and burnout related to vicarious trauma.[465] Frequently listening and responding to details of traumatic events, including often graphic evidential matters, affects all lawyers and, for some, may have harmful or life-changing consequences.[466] It has also been observed that the risk of vicarious trauma for lawyers is heightened by "general characteristics of the legal profession such as the stigma attached to experiencing mental illness, the competitive and adversarial nature of the profession, and the traditional lack of training, self-care and supervision".[467] For interviewees engaged in

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[461] Participant 20.
[462] See also section 4.2.4.
[463] Participant 10.
[464] Participant 33.
[465] See C Denvir and others, Legal Aid and the Future of Access to Justice (2023). This was also an issue raised in the Dorrian Review, para 3.33.
[466] C James, "Towards trauma-informed legal practice: a review" (2020) 27 Psychiatry, Psychology and Law 275.
[467] C Pike and A Rebar, "What would a trauma-informed workplace ideally look like in legal aid? A qualitative perspective from lawyers" (2024) 31 Psychiatry, Psychology and Law 523 at 524.

service delivery, many reflected upon the way in which they try to deal with the risk of vicarious trauma and burnout.

Several interviewees discussed the need to take time away from cases and clients, for example by way of short career break, or a sabbatical, or ensuring day-to-day that there is time to decompress after meeting clients: "I find it is a lot, it takes a lot of energy to meet with the clients. And afterwards, I just feel like I just need to shut off for a bit."[468] Another interviewee similarly observed the need to put support in place for lawyers so that their work does not overly impact upon personal and family life: "Just given the nature of it, it can be a lot for the staff doing it, to ensure that they're not taking on anything and bringing it home unnecessarily."[469]

The importance of reflective supervision was raised again in the context of minimising vicarious trauma: "We're careful of vicarious trauma and making sure [the lawyers] are well supported and they have debrief processes."[470] Having time to discuss issues in a confidential and safe space with colleagues is critical in the context of ILR and this is perhaps especially the case in salaried models where the nature of the work is inevitably more intense and is more likely to form most, or all, of a lawyer's caseload. Therefore, it is important to pay attention to ensuring that workplace opportunities are available for lawyers to adequately anticipate and minimise vicarious trauma. As one commentator notes:

> A trauma-informed approach may provide lawyers with better opportunities to 'survive and thrive' by overcoming stigma, maximising protective strategies, normalising the effects of indirect exposure, ensuring the workplace is informed and has supportive systems and developing individual resilience to clients' trauma as part of regular, day-to-day legal practice.[471]

This aligns with recent research, which highlights the importance of senior management being proactive in overcoming the obstacles to embedding trauma-informed workplace culture.[472] The barriers identified include time and work constraints, budget and inadequate technology.[473] Relatedly, in terms of funding, some interviewees expressed frustration at the lack of resource available to truly embed trauma-informed practice, which includes adequately dealing with vicarious trauma:

> The government comes up with these concepts and they think, great, you know, we'll fund you for one lawyer. But it doesn't understand all the other things that need to go around actually running the service. They fund the lawyer and think they'll be okay, what about their support and how they can really manage themselves to deal with this kind of trauma that their clients have experienced.

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[468] Participant 24.
[469] Participant 12.
[470] Participant 26.
[471] James (n 466) at 275.
[472] Pike and Rebar (n 467) at 535-536.
[473] Ibid.

> So yeah, it's a very simplistic view of what it takes to run a trauma-informed service that we're trying to offer.[474]

Another interviewee observed in this context that where lawyers can work in pairs or teams they can "upskill each other, learn … actually have somebody else doing the same role that they can just talk to each other and support each other".[475] Notably, peer support was mentioned by several interviewees as an important way in which vicarious trauma might be minimised: "Mostly, we do debrief with each other. So yeah, that's pretty much it. Debrief with each other. I debrief with other lawyers as well, like, other Legal Aid lawyers."[476]

Another interviewee discussed compassion satisfaction as a way of mitigating burnout. This refers to the satisfaction derived in the workplace from helping and supporting others:

> I think the peer-to-peer support really does play a role in that. But I also think things like feedback can also play a role in that, if we talk about, you know, compassion fatigue versus compassion satisfaction. And I think to know that even when a case hasn't been successful, to know that somebody has had a successful time in that relationship can mitigate some of the effects of their own frustrations with the system.[477]

It is noted that studies tend to show that higher levels of compassion satisfaction correlate to lower levels of burnout.[478] There is also a greater likelihood of higher levels of compassion fatigue, rather than satisfaction, the longer people work in areas where the risk of vicarious trauma is high.[479] Burnout is a common theme in studies of victim advocates, which in turn means that they may be less able to meet survivors' needs and cope with the specific challenges of the work.[480] The data collection demonstrates the importance of creating workplace opportunities to anticipate and minimise vicarious trauma, as well as providing support to deal with it when it arises. Establishing a community of practice for lawyers delivering ILR will promote the exchange of learning around best practice and provide support to minimise vicarious trauma and may improve rates of long-term retention in roles and help lawyers to develop specialist skills in trauma-informed practice.

7.7 Chapter summary

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[474] Participant 26.
[475] Participant 27.
[476] Participant 14.
[477] Participant 33.
[478] J Singer and others, "Compassion satisfaction, compassion fatigue, and burnout: a replication study with victim advocates" (2019) 46 Journal of Social Service Research 313 at 316.
[479] F Fontin and others, "Compassion satisfaction and compassion fatigue among violence intervention caseworkers" (2020) 47 Journal of Social Service Research 486 at 490.
[480] Wegrzyn and others (n 338) at 1979.

This chapter has analysed data relevant to the ways in which trauma might arise in the context of ILR provision, the principles that should guide a trauma-informed approach and how those principles are currently being applied and upheld in the models studied. Working with complainers in cases of sexual violence demands a unique set of skills and a different approach to casework and to clients. It is clear from the data collection that a generalised approach without adequate training and ongoing reflective supervision will fail to meet the needs of clients, and will not adequately protect lawyers from the risks of vicarious trauma and burnout.

Several important themes can be drawn from the research. First, the need for clear timelines that minimise delay so that there is adequate time to build the trust and confidence of complainers. Secondly, ensuring that information is conveyed in ways that are alive to the impacts of trauma and that communication styles are adjusted accordingly. Thirdly, the need for bespoke training and ongoing reflective practice drawing upon multidisciplinary expertise. Finally, managing expectations about the limitations and extent of the provision of ILR; and signposting to other support services, as necessary. It is clear that being properly trauma-informed requires more than simply the completion of one-off basic training.

As a final point, any model of ILR must also pay attention to the heightened risk of vicarious trauma and burnout for the lawyers providing the service. Several proposals were made by interviewees in this respect which include allocating resource and time to peer support, the provision of breaks and the importance of reflective supervision.

Chapter 8: Models of Delivery and Funding

Key points

- Across the jurisdictions studied, the key distinction was whether ILR was delivered by way of salaried or private practice lawyers. Both models have distinct advantages and disadvantages.

- The advantages of a salaried model include the development of expertise in relation to service provision; easier integration of principles of trauma-informed practice; a single point of contact for clients; mutual support amongst lawyers providing the service; greater ease of monitoring and evaluation; and potential benchmarking of rates of pay. Disadvantages might include low rates of pay; capacity issues; and conflicts of interest around cases, especially where services were situated within legal aid. A salaried model will usually require some degree of ad hoc private provision to deal with conflicts of interest, a need for specialist expertise, or unexpected capacity issues.

- The key advantage of a private practice model is flexibility and with that a minimisation of burnout and the risk of vicarious trauma. Reaching more remote geographic areas is also a potential advantage. Disadvantages include insufficient time to spend with traumatised clients to build trust, inability to develop specialist expertise, difficulties in finding roster or panel lawyers at short notice, conflicts of interest, and the challenge of monitoring the quality of casework.

- Interviewees tended to observe a greater number of advantages and fewer disadvantages with the salaried model. In addition, the disadvantages of the salaried model were seen as more easily addressed compared to those of the private practice model. The risk of burnout can be lessened through allocating resource and time to peer support, the provision of breaks and reflective supervision. Capacity and conflict of interest issues can be addressed by having additional provision by way of an ad hoc panel of lawyers. The most significant disadvantages of the private practice model relate to difficulties in developing specialist expertise and embedding trauma-informed approaches. These are not impossible to address, but the constraints of private practice make it harder to do so.

- In both jurisdictions that operated a private practice model, interviewees told us that if they could start again and design their system from scratch, they would choose a salaried model.

- Regardless of the model, key issues include rates of pay and conditions and (in a salaried model) grants being for sufficient lengths of time to prevent insecure employment and facilitate the development of trauma-informed approaches, specialist expertise and reflective practice skills.

8.1 Introduction

This chapter analyses different models of ILR delivery across the jurisdictions studied with a focus on funding and structure of service provision. It sets out the advantages and disadvantages of the two broad models of provision (the salaried and private practice models) respectively. It also considers findings in relation to the importance of specialist expertise for the provision of ILR and related issues of pay and retention of lawyers.

8.2 Summary of models of delivery and funding

Several different models of delivery and associated models of funding can be delineated across the jurisdictions studied, as discussed in chapter three. The main distinction we observed across these models was whether ILR is provided by way of salaried lawyers working within organisations or a private practice/judicare model where lawyers work on a case-by-case basis administered by the relevant legal aid agency.[481] Private practice models tended to operate by way of a panel or roster system where lawyers are selected and trained to provide the service as part of their wider legal practice in criminal and/or areas of civil law.

Table 8.1 below sets out the respective models in each of the jurisdictions studied. It also identifies 'hybrid' salaried models that have some funding available to assign cases to other lawyers on a legal aid funded case-by-case basis. In several of the models studied, this is considered necessary in case there is a conflict of interest, or where specialist expertise is needed, or advocacy (rights of audience) may not otherwise be available within the salaried service. We note that almost all salaried lawyer models have a hybrid system in place with some models being more reliant on private practice lawyers than others. As we have outlined in chapter 5, the requisite rights of audience for those appearing in the court within which ILR is to be provided and legal cultural norms about the standard of representation expected play a factor in this context.

Table 8.1 also identifies whether salaried services are in a not-for-profit setting, for example, a law centre, victim support or gender-based violence service. It should be noted that table 8.1 summarises data gathered from our interviews and where interviewees have been able to provide details these are only estimates and not otherwise easily verifiable from publicly available sources. Likewise, given that some jurisdictions have pilot models developing at fast pace, information may have been subject to change since the time of interview.

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[481] We note that there is some contestation around the labelling of legal aid and/or not-for-profit legal service as 'private practice' in view of its failure in adequately capturing the public interest nature of the work. See further E Cooke, "'Fat-cats' versus 'church mice': unveiling legal aid practice from behind the shadows of private legal practice in England and Wales" (2024) 44 Legal Studies 573.

Each salaried service operates with either three or four full-time equivalent lawyers. As discussed in chapter three, in some salaried models (Victoria and Queensland) there is some overlap between ILA and ILR provision. In others, there is provision of ILA only (England and Wales), or there is provision only of ILA with very limited ILR (usually by written submissions) (Northern Ireland). We note that the models that seem closest to what is envisaged for ILR at section 275 hearings by the Victims, Witnesses, and Justice Reform (Scotland) Bill are those in Ireland and in New South Wales. The former operates on a hybrid model but one which relies heavily on private practice lawyers; and the latter operates on a salaried basis with ad hoc support from legal aid panel lawyers.

Table 8.1: Models of ILR in comparator jurisdictions

Jurisdiction	Salaried model	Located in third sector organisation	Located in legal aid	Ad hoc legal aid panel of solicitors/ counsel	Private practice/ panel lawyers
Australia – Victoria	✓	✓	✓	✓	X
Australia - Queensland	✓	✓	✓	✓	X
Australia – NSW	✓	X	✓	✓	X
Canada	X	X	X	X	✓
England and Wales (ILA)	✓	✓	X	X	X
Ireland	✓	X	✓	X	✓
Northern Ireland (ILA)	✓	✓	X	✓	X

In Ireland, civil legal aid solicitors work in one of 32 law centres across the country and instruct counsel for court appearances. Barristers are appointed to a panel so they are eligible to undertake a variety of work for the legal aid board, and receive training in that context. They carry out all of the required court work. By contrast, in Northern Ireland (which has primarily an ILA model at present), three solicitors work within Victim Support NI providing ILA and some ad hoc (paper-based) ILR. They have a small allocation of funding (approximately £55k) to draw down as needed for counsel's advice or representation in court, but no funds had been spent at the time of writing.

The Australian models we studied provide useful illustrative examples of the hybrid approach. In Victoria, three salaried lawyers work in two practice sites: Victoria Legal Aid (one lawyer) and the Women's Legal Service (two lawyers). The Queensland Service has four salaried lawyers in two practice sites: Queensland Legal Aid (two lawyers) and Queensland Women's Legal Service (two lawyers). Queensland relies on these salaried lawyers for most hearings, but instructs out to private practice lawyers as needed.

Again, this is considered especially important as an available option if there is a conflict of interest. In New South Wales three salaried lawyers work within the Sexual Assault Communications Privilege Service (SACPS), which is part of Legal Aid New South Wales. A panel of legal aid lawyers provides support to SACPS as needed on an ad hoc basis.

The Canadian model, like Ireland, operates predominantly via panel or 'roster' lawyers instructed on a case-by-case basis. The funding (for both ILA and ILR) comes from a mix of federal and provincial funds. As one interviewee commented in relation to the funding of this model:

> [W]hat [the Federal Government] provide is enhanced funding. So that's, kind of, the language we put in because the provinces and territories themselves provide a budget through their annual budget to support those victim services. We come in and enhance or increase funding on certain initiatives … one of those … components is support for victims of sexual violence, which includes our initiative on independent legal advice and legal representation for victims of sexual assault and intimate partner violence.[482]

In Nova Scotia, there is provision for both ILA and ILR. The provision of ILR is through the Sexual Offence Legal Representation Program (SOLR). There, ILA and ILR are separate programmes, both delivered via a roster of private practice lawyers. Likewise, in British Columbia, both ILA and ILR are delivered but for funding purposes the programmes are considered quite separate. ILA is delivered by two salaried lawyers in a not-for-profit organisation whereas ILR is managed out of Criminal Law Services and Legal Aid British Columbia, which uses a roster of private practice lawyers.

The three Australian jurisdictions we examined, although operating a salaried model, also relied on a panel of ad hoc private practitioners to deal with conflict or capacity issues. Several Australian interviewees commented in relation to the fixed payment that applied to panel lawyers:

> They're a fixed amount and [there's] basically a bucket of funds that then the lawyer will then invoice for whatever they've done. They've got a fair bit of discretion about what they do. The bucket's not particularly big, I think it's like two [client] conferences, a half-day prep and a half-day court time. So that's not a lot, it's probably … I think in total, it works out to be about 1,200 dollars, Australian dollars … They can get extensions for more if necessary. And sometimes these do drag on.[483]

> So, for barristers, they've got fixed fee appearances, and they've also got funding for preparation. Our grants model, we don't have specific grants of aid that have criteria for these matters, but we've worked with grants to have, kind of, an

[482] Participant 3.
[483] Participant 14.

> agreement about what they'll do. That's on the dream list is to have specific … criteria for what additional prep we're giving them … And same with our preferred suppliers have that as well. Solicitors only have an initial preparation grant and then appearance grants. We're working on getting them an additional preparation [grant] as well. It hasn't really come up that much, but it would be good to have.[484]

8.3 Salaried model: advantages and disadvantages

As outlined above, most of the models studied deliver ILR through salaried lawyers. This was seen by interviewees as having a number of key advantages. The first was that, compared to the private practice model, it more easily affords the opportunity for specialism and a "concentration of expertise":[485]

> I think the key there is specialism. So, we've developed and built up a specialism.[486]

> You need someone that can focus on it because it's very different … it's very, I don't want to use the word, but niche. And so, you can't dip your toe in and do one of these matters, you have to be able to spend a lot of time in it.[487]

> The specialisation aspect is definitely needed and the experience and the training.[488]

Relatedly, having some background experience of criminal law was deemed important:

> The issue is that then we have people that aren't criminal law solicitors getting their heads around a criminal law process. So, I think that it requires … I think you can't … it's very difficult to find someone that can come into the role and pick it up running, they have to have been taught by someone.[489]

Specialism and expertise were prevalent themes in relation to the perceived advantage of a salaried service. It is worth noting that across the data collection, this was a theme that weighed heavily in favour of the salaried model, even for those working in a private practice model. For example, in Ireland, an interviewee reflected that if they had the choice they would go back and create the scheme again with a standalone salaried unit delivering ILR, as in the Australian models, rather than situating the advice provision in more general law centres which cover a wide range of mainly civil work:

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[484] Participant 22.
[485] Participant 14.
[486] Participant 17.
[487] Participant 22.
[488] Participant 23.
[489] Participant 22.

> I would build an experienced unit with two solicitors. Two solicitors, three legal clerks, just doing this type of work, particularly for Dublin, where the vast majority of cases are [located]. You could support the more regional cases as they arise and build up that bank of knowledge and experience in it. Because I'm conscious that our aid … our advice is going to expand and potentially explode. So, I really think we need to build … an ideal scenario, we will build a wealth of experience and then that could flow out.[490]

Similarly, an interviewee also observed that a benefit of the salaried model was the extent to which it can build capacity in the sector. Even where lawyers might leave the service, they take valuable experience to other roles in related fields of legal aid or not-for-profit legal sector.[491]

A second key advantage of the salaried model that was identified by participants was that, compared to a private practice model, it is easier to incorporate principles of trauma-informed practice. Chapter 7 discussed the importance of trauma-informed practice to the provision of an ILR service for sexual offence complainers. Four principles of trauma-informed practice were identified: adequate time to build the trust and confidence of complainers; conveying information in ways that are alive to the impacts of trauma; bespoke training and ongoing reflective practice drawing upon multidisciplinary expertise; and managing expectations about the limitations and extent of the provision of ILR. It is the first of these in particular that is easier to deliver in a salaried model. Interviewees saw the salaried model as more easily providing a single point of contact for clients and more time and flexibility in the caseload to offer support:

> In private practice you are watching the clock constantly, you're recording every six minutes of your day. Whereas actually, a trauma-informed, empathetic approach that we have to take to deliver the service properly, there needs to be a degree of open-endedness to that … if you need to give up a day to someone, you need to tune into their case, you can do that, there's the flexibility to do that, which you just wouldn't have where there's a profit motive and get them in, get them out, stack them high … And I think that's the big difference.[492]

> And then it's really about minimising a case changing hands, having as much as we can a single point of contact for that victim.[493]

> So having someone there that they've met before, that they know, that they've got as a point of contact, I mean, that's invaluable.[494]

As noted above, some of the salaried models we examined located the lawyers providing ILR within third sector organisations, such as victim support services. This can

[490] Participant 12.
[491] Participant 14.
[492] Participant 17.
[493] Participant 15.
[494] Participant 20.

further help to minimise complainer re-traumatisation because of the availability of other support services. For example, for those models situated within victim support services it is easier to access other support such as advocacy or advice on compensation.[495] Other examples of legal information and/or advice that complainers might be easily referred for include support with applying for non-harassment or restraining orders, family law matters, immigration and issues related to complainers themselves being in the criminal justice system.[496] Additional funding for these wider services comes from philanthropic sources and/or legal aid.[497] Some models in not-for-profit organisations have also established pop-up clinics in other community-based organisations.[498]

For several Australian ILR providers, being located in the not-for-profit sector means that they can extend their support to the provision of social services:

> So, we committed to being involved in the [ILR service] and we would provide the social work system within our existing resources where we could, we would capture and monitor that. But we were very clear that to continue on, they need to really consider the non-legal supports that women will need.[499]

> If I realise during that session that this person has no supports around them, they are at risk of homelessness or they have, you know, a mental health condition that is really being exacerbated right now, I can say to them, we have a social worker, do you want to work with the social worker?[500]

A third advantage of the salaried model – identified by policymakers – was the level of cost control it affords, as well as making it easier to monitor and evaluate:

> So, we use that [model] … so we can have control of the cost. We did look at other models, but they were … going to be wildly more expensive. We didn't have the control. We didn't have the ability to get the feedback from the models.[501]

Another advantage for those models situated within existing legal aid provision is the opportunity to rely on networks of legal aid lawyers in other regions for aspects of casework, which might be especially helpful when trying to coordinate a service across a wide geographic area:

> So, because Legal Aid has offices everywhere, we can also draw on that somebody from one of those local offices can go down to the court, scan

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[495] Participant 25.
[496] Participant 26.
[497] Participant 26.
[498] Participant 18.
[499] Participant 27.
[500] Participant 31.
[501] Participant 18.

> documents and email them to us, for example. But you can get a local agent to do that, you just have to fund it.[502]

Situating ILR within existing organisations also brings the advantage of being able to rely upon the wider infrastructure of those organisations. This administrative and technical support was seen as particularly useful as compared to a judicare model:

> I guess if you're working within a larger organisation, then you're drawing from a general pool of things like admin support, tech support, services like printing, and so on and so forth. A lot of lawyers struggle with things like that. Because, I mean, if you give a private lawyer a matter and they suddenly have to print 2,000 pages worth of stuff, they've got a problem, you know … they're going to struggle to get reimbursed by Legal Aid for their expenses to print that much stuff.[503]

A final perceived advantage that was mentioned was that rates of pay can be benchmarked.[504] This can be attractive in terms of job security as compared to private criminal defence practice.[505] Across the jurisdictions studied, a benchmarking exercise could be set against civil service rates of pay or equivalent salaries in the not-for-profit legal sector:

> So, the starting salary was, sort of, benchmarked against what an equivalent Civil Service group would be. But we do allow for an increase every year in the salary but it wouldn't be in line with cost of living or things like that. It wouldn't be tied to the Civil Service pay grades either.[506]

> My salary at least, my understanding is that it's just benchmarked to [other employees of the organisation I work for]. So, whatever another lawyer of my seniority in [the organisation] gets paid, that's what I get paid.[507]

With respect to disadvantages of the salaried model, one is that there may be a higher likelihood of burnout and risk of vicarious trauma. This risk was discussed in chapter 7, where the research evidence on this topic was outlined. To mitigate this risk, there is a need to ensure that resource and time are allocated to peer support, the provision of breaks and reflective supervision.

An interviewee commented that the salaried model also means that lawyers tend to be working exclusively on sexual violence cases and a "combination of work types" might be more helpful in providing variety and minimising burnout.[508] This was also raised as an issue in terms of capacity and the challenge of covering periods of annual leave or

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[502] Participant 14.
[503] Participant 14.
[504] Participant 18.
[505] Participant 24.
[506] Participant 18.
[507] Participant 31.
[508] Participant 23.

sick leave. As outlined below, this was raised by three interviewees who noted that ensuring there was more than one lawyer was essential in terms of overcoming the problem:

> We've only been funded for one lawyer, which, in and of itself is okay in an organisation that has other criminal lawyers. But if we only provide one lawyer, there'd be very much in isolation in terms of their practice area. If they would go on and leave, which people are entitled to do, who covers it? You know, so it creates all those sorts of sustainability issues.[509]

> Just because you do have people go on leave or, you know, it is a very difficult thing to do continuously … So, I think it's better really if you can have a few lawyers, rather than it all falling on one person to do. You know, for practical reasons as well, if people need to have leave, it's important I think to do that.[510]

> With the oversight from myself, a team leader and then a few other lawyers … it just provides further options that mean that it doesn't all rest with that one person. Which, you know, can be impacted by if someone is unwell, periods of holiday, things like that, that can make it … challenging.[511]

In a model where lawyers are dealing with other legal aid matters as well as ILR work, one interviewee raised lack of capacity as an issue and observed that the private practice model might by comparison be better able to deal with such issues:

> [I]t's because of the trouble we have getting law centres to take the cases. I think if we PP'd [private practice] them out, it would be … there'd be less capacity constraints. I think the one big thing and the experience we have of 45 years now almost of running the law centre model is that it's always had limited capacity and we've had to effectively manage that capacity through the use of waiting lists. And the waiting lists have gone up, have gone down from time to time, depending on the economy effectively.[512]

For some, the rates of pay were perceived to be unreasonable because they had not been benchmarked against other public sector legal employers:

> Now the other thing is that, yeah, rates of pay have been an issue. Our pay scales for solicitors are different to what other public sector legal employers have. And when I say different, I say worse.[513]

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[509] Participant 27.
[510] Participant 25.
[511] Participant 23.
[512] Participant 11.
[513] Participant 11.

> But yeah, that has made us uncompetitive with other public sector legal employers. And, you know, it depends on what state the economy is in. If the economy is in dire straits and people want a job, they'll take the job. If the economy is good, people will take the higher paid role elsewhere.[514]

Only one interviewee (an independent barrister) observed that the salaried model may not be perceived as sufficiently independent and that the private practice model would be preferable in terms of protecting the lawyer-client relationship:

> I think if it is a salaried thing, it will not be seen as independent. That's my gut reaction. And I draw on my experience … So, they're just seen as establishment. They're seen as they're not … I think you have got to find the money for … you either … it's all duck or no dinner, in my view, you either have your own lawyer or you don't.[515]

No other interviewees identified perceived independence as an issue where lawyers were situated in third sector organisations. However, this was raised as a potential problem where ILR provision was too closely associated with criminal legal aid provision. For example, for those salaried models located within legal aid, one of the most prevalent challenges described by interviewees related to potential conflicts of interest. This was perceived as an issue because of the tensions between legal aid funding for criminal defence work and work in support of victims at the same time, or from the same funds, which gives rise to the appearance of conflict:

> But I think it's just this tension, you know, for Legal Aid who have always done, kind of, criminal defence work to then start doing victim work, there's just going to be issues that come up with that. So, I think that's something we probably need to work on a bit.[516]

One interviewee described in some detail the way in which this tends to be overcome in practice however using their ad hoc panel of lawyers:

> So we just send a text out to all of our panel and just say there's a matter, it's on this day, this is the name of the accused, so they know if they've got a conflict because they might have appeared for this before. This is when it's in court. And the first person to respond gets it.[517]

In relation to resolving conflicts, several interviewees described the benefit of salaried models located in both not-for-profit and legal aid practice sites where cases could be referred to each other if a conflict of interest arises. A memorandum of understanding regulates the relationship and, if needed, a case can otherwise be sent to a private

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[514] Participant 10.
[515] Participant 21.
[516] Participant 25.
[517] Participant 14.

panel of lawyers located in one of five or six selected law firms.[518] It is considered important that such conflicts are handled quickly.[519]

In Scotland, some interview participants commented on the idea that an ILR service could be located within the existing Public Defence Solicitors' Office (PDSO) service. It was observed again, however, that this would have the potential for conflicts of interest to arise. Lawyers in the PDSO are salaried and employed by the Scottish Legal Aid Board to provide defence services for clients who qualify for legal aid.[520] One interviewee commented as follows with respect to conflicts of interest, including the potential for legal challenges on that basis:

> If PDSO or a form of PDSO … or a subgroup of PDSO were allocated this work on a commissioned basis, obviously you would have to be very careful because if that subgroup of PDSO are effectively, you know, aligned with PDSO, you've immediately got a conflict situation because PDSO are acting for accused persons … I think as well as the actual conflict there is maybe perceived conflict as well … conflict of interest, perceived or real, could be there in some cases. So, if it was a solicitor or a different PDSO office, could there be challenges if somebody had dealt with a Section 275 on a case?[521]

The interviewee noted further that if this challenge could be overcome, an advantage was that the PDSO offers the possibility for service provision in geographic areas which may not otherwise have access to it.[522]

8.3.1 Potential contracting of ILR in Scotland

Several interviewees in Scotland observed the potential of contracting legal service provision with respect to ILR. Legal aid contracting has been defined as follows:[523]

> Contracting is the system of service delivery through formal, legally binding contracts between the contracting authority … and legal services providers. The contracting authority decides how many contracts are awarded and defines how the service provider must deliver the required services. Usually quality standards and other requirements are specified along with a range of contractual terms that the provider must meet. Contracts can be non-competitive – meaning that any provider who meets the published requirements is awarded a contract, or competitive – meaning that contracts are only awarded to a limited number of providers.

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[518] Participant 22.
[519] Participant 23.
[520] Legal Aid (Scotland) Act 1986.
[521] Participant 35.
[522] Participant 35.
[523] H Barrett, A Scoping Study into the use of Contracting for the Provision of Legal Aid in Northern Ireland (Northern Ireland Official Publications Archive, 2019) 8.

Depending on how contracting was structured, and the extent to which those providing ILR under the contract were specialising in ILR work, this might result in an approach superficially similar to a salaried model. Contracting legal aid services, while not prevalent in any of the international models we studied and therefore extremely limited in terms of data collection on the issue, is common in England and Wales with respect to different types of work across areas of civil and criminal law. The Legal Aid Agency (LAA) tenders every three to four years for services by way of contract and may also tender on an ad hoc basis, for example, if there is a gap in service provision in a certain geographic area.[524]

One interviewee noted that for this system to operate in Scotland a change to legislation would be required to widen the scope from those registered to provide criminal legal assistance to include other service providers.[525] Another interviewee considered that an advantage of this model was that it might help to tackle issues with conflict of interest:

> It would negate the conflict of interest issue and I'm assuming they would be funded … they'd have a salary, so they wouldn't have to apply separately for every case … I can see the benefits of that.[526]

The interviewee commented that as compared to a more traditional judicare model on a case-by-case basis, the contracting of services might also better allow for monitoring of service provision. They observed in this context that "peer review or some other form of quality assurance would be set up for it" and would be "built into the terms of the contract".[527]

Another advantage of the contracting model, as compared to the problems presented by short-term grants of funding in the salaried model (as explored above), is that the length of the contract could be longer and therefore provide greater security to lawyers.[528] Contracting of services was also considered by one interviewee as a way of tackling the wider problem of recruitment and retention, as compared to the salaried model, because it does not take criminal legal aid lawyers away from other areas of work:

> You can see that the latter would work [referring to specialist salaried model] and I can see how that would be a preferred model for the government because it controls the expenditure to an extent. All I would say on that is, if you look at that in isolation, I think that's probably a good idea to deal with this particular issue. But in the bigger picture, it's yet another thing taking solicitors out of the system.[529]

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[524] The Law Society of England and Wales, Tendering for legal aid contracts (10 October, 2024).
[525] Participant 36.
[526] Participant 41.
[527] Participant 36.
[528] Participant 36.
[529] Participant 40.

The interviewee further observed in relation to lawyer recruitment that current criminal legal aid solicitors, especially those coming towards the end of their careers, were likely to be interested in taking up the work so long as the rates of pay were reasonable.[530] It was nonetheless observed that under current frameworks it would not be possible for PDSO lawyers to provide the service under contracting arrangements because they are paid on a salaried basis. The contracting would be "on the basis of price to deliver a particular service in a particular location" making it difficult to accommodate under the salaried system.[531]

A perceived advantage of commissioning a service by way of contracting, as compared to the current judicare model in Scotland, was the fact that it might provide some measure of predictability and stability in a system already under pressure. One interviewee observed in this context:

> If the government wants to and parliament wants to introduce a dedicated service for a vulnerable group of people that has to be responded to, you know, fairly swiftly, you're not going to have a lot of time to do this type of work, then you're not talking about leaving it to chance, it has to be a dedicated service. And, therefore, I think it has to be a commissioned service of some kind.[532]

In terms of disadvantages, it was noted that a contracting model might limit choice for complainers in terms of instruction of solicitors, which is challenging given its importance to this type of service provision:

> The cons of [the contracting model] is just that the complainer wouldn't have the right to pick who they want [as their solicitor] and it might be that they know a good lawyer that they would prefer to speak to? As obviously, you're dealing with quite delicate issues and then the complainer doesn't have any real control over that. And that might be an issue because control might be part of the [criminal] background [to the case]. And the whole point of this is to give the complainers control and feel involved?[533]

Another potential disadvantage of contracting is that it may not be as 'demand-led' as the current case-by-case judicare system.[534] Others have raised significant concerns about the cost-effectiveness of contracting and the risks associated with delivery, particularly in smaller jurisdictions. For example, in Northern Ireland, a recent scoping study concluded that, "the theoretical attractions of price-based competitive

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[530] Participant 40.
[531] Participant 36.
[532] Participant 36.
[533] Participant 41.
[534] See Scottish Legal Aid Board, Response to the Legal Aid Reform in Scotland Consultation (2019) 6-7. For international comparative discussion of legal aid, including Scotland, see Open Innovation Team, Review of Civil Legal Aid in England and Wales: Comparative Analysis of Legal Aid Systems (2024).

contracting for Legal Aid are not in practice deliverable".[535] Potential risks include non-delivery, abortive costs and localised market failure.[536]

8.4 Private practice: advantages and disadvantages

Two of the ILR models we examined delivered ILR through a private practice model. One advantage identified in relation to this model was that it affords greater variety and flexibility for lawyers. This can in turn help to minimise the likelihood of burnout and vicarious trauma. As one lawyer commented in this context: "[the work] is a very difficult thing to do continuously".[537] Similarly, another lawyer commented that there can be high rates of attrition with ILR work and the private practice model might ensure there is always a group of lawyers able to take on cases and that specialist expertise can be provided if needed.[538]

The private practice model might also allow lawyers to be more easily accessible to a wider geographic area. Where salaried lawyers need to travel to different courts across a large region this can mean there is less time available to spend with clients. As one interviewee noted: "It's always seemed a bit more trouble than it's worth to really have, you know, a staff lawyer just doing this exclusively. And it's trying to cover the whole [jurisdiction] and travel around."[539]

Aside from these advantages, interviewees tended to discuss the drawbacks of the private practice model. Key amongst these was the difficulty of taking a trauma-informed approach to clients. For those providing services within this model, they talked about the difficulty of providing adequate representation in the limited time available within the fixed fee arrangement. For example, one interviewee observed that the vicarious trauma of the work risked being exacerbated by frustration around not being able to spend adequate time with clients (in a model where three hours of advice was funded):

> I think it's more emotionally taxing for lawyers. So, a lot of lawyers don't want to hear these stories and deal with the vicarious trauma, I would say. And then, of course, with the limited hours, you can't really do that much, so that's a bit frustrating.[540]

For another interviewee in the Scottish context, the challenge of taking a trauma-informed approach was similarly connected to the lack of time available for clients, as

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[535] Barrett (n 523) 6.
[536] Ibid 42.
[537] Participant 25.
[538] Participant 14.
[539] Participant 5.
[540] Participant 2.

well as a general challenges in terms of embedding trauma-informed practice into service provision:

> It's a balancing of the risks, that provision not being available or not being available at a sufficient quality or not available in a trauma-informed way because not all firms are operating like that. Although the Law Society [of Scotland] are promoting trauma-informed training and lots of solicitors have done it, there's many who haven't and don't provide their services in that way.[541]

The challenge of insufficient time to build trust with clients in order to take a trauma-informed approach was also identified by research participants in Canada. While one interviewee observed that the private practice model might allow for a wider geographic reach, another commented that this was nonetheless often difficult because service provision might be for a limited time and only by phone or online:

> And then from my understanding, they weren't necessarily connecting or meeting with the survivor until very close to the hearing date. It's a big province and … you might have a lawyer based in [Canadian city] but the victim is in [other Canadian city] and they'll maybe get a phone call and sometimes the lawyer is only appearing for those hearings by phone or by video … there's not a lot of chance to build up a relationship of trust and, you know, comfort for the survivor with that lawyer.[542]

With respect to this issue, the interviewee commented that "marrying up the independent legal advice schemes with the independent legal representation" might help to ensure lawyers had more time with complainers,[543] as well as a pre-existing lawyer-client relationship to rely upon for the delivery of ILR.[544] It is worth nothing that, in the Scottish context, a prospective private practice model was similarly identified as a barrier to wide geographic reach and consistency of service provision:

> I think the downside of [the private practice model] is that lack of assurance about any geographical area or at any point in time, you know, is this service going to be available? Judicare can't provide that. It can't provide that just now on, you know, the whole range of other cases that are available.[545]

Notably, the issue of insufficient time for cases and lack of available lawyers might also relate to the process by which the private practice lawyer is assigned. As several interviewees outlined, lawyers are generally assigned when court dates are set, sometimes making it difficult to find a lawyer at short notice:

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[541] Participant 36.
[542] Participant 5.
[543] In the Canadian jurisdictions we examined, ILA and ILR are separate services and are administered by different bodies – see section 3.2.2.
[544] Participant 5.
[545] Participant 36.

> The other complication is that a lot of times, we don't assign lawyers until court dates are set. So, you know, it might be coming up in the next month or two and so finding a lawyer on our roster of lawyers that we've already pre-approved for doing this type of work can be more difficult if the court dates are coming up because they're very busy as well.[546]

> It's really just finding the right lawyer who's available. So sometimes we'll get, like requests during the school break, school March break, which is like a two-week period. And we're, like, there's just no lawyers working. And so sometimes things have to get adjourned. We do our best but sometimes we'll get, you know, a very last minute [referral] and it's really difficult to find somebody available because our lawyers are very busy with other things, and they do lots of other work.[547]

Indeed, across two of the Canadian jurisdictions studied, which operate a private practice model, a lack of available lawyers to take on ILR cases was identified as a key challenge. One interviewee reflected that they were still working on solutions to this problem: "And, I mean, we don't have a perfect solution for that yet, it's something that we're working on. I wouldn't say that was a sort of unexpected challenge, but it's something that is definitely coming to the fore."[548] Aside from lawyers being busy on other cases, another issue was that they might be conflicted out of cases due to their other criminal defence work.[549]

In one Canadian jurisdiction, the problem of insufficient lawyers available related to low rates of pay. Recent increases in one jurisdiction were noted to have "expanded the roster of lawyers",[550] nonetheless, the knock-on impact of having insufficient lawyers to provide ILR was noted as a concern. Being unable to secure a lawyer can mean repeated adjournments and delays, which risks re-traumatising complainers. One interviewee commented that a salaried model may be preferable to a roster (private practice) model in view of this issue:

> I would say there's some challenges … It would always be nice to have more [lawyers]. You know, it would be nice if there were, ideally, if you were going to be, like, here's a wish list and this is what we would like, it would be really nice to be able to have lawyers that are designated to the work. I don't know, you know, if there was a position or there was some way that you had two or three folks that could take all the files and that's their work and that's what their focus is. I would say in an ideal world, that's what I would like to see, I think that would be preferable over having a roster.[551]

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[546] Participant 1.
[547] Participant 1.
[548] Participant 4.
[549] Participant 1.
[550] Participant 5.
[551] Participant 7.

An interviewee within a private practice model also generally observed that it afforded insufficient opportunity for the quality of representation to develop over time and it was also more difficult to have oversight of cases.[552] Developing this point, they observed that the comparative advantages of a salaried model were that:

> … people could hone their skills, they would, kind of, be a subject matter expert in that sense. That type of thing. You know, back each other up, if someone's on vacation, well, this person's covering. Or if someone needs support, there's this person.[553]

The challenge of monitoring the quality of provision in private practice/judicare models was also raised by another interviewee:

> But with judicare case by case funding, there is no control over which firm will choose to do it, where that service can be provided, when it can be provided. So, from a government point of view, judicare can't provide security of provision.[554]

It is important to note that while conflicts of interest might arise in the salaried model, they were similarly identified in the roster/panel system as a potential issue. As explained by one interviewee: "It has possibly gotten tricky where an organisation is supporting [the accused in the same case as] the complainant who is seeking support".[555] Another Canadian interviewee noted that, practically speaking, they had to try and ensure that different people within legal aid were assigning a lawyer to the defendant and the complainer:

> We just don't want to have the appearance of, you know, we've approved the defence budget for how they're going to run their trial and we've also assigned the complainant their lawyer. So, we just try to have two different people doing that. So that's like one of the, kind of, weird things that comes up as well.[556]

Likewise, in Scotland, the likelihood of conflicts of interest in the private practice model was raised as a concern:

> Because obviously cases can run on for a long time … if they act … either they could be acting in a case that's related to one where ILR then comes into play and so they could be ruled out for that reason, or they might be reluctant to represent somebody for an ILR matter or section 275 matter because that could then preclude them from acting in something more lucrative.[557]

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[552] Participant 7.
[553] Participant 7.
[554] Participant 36.
[555] Participant 3.
[556] Participant 1.
[557] Participant 37.

> There's an increasing trend in ... certainly, in Glasgow and Edinburgh, for amalgamations of criminal firms. So that could potentially cause conflict. If you've got these big firms like [redacted] who have got 20, 25 solicitors, then you might end up with one person dealing with a rape case and they go to a different office. But that would ... most people would notice that and that wouldn't be an issue.[558]

In terms of tackling this issue in practice, an interviewee noted that the collegiality of the profession would assist in ensuring cases were covered by other lawyers as required.[559]

8.5 Discussion of the advantages and disadvantages of the models

While caution should be exercised in generalising qualitative research findings, it is nonetheless possible to draw some tentative conclusions from the data collection.

First, some of the drawbacks mentioned above potentially arise in both models. There is, for example, potential for conflicts of interest (because the organisation involved is also representing accused persons) to arise regardless of which model is chosen. The important thing here is to have provisions in place to deal with these when they occur.

Secondly, taken together, interviewees tended to observe a greater number of advantages and fewer disadvantages with the salaried model of provision. Perhaps more importantly, however, the disadvantages of the salaried model were seen as more easily addressed compared to those of the private practice model. The risk of burnout can be lessened through allocating resource and time to peer support, the provision of breaks and reflective supervision. Capacity and conflict of interest issues can be addressed by having additional provision by way of an ad hoc panel of lawyers.

The most significant disadvantages of the private practice model relate to difficulties in developing specialist expertise and embedding trauma-informed approaches. It is well accepted that taking a trauma-informed approach is necessary to meet the needs of complainers in cases of sexual violence and to minimise the risk of re-traumatisation. This is not impossible to do in a private practice model, but the constraints of private practice make it harder to do so. Certainly, for most interviewees, the salaried model was said to provide greater opportunities to understand and embed trauma-informed approaches.

It is also notable that in both jurisdictions that operated a private practice model, interviewees told us that if they could start again and design their system from scratch, they would choose a salaried model.

8.6 Recruitment and retention of lawyers

[558] Participant 40.
[559] Participant 40.

Regardless of the model chosen, issues potentially arise in relation to the recruitment and retention of lawyers. Certainly in some salaried models there have been issues with recruitment of suitably qualified lawyers. In several of the Australian jurisdictions, there was discussion of the need to take time to find the right expertise as well as ensuring that appropriate training and supervision was in place. The salaried lawyers recruited tend to be at the 'mid-career' stage and usually have a minimum of around five years of post-qualification experience.[560]

In the recently established ILA pilot in England and Wales, following an unsuccessful recruitment exercise, additional funding was sought to facilitate an increase in rates of pay and provide wider support to lawyers delivering the service. This included infrastructure such as "specialist training, paralegal support, counsel advice, supervision and management support".[561]

The challenge of recruitment and retention of lawyers working in legal aid outside of Scotland and in not-for-profit civil society organisations has been well documented elsewhere.[562] This is said to be particularly acute for lawyers who are at the mid-career stage who may have increased financial and caring responsibilities.[563] In our data collection, it was generally deemed important amongst interviewees in practice that rates of pay were reasonable and benchmarked fairly. One interviewee in England commented that this might not mean salaries are commensurate with legal aid, especially, for example if the rates of pay related to equivalent rates for early legal help (i.e. the provision of legal information and general legal advice). In short, they observed that the equivalent legal aid rates would be insufficiently high to make the role attractive:

> We did a lot of, you know, discussions with lawyers about this. I mean, to do just advice work that's not litigation, that's not in court, is on what's called the Legal Help Scheme. The payment for that is tuppence ha'penny basically and both civil and criminal lawyers only do it as a loss leader in order to pick up cases which then become certificated cases in either the criminal or the civil courts.
>
> So, in the [redacted] pilot, they actually negotiated a very high rate of pay for the pilots … but it's … not Legal Aid rates. If you paid more money, yes, people would do it, but it's just not deliverable within the existing Legal Aid framework that we have.[564]

In Ireland, an interviewee related the issue of rates of pay and retention of lawyers to the wider problem of comparatively low rates of pay for legal aid lawyers in that

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[560] See e.g. participant 23.
[561] N Vickers, "Free legal advice for rape victims starts", BBC News, 18 June 2024, https://www.bbc.co.uk/news/articles/cedd7zgq59do.
[562] Denvir and others (n 465).
[563] J Kinghan, Recruitment and Retention of Mid-Career Lawyers in Civil Society Organisations (2023) 19.
[564] Participant 8.

jurisdiction.[565] Adequate resource in support of the service was noted as important in terms of tackling issues with delay in the system regardless of the model of delivery adopted. As one interviewee stated:

> I think … about what the best model of providing the service is. Ensure, you know, it's adequately funded in whatever model is chosen. That the fees for solicitor and counsel are adequate for in terms of the service that is provided. And ensure that there's no possibilities for logjams in terms of how it's been structured.[566]

In Scotland, one interviewee commented from a practical point of view that the take up of ILR by lawyers under a private practice model might be limited by the constraints of 'time and line' funding where a solicitor is reimbursed for time spent on specific tasks (known as 'line items'):

> So you only get paid for the time you appear in court, but what a lot of the lawyers were saying was, and I get this because if you're a busy lawyer and you already have a busy practise and then there's [a preliminary hearing] at 10:45 in the morning [where you are providing ILR] you know that means you have to clear your diary for that day or that morning … All of that to just get paid for that 15-minutes or half an hour? You're losing an awful lot of remuneration for the amount of other stuff you might have to move out?[567]

Likewise in Scotland, several interviewees also observed the potential challenge of recruiting suitably qualified lawyers when they perceived numbers of criminal legal aid lawyers to be already at low levels, however, they nonetheless highlighted the need for appropriate specialist expertise in criminal law.[568] One considered the advantages of the salaried model in this context: "Solicitors would be employed because of their ability and skill sets. So, I can see benefits of that."[569]

As in other jurisdictions, interviewees in Scotland observed that lower numbers of suitably qualified lawyers might be linked to low rates of pay, as well as to the attraction of the role of working for Crown Office, as compared to private criminal defence practice, in terms of stability and working conditions.[570] Relatedly, as is well identified by legal aid workforce research in England and Wales,[571] the problem of an ageing demographic of criminal legal aid lawyers was repeatedly noted by interviewees as adding additional pressures in the system. As described by one interviewee:

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[565] Participants 10 and 16.
[566] Participant 11.
[567] Participant 41.
[568] Participants 40 and 41.
[569] Participant 41.
[570] Participant 40.
[571] Denvir and others (n 465) 41.

> Because one of the other key aspects is, we're all acutely aware that the criminal defence profession has its lowest numbers at present. And obviously the Dean of Faculty referenced it at the start of the legal year just over a fortnight ago and the Law Society reports about the criminal defence bar being an ageing profession. When I say defence bar, I mean … I include obviously solicitors in that that there's an ageing profile in the defence community. And if they are currently struggling to support accused in these cases, where do we get the profession that's needed to support complainers and the ILR process as well?[572]

In this context, another interviewee in Scotland observed: "There are far, far too few criminal lawyers, there are really not enough advocates either. The High Court's running at, you know, 18 months to two years delays for trials."[573] With respect to the ageing demographic for criminal lawyers and numbers more widely across Scotland, the interviewee expanded the point as follows:

> The Legal Aid Board have a thing they call the peer review, which is to review criminal solicitors and check they're doing the job properly. You have to have done at least seven cases in a calendar year to be peer reviewed and only 484 solicitors met that criterion. Right. That's for the whole of Scotland. Of that 484, I think there's 156 did 52 per cent of the work. So, there's a very small number of us and we are aging, you know, for everyone under 30, there's two over 50.[574]

The lack of available lawyers also relates to the challenge of potential conflicts of interest, as discussed above. In Scotland, this was perceived to be particularly acute in areas outside of the central belt where there were generally fewer lawyers. As one interviewee noted:

> There's maybe … only one main criminal lawyer in Shetland … So if it was a sexual case up there, I don't know who else the complainer would go to … because the accused is probably instructing that solicitor, so things like that, you know, it's just capacity.[575]

An interviewee in the Scottish context also observed the importance of having available solicitor advocates, or the ability to instruct counsel.[576] As explored in chapter 5, the availability of lawyers with the necessary rights of audience are critical to the effective delivery of ILR and suitable experience and expertise will need to be ensured at the recruitment stage regardless of the model of delivery. That said, one interviewee did not necessarily consider it essential for lawyers delivering ILR to have parity of seniority with defence counsel in terms of years of practice and expertise:

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[572] Participant 34.
[573] Participant 40.
[574] Participant 40.
[575] Participant 41.
[576] Participant 41.

> So, I wouldn't have seen the need for that, it doesn't obviously occur to me that there should be parity. It's not like during the trial process where, if the trial was to be prosecuted by a silk, then there's an argument that there should be parity there because there will be a battle across the way.[577]

Another interviewee in Scotland commented that whether a lawyer brings experience of defence or prosecution work might be relevant to their general approach:

> The one thing I'm not sure about is, when I deal with people who have spent their entire career prosecuting, sometimes it's not easy for them to have the football-loving neutral mindset and give the sort of open and unbiased advice because they can see both sides of it. I'd have a slight concern that if you have somebody who only ever interacts with complainers that perhaps that, inadvertently or unconsciously, affects their approach to it.[578]

The inter-relationship between advice and representation was also identified as a concern insofar given that the time needed to be able to adequately advise and represent clients might not be available in view of other pressures and could therefore limit lawyer recruitment to a private practice model. As one interviewee noted:

> Then the next problem that comes in is where do you get that legal advice? Because you're asking already overstretched criminal solicitors to allocate probably at least half a day to attending with somebody. They need to be made aware of the facts of the case, there needs to be an element of preparation.[579]

Against this background, and especially important in the context of vicarious trauma, is that research elsewhere demonstrates that delay and pressure in the system can adversely affect the well-being of lawyers and may also adversely impact lawyer retention.[580] As one interviewee observed, "The biggest problem with our profession at the minute is the work-life balance … it cuts into your family life, which is a definite issue."[581]

Organisations providing salaried service provision by way of short-term grant funding tend to generally face issues with recruitment and retention of lawyers.[582] The use of short, fixed-term contracts can exacerbate workplace insecurity and inequality[583] and, in the context of ILR provision, may also lead to issues with embedding cultural change

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[577] Participant 38.
[578] Participant 38.
[579] Participant 40.
[580] Denvir and others (n 465) 92-127. See also R Collier, "Whose 'wellbeing' are we talking about? Culture change and the politics of the legal profession's wellness turn" (2025) International Journal of the Legal Profession, advance access.
[581] Participant 40.
[582] Kinghan (n 563).
[583] P Findlay and others, Fair Work in the Third Sector in Scotland: A Report for Glasgow Council for the Voluntary Sector (2023) 71.

in terms of adopting trauma-informed lawyering approaches. In Scotland, one interviewee observed the challenges faced by organisations given the tendency towards one-year Scottish Government commitments to grant making:

> The grant funding … currently, how grant funding is operating is that it's one-year budgets. That's extremely difficult for services to manage. And there are delays in getting those decisions each year. So, the services themselves are … I think they suffer a lot. If it's only a one-year budget, you know, you have to give staff notice of redundancy. And it's a very, very difficult process for everybody involved. But that is the same for grant funding across the advice sector. So, the advice sector obviously are very, very good at managing, you know, a jigsaw of financial planning but … it's not easy at all.[584]

Finally, in each of the salaried models studied, other issues pertaining to lawyer retention tended to relate to discussion of the need for reflective supervision and other support structures in place to minimise vicarious trauma and burnout, as discussed in chapter seven.

8.7 Chapter summary

The key distinction across the models studied is whether ILR might be delivered by way of salaried or private practice lawyers. Even in a salaried model, facilitation of some degree of ad hoc private provision is usually required to ensure there is representation available should there be a conflict of interest, specialist expertise is needed, or capacity issues unexpectedly arise.

The advantages of a salaried model include the development of expertise in relation to service provision; easier integration of principles of trauma-informed practice; a single point of contact for clients with potential access to other support services; greater ease of monitoring and evaluation; potential benchmarking of rates of pay; lawyers can rely on the technical and administrative support of the wider organisation; and they can support one another, including during periods of leave, thus minimising the likelihood of burnout.

The disadvantages identified in relation to the salaried model were in relation to low rates of pay; capacity issues where there were not enough lawyers to meet demand; and conflicts of interest around cases, especially where services were situated within legal aid.

The key advantage of the private practice model was that it provided a measure of flexibility to lawyers and could relatedly therefore minimise burnout and the risk of vicarious trauma. It was also identified as an attractive model for reaching more remote geographic areas. However, several disadvantages were identified including challenges in integrating trauma-informed practice (especially relating to insufficient time available

[584] Participant 36.

to spend with traumatised clients in order to build trust); the inability to develop specialist expertise in the provision of ILR; the difficulty of finding roster or panel lawyers at short notice; conflicts of interest; and the challenge of monitoring the quality of casework.

Interviewees tended to observe a greater number of advantages and fewer disadvantages with the salaried model of provision. Additionally, the disadvantages of the salaried model were seen as more easily addressed compared to those of the private practice model. The risk of burnout can be lessened through allocating resource and time to peer support, the provision of breaks and reflective supervision. Capacity and conflict of interest issues can be addressed by having additional provision by way of an ad hoc panel of lawyers.

It is clear that attention should be paid to ensuring the rates of pay and working conditions are attractive to recruit, and retain, suitably qualified lawyers. In this respect, it is considered important that grants of funding under a salaried model are for sufficient lengths of time to prevent precarity and insecure employment. This is especially important for this type of service provision where a trauma-informed approach, and the nature of the work, depend on having time to develop specialist expertise and the skills needed for reflective practice.

Chapter 9: Evaluation and Measuring Success

Key points

- ILR services can be evaluated using 'victim measures', 'system measures', or a mixture of both. Victim measures relate to how complainers feel as a result of engaging with the service. The two victim measures that were repeatedly mentioned by research participants were increased agency for complainers and improved complainer wellbeing. Both can also have a positive impact in terms of preventing complainer withdrawal from the prosecution process.

- As well as the positive benefits to complainers arising from ILR, participants noted that complainer wellbeing might be adversely affected if introducing ILR had the knock-on effect of introducing delays into the progress of the case.

- System measures relate to service outcomes, such as substantive legal outcomes, the take-up of the service, or case processing times. These can be informative but substantive legal outcomes in particular is a measure that needs to be regarded with caution, as complainers may feel an increased sense of agency even if the outcome of the hearing is not the one that they wanted.

- There is a lack of transparency around the evaluation of existing ILR schemes. Publicly available data is almost non-existent, which limits the opportunity for an international community of practice to develop.

9.1 Introduction

This chapter discusses the evaluation of ILR schemes. It draws from the interview data to examine how research participants thought that 'success' should be defined and measured. It then moves on to consider how ILR schemes have been evaluated in practice, although in relation to this, its main finding is that very limited data exists in the public realm.

9.2 How might 'success' be measured?

There are various ways in which an ILR scheme might be evaluated. These can broadly be divided into what might be termed victim measures and system measures.[585] Victim measures here relate to how victims feel as a result of engaging with the service. This might include feelings of general wellbeing, agency or feeling more supported or

[585] The terminology is adopted from KA Lugo-Graulich and others, What Constitutes Success? Evaluating Legal Services for Victims of Crime: Final Report Prepared for the United States Department of Justice (2021) 29 (figure 8). The authors also note what they term "community measures", which would include things like the extent to which the general community are educated about victims' rights and have confidence in the criminal justice system.

knowledgeable about their rights. System measures relate to service outcomes, such as substantive legal outcomes, case processing times or the take-up of the service. The two types of measure are often related – victim satisfaction might be improved by, for example, the outcome of the case or detrimentally affected by, for example, longer case processing times. One of the very few evaluations of an ILA/ILR scheme that is publicly available used both types of measure in its assessment.[586]

System measures are generally more easily quantifiable than victim measures. The latter might be quantitively assessed – at least to an extent – by comparing the satisfaction levels of two separate groups of complainers who have engaged with the criminal justice system with and without ILR. The difficulty would be in confidently attributing any differences in satisfaction levels to the ILR service, as it would be impossible to hold every other aspect of the complainer experience constant. As such, they are perhaps better thought of as qualitative indicators that can be explored via complainer interviews or focus groups.

9.2.1 Victim measures

Victim measures were the most commonly mentioned measures of effectiveness among our interviewees. When asked how they would assess the success of an ILR scheme, almost all respondents focused on client satisfaction as the primary evaluative criterion. One interviewee stated that the measure of success for their particular scheme would be: "that we have happy clients most of the time for the most part".[587] Another interviewee put it like this:

> I think the only person that can evaluate it is the person themselves who's gone through that support or that engagement. So, it would be the victim-survivor, I think they're the only one who can evaluate whether or not it felt okay.[588]

Complainer satisfaction in the context of an ILR scheme has at least two distinct but related components.[589] The first is agency. Research has suggested that complainers feel that they have little or no control over what happens in the criminal justice process after they report an allegation of a serious sexual offence and that this marginalisation is very stressful.[590] Although in the schemes that were examined, ILR is provided only in relation to a small component of the criminal justice process (admissibility of sensitive records or sexual history evidence), interviewees commonly spoke of an effective scheme being one that gave complainers a sense of agency over at least one aspect of the process that they would not otherwise have had, or one in which there can be

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[586] Smith and Daly (n 92). This evaluation of a victim advocate scheme focused on substantive case outcomes (section 6.1), complainant satisfaction (section 6.3), the impact on the accused (section 6.4), and the efficiency of investigations (section 6.5).
[587] Participant 22.
[588] Participant 33.
[589] For a general checklist of the different ways in which victim satisfaction might be measured, see Lugo-Graulich and others (n 585) 29 (figure 8).
[590] See e.g. Brindley (n 251) 308-310.

"effective participation"[591] by the complainer. In relation to an ILR for sensitive records scheme, one interviewee stated:

> What I think is at the absolute crux of all of this is that aspect of agency around their records. There's so many other parts that they have no control over in the criminal justice process, so the more we can give them that is definitely a focus for us.[592]

Interviewees stated that a scheme might be successful in providing a sense of agency to complainers, even in a case where the substantive legal outcome was not the one that they desired: "it might not be the result they wanted, but they have that information and they were involved".[593] As one interviewee put in in relation to sensitive records ILR:

> We can't guarantee that records won't be ordered to be produced but we will make all the arguments we possibly can, make all the submissions we can and then it will be for the judge to decide. But I think at least the comfort for clients knowing that it's been through those processes with really careful consideration as to how the law applies at least gives them something.[594]

Another stated that:

> It's about the experience of the client, that agency and I think testing what that has meant for them to have that agency in that process. Because I think you can't always influence the outcome of the trial, whether the woman thinks she gets justice … But I think it's the agency for her and what it means for her to have someone in her court.[595]

A second aspect of complainer satisfaction relates to the broader issue of complainer wellbeing. There is overwhelming evidence that those who engage with the criminal justice system after making an allegation of rape or other serious sexual offences can find the experience distressing and re-traumatising.[596] In this sense, an effective ILR scheme is one that does not itself contribute to re-traumatisation, which it might do if it

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[591] Participant 40.
[592] Participant 23.
[593] Participant 22.
[594] Participant 23.
[595] Participant 27.
[596] In Scotland, see e.g. HM Inspectorate of Prosecution in Scotland, Thematic Review of the Investigation and Prosecution of Sexual Crimes (2017) ch 4; O Brooks-Hay, M Burman, L Bradley and D Kyle, Evaluation of the Rape Crisis Scotland National Advocacy Project: Final Report (2018) 21-25; O Brooks-Hay, L Bradley and M Burman, Justice Journeys: Informing Policy and Practice Through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault (2019) chapter 3. Internationally, see e.g. E McDonald, Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot (Canterbury University Press, 2020) (New Zealand); J Murphy-Oikonen, L Chambers, A Miller and K McQueen, "Sexual assault case attrition: the voices of survivors" (2022) 12 SAGE Open 21582440221144612 (Canada).

did not operate in a trauma-informed manner.[597] One interviewee spoke of judging the scheme as successful on the basis they are "trying to make things a human-centred approach, come through that lens and being trauma-informed … that's what we want".[598] In addition to this, however, effective ILR provision may also serve to improve the wellbeing of complainers.[599] As two of our research participants put it:

> I think it's always important when you do evaluations to be, like, qualitative because sometimes the numbers don't tell a story. And so like, really drill down into what does that look like for this woman and what did her experience look like? And I think, you know, when we talk about chipping away and small victories, some of it is just that you have made that woman's experience of one particular part of one particular flawed system a bit more bearable.[600]

> Sometimes I look at what I do and I think this is trivial. But it's not trivial to the person that cares about it. So, I don't think there is a way to measure it because … the currency is measured in the dignity of the complainants within the criminal justice system, that's the measure. We give them options, we give them choice, we give them advice and we give them the ability to have an impact on how re-traumatising this is going to be.[601]

The two measures are, of course, related. Re-traumatisation may be lessened by the complainer having a sense of agency in decision making.[602] But it also relates to a sense of having the support of someone who is focused on them, rather than on the broader public interest:

> It's like in that moment, you have an ally and you have someone with you who's going in to bat for you. And that might be the only time that that woman experiences that from statement to completion.[603]

Another interviewee described it in the sense of complainers being able to have confidence and trust in the advice that they are being given, knowing that their best interests, rather than the best interests of the prosecution, are being considered:

> What's very, very clear is that survivors really value having someone that they trust to be giving them information from their own perspective. So quite often, we have to tell people things they don't want to hear, we have to say, sorry, I don't think that is going to work or I'm afraid you do have to provide that if you want the case to go forward or whatever. We … give people honest advice. Sometimes it

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[597] On which, see chapter 7.
[598] Participant 7.
[599] See e.g. R Killean, "Legal representation for sexual assault complainants", in R Killean, E Dowds and A-M McAlinden (eds) Sexual Violence on Trial: Local and Comparative Perspectives (2021) 174 at 177.
[600] Participant 26.
[601] Participant 14.
[602] See e.g. Brindley (n 251) at 318; Kirchengast (n 127) at 68.
[603] Participant 27.

> will accord with what they want, sometimes it won't. But even when we give people negative advice, we find people really, really appreciate it. You know, nine times out of ten people say, well, thank you, at least now I know I've looked into this or thank you, you've explained it in a way which I finally understand and nobody else had explained it to me, so it didn't make sense.[604]

Improved complainer wellbeing is important in itself, but it may also contribute to preventing complainer withdrawal from the prosecution process.[605] Several interviewees mentioned the latter as an evaluative measure. This was especially the case in relation to the ILA schemes that formed part of our research.[606] It was, however, also mentioned by some interviewees as a measure of success in relation to ILR schemes. One interviewee providing ILR to complainants in relation to sensitive records applications commented that:

> What we're seeing so far is that having the support of a lawyer … in this service really contributes to [complainant] willingness to stay engaged in that prosecution as well, given that they've been able to get through this hurdle with that support.[607]

The point was also made, however, that it is important when assessing the effectiveness of ILR provision to look carefully at complainer wellbeing and the factors that affect it. If introducing ILR had the knock-on effect of introducing inordinate delays into the progress of the case, for example, this has the potential to adversely affect complainer wellbeing, negating or lessening the benefits brought by increased agency. As one of our research participants put it:

> I think an effective ILR system would be one that allows the complainer to be able to provide the court with their views on [the application] in a way that allows the court to take account of these when considering the application [But] I think there also has to be a balance in terms of ensuring that it doesn't interfere with the case proceedings in general, and there isn't any unnecessary delay or churn involved in the ILR system, which would impact both the complainers, other witnesses, and accused in general.[608]

9.2.2 System measures

Three system measures were mentioned by interviewees: scheme take-up, substantive legal outcomes and case processing times.

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[604] Participant 8.
[605] See e.g. Iliadis and others (n 164) at 272; Killean (n 599) 174 at 178.
[606] See e.g. participant 18.
[607] Participant 28.
[608] Participant 40 and see section 9.2.2 below. The issue of delay in proceedings from the introduction of ILR was also discussed in section 4.2.4.

In terms of scheme take-up, several interviewees referred to the number of complainers who accessed the scheme as being an important evaluative measure, either as a measure on its own, or in terms of cost effectiveness (the number of complainers assisted divided by the cost of the scheme). However, it was also suggested that this measure was an incomplete one. This is because a successful ILR scheme might be one in which applications made by the defence (and therefore the number of complainers seeking ILR) decreased, because the knowledge that the complainer would be legally represented would deter the making of frivolous applications or ones that had little chance of success. As one of the policymakers who was involved in designing an ILR scheme in relation to sensitive records stated:

> So, I think the biggest thing when we were talking about the scope of this pilot and the success we could have was that it could have a chilling effect on exploratory applications for these types of records. That was probably the biggest outcome we would hope to see … If we could achieve a resetting of the expectations from those seeking those records, that actually victims will fight back and that you're not going to get away with a fishing expedition for records that you shouldn't have. That would be the number one outcome we would seek.[609]

A similar point was made in relation to one of the more established ILR schemes: "I think anecdotally, the other thing is when we're hearing that people are avoiding accessing or trying to access the records, that's really important".[610] With this in mind, another interviewee suggested that as well as the numbers assisted per se, an equally important evaluative measure is client awareness of the scheme (or more broadly the scheme's accessibility to those who do need it): "it's about continual improvement in terms of both the awareness for practitioners, the awareness for clients".[611]

A second quantitative measure mentioned by interviewees was substantive case outcomes.[612] But here too 'success' is perhaps not quite as straightforward as the number of cases 'won' or 'lost'. As one interviewee put it in relation to ILR for sensitive records:

> I don't think there is a, sort of, general way to measure whether you're successful or not. Because … we're trying to do lots of different things. Sometimes we're trying to keep the information out, sometimes we're trying to get the information in. Sometimes we're trying to get some of the information in.[613]

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[609] Participant 29.
[610] Participant 22.
[611] Participant 23.
[612] See e.g. participants 1, 2 and 27.
[613] Participant 14.

Additionally, as has already been discussed, client satisfaction may be positive even in case where the outcome was not the one that the complainer desired, if it increased the sense of agency that the complainer felt they had over the issue.

The final system measure that was mentioned was case processing times. This was not as frequently mentioned,[614] but it is nonetheless a system measure that would be relevant to any evaluation of ILR.[615] The detrimental impact of delays on complainers in sexual offence cases has been well-documented,[616] and delays will of course also impact the accused person and other witnesses in the case.

9.3 Evaluation of existing ILR schemes

Publicly available data on the evaluation of the existing ILR schemes that were examined in this report is almost non-existent.[617] The researchers identified a small number of evaluations that had taken place and had sight of some of these, but they were not given permission to refer to them in the public domain. In two instances, it is a matter of public note that an evaluation of the ILR scheme has taken place, but despite the best efforts of the researchers and our network of contacts we were unable to obtain a copy of the reports. This lack of transparency is regrettable, as it prevents an international community of practice developing whereby one jurisdiction can learn from another. A recent review of sexual assault victim advocacy noted the lack of an evidence base on what works well in this context and recommended the establishment of a "clearing house could allow agencies to share their evaluation data (without identifying their program), so that practitioners and researchers can identify important trends in advocacy" such as "what is most and least helpful; how well different types of clients are served etc".[618] The same point could justifiably be made in relation to ILR.

The only publicly available evaluation of an ILR or ILA scheme in the jurisdictions that we examined is the evaluation of the Sexual Violence Complainants' Advocate (SVCA) scheme that operated in Northumbria between September 2018 and March 2020.[619] This was an ILA service, which provided advice and non-court intervention for complainants in relation to requests to access their personal data.[620]

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[614] It was touched on by e.g. participants 40 and 24.
[615] It was discussed, albeit briefly, in the evaluation of the Northumbria pilot of the SVCA scheme: see Smith and Daly (n 92) 63.
[616] See e.g. M Burman and O Brooks-Hay, Delays in Trials: The Implications for Victim-Survivors of Rape and Serious Sexual Assault: An Update (2021).
[617] In the context of Ireland, the O'Malley Review considers the strengths and weaknesses of the ILR system as it stood when the review was undertaken, but this discussion is limited: see O'Malley (n 52) chapter 6.
[618] Wegrzyn and others (n 338) at 1980.
[619] Smith and Daly (n 92). There have also been evaluations of support services for victims of sexual assault that do not include ILR or ILA: see e.g. O Brooks-Hay, M Burman, L Bradley and D Kyle, Evaluation of the Rape Crisis Scotland National Advocacy Project: Final Report (2018).
[620] As noted earlier, there was one case where the SVCA instructed counsel for a hearing (although in the event the hearing did not take place). See further section 3.3.2, where the scheme is described.

As noted previously,[621] the evaluation concluded that the pilot had been successful. A total of 83 eligible referrals were made,[622] and complainants engaged with the service in 47 of these cases (57%).[623] The most common type of support offered was advice on data requests (38 cases), followed by attending ABE interviews (20 cases) and intervention (short of court representation, which was not part of the scheme) on data requests (18 cases).[624] The average time commitment by SCVAs per case was 155 minutes at an average cost of £725.[625]

The evaluation found a positive effect in terms of the outcome of the request to access data. There were 22 cases where SVCAs challenged data requests, and in eight of the 22 cases where the outcome of the challenge was known, the request was withdrawn or amended to a reduced timeframe or scope.[626] The overwhelming consensus of stakeholders was that the SVCA project led to greater consideration of third-party requests before they were made.[627] Only three complainants gave feedback on the pilot, but their comments were all highly positive, in terms of feeling supported by someone who had the legal training to understand, explain and navigate the criminal justice system.[628]

While not a formal evaluation, there is evaluative material in the public domain relating to the initial pilot of the New South Wales Sexual Assault Counselling Privilege (SACP) service, which took place in 2009. It is reported that solicitors acted for 32 men and women in relation to 116 subpoenas. In terms of outcomes:[629]

> Representation through the project successfully resulted in preventing or limiting access to victims' confidential records in 91 per cent of subpoenas. Of the 80 relevant subpoenas, access to subpoenaed documents was refused in 11 matters, partial access granted in 50 matters and 12 subpoenas were withdrawn. Full access was granted to the parties in only seven subpoenas.

It was noted that the scheme was very positively received by complainants, but also that prosecutors were very positive about the availability of free representation for complainants, noting that this saved time, allowing prosecutors to focus on other issues.[630] It was also noted, however, that timely compliance with the legislation's notice requirements was a problem, with a lawyer involved in the pilot stating that the

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[621] See section 3.3.2.
[622] Representing approximately 6% of eligible cases reported to the police during that period: Smith and Daly (n 92) 38.
[623] Ibid 7. Most of the complainants who quickly disengaged "did so because they decided not to proceed with the police complaint": ibid.
[624] Ibid.
[625] Ibid.
[626] Ibid 51.
[627] Ibid 53.
[628] Ibid 58.
[629] A Jillard, J Loughman and E MacDonald, "From pilot project to systemic reform: keeping sexual assault victims' counselling records confidential" (2012) 37 Alternative Law Journal 254 at 255.
[630] Ibid.

notice provisions were "honoured more in the breach than the observance" which "creates significant difficulties for complainants".[631]

Notwithstanding the absence of formal evaluation, our research participants did on occasion express views on whether they considered ILR in their jurisdiction to be successful. In those jurisdictions that operated a salaried lawyer model, their assessments were overwhelmingly positive. One commented that "there is quite a lot of good feedback and we are seeing that victims are more willing to be engaged and are saying it feels like I've got a voice for the first time".[632] Another stated that:

> I think it's [a success] and I'm basing that off the kind of feedback I've received from our clients … they're just really positive and thankful for the representation that we can give them … My sense is they feel heard in this and they seem to really trust us to represent them and represent their voice. … So, I think that's been really positive and I think a sign that it's a success.[633]

It does have to be said, though, that these assessments were based primarily on complainant feedback rather than other measures and in some cases were based on only the first few months of operation of the service.

Similarly positive feedback was noted in Northern Ireland about the SOLA scheme. As noted previously, there have been high levels of engagement with the scheme. Of those clients referred, 86% took up the legal support offered.[634] Of those clients who took part in a Victim Support NI survey, 100% said that advice "allowed them to have a voice in the criminal justice process" and 75% reported improved confidence in the criminal justice system.[635] One of our research participants stated that "the feedback from service users has been overwhelmingly positive, you know, they've come back to say that … and they've continued with the case, that their advice meant, you know, the difference between continuing or not".[636] Another noted that the target of 80% of those being referred to the SOLA service remaining engaged with it has consistently been met since 2021.[637]

In the two jurisdictions that operated a private practice model, research participants were less positive about the service. At least one interviewee in each jurisdiction expressed the view that if they had the choice to go back and create the scheme again, they would choose to operate on the basis of a salaried lawyer model.[638]

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[631] C Gleeson, "The Sexual Assault Communications Privilege pro bono scheme" (2010-2011) Bar News: Journal of the NSW Bar Association 73. Issues relating to notice requirements were explored in our interviews – see especially chapters 4 and 7.
[632] Participant 30.
[633] Participant 25.
[634] Victim Support NI, Annual Report 2022-23 (2023) 7.
[635] Ibid.
[636] Participant number withheld to protect confidentiality.
[637] Participant number withheld to protect confidentiality.
[638] This is discussed in more detail in chapter 8.

9.4 Chapter summary

This chapter has examined the ways in which the provision of ILR might be evaluated. It drew a broad distinction between victim measures and system measures. The vast majority of our research participants focused on victim measures such as complainer satisfaction as the most important evaluative measures of an ILR scheme. In a sense, this is not surprising, given that most of the comparative interviews were undertaken with those who operated the schemes, not with those from organisations that were responsible for funding them. Nonetheless, it is notable that the two 'success measures' that repeatedly came up were increased agency for complainers and improved complainer wellbeing. Both of these can also have a positive impact in terms of preventing complainer withdrawal from the prosecution process. As well as the positive benefits to complainers arising from ILR, however, participants noted that complainer wellbeing might be adversely affected if introducing ILR had the knock-on effect of introducing delays into the progress of the case.

System measures relate to service outcomes, such as substantive legal outcomes, take-up of the service, or case processing times. These can be informative but the first two, in particular, need to be treated with caution. Complainer satisfaction may be positive even where the outcome was not the one that the complainer desired, if it increased the sense of agency that the complainer felt they had over the issue. Figures on the take-up of the service need to take account of the possibility that applications made by the defence (and therefore the number of complainers seeking ILR) might decrease, because the knowledge that the complainer would be legally represented would deter the making of frivolous applications or ones that had little chance of success.

A further finding from the research is that there is a lack of transparency around the evaluation of existing ILR schemes. Publicly available data is almost non-existent, which limits the opportunity for an international community of practice to develop. We have already noted that the establishment of a community of practice for lawyers delivering ILR within the Scottish jurisdiction would be helpful.[639] In the same vein it would also be beneficial to develop a wider international community of practice among comparable jurisdictions that operate ILR schemes.

[639] See section 7.6.

Chapter 10: Key Findings and Conclusions

10.1 Introduction

The aim of this research was to develop an evidence-based understanding of different models of delivery of ILR in adversarial legal jurisdictions comparable to Scotland, identify their advantages and disadvantages, and consider how ILR might best be implemented in Scotland in light of its specific criminal justice context. In this chapter, we summarise the key lessons from the analysis of comparable legal jurisdictions, before outlining the issues that need to be taken into account in designing an effective ILR system in the specific Scottish context. We then bring together these two aspects of the research and set out our key conclusions.

10.2 Key findings of the comparative research

10.2.1 Referral pathways

Systems of ILR delivery require to be structured around a 'triggering event', in the form of a particular type of application, or intimation of the intention to make a particular type of application, by the defence. Rules of professional practice on how solicitors may obtain clients impact the design of referral pathways that follow from that triggering event. In each of the jurisdictions we studied that operate an ILR service, initial responsibility was assigned to the prosecutor to take action following the triggering event to inform the complainer of their right to ILR. All of these jurisdictions also operated a form of direct prosecutor referral, whereby the prosecutor passed on the complainer's details to an ILR provider, who in turn contacted the complainer.

Interviewees saw direct prosecution referral as having two main advantages: it was considered likely to lead to a higher uptake of the service and with appropriate information sharing could reduce the risk of re-traumatisation. However, direct prosecutor referral would not be possible in Scotland, given the present professional practice rules on how solicitors obtain clients. The relevant rules on professional practice would not, however, preclude COPFS providing complainers with information about a dedicated service of ILR provision for complainers at section 275 hearings, assuming the complainer then took the next step of instructing a solicitor at that service directly.

As such, we would endorse the proposed approach envisaged in the Bill relating to the role of the Crown in intimating rights of ILR to complainers, whilst proposing ongoing scrutiny of their performance in this respect once ILR becomes operative. This is a similar referral mechanism to the one that operates in the context of Northern Ireland, where the prosecutor provides details to the complainer of the available legal assistance service (albeit this is a service that provides ILA, rather than ILR).

Delay was consistently identified as a problem in the practical operation of all types of referral mechanism. Swift action by the prosecutor in terms of contacting the

complainer following the triggering event is of the utmost importance to the effective operation of an ILR scheme, especially given the time parameters within which ILR must be provided. Failure to do this timeously is likely to lead to further complainer re-traumatisation and potential delay in proceedings.

We were asked to consider the position of docket and other witnesses in relation to section 275 applications and ILR. The interview data and legal analysis indicates that there is no way to ensure consistent and effective representation of such witnesses via consistent referral pathways under the proposed system of ILR other than by amending section 274 of the 1995 Act to ensure such individuals are now protected by this provision.

10.2.2 ILR in court hearings

Facilitating ILR in court proceedings is a matter that requires careful thought and consideration even where the right to ILR is narrowly defined. The form ILR can take varies between written and/or oral submissions. We consider that in some instances involving unopposed and uncontentious section 275 applications there is capacity for submissions to be provided in writing only, although opposed applications will require a legal representative to attend court.

In the jurisdictions we analysed, the role of ILR was sometimes performed by solicitors alone and sometimes with solicitors instructing a class of independent specialist pleaders, such as barristers. The advantage of involving a specialist independent pleader in a system of ILR was the added expertise and ability that such a lawyer brought to the service. The involvement of such individuals, however, comes at both a logistical and financial cost. In Scotland any system of ILR will require the involvement of advocates or solicitor-advocates who have rights of audience in the High Court of Justiciary. Policy makers should consider whether in future a service could utilise an employed number of solicitor advocates. Regardless of the type of service delivery adopted, it must protect complainers' choice of representation where possible and have capacity to utilise other independent specialist pleaders, where appropriate.

Whilst the danger of the impression of coaching of witnesses is a risk in systems providing ILR, relevant professional rules in operation in Scotland, and careful legal practice should ensure appropriate conduct. Where ILR requires to be provided at trial, or where complainers are given a right of appeal, difficult issues for policy makers arise. In respect of the former, a salaried model of ILR provision has the potential to mitigate against delay. In respect of the latter, the Bill's approach appears to be arbitrary, and more thought requires to be given the position in summary cases.

10.2.3 Relationships with criminal justice stakeholders

Collaboration between all stakeholders – in particular the ILR service provider(s), the prosecution and the Government (or the body funding and/and evaluating the scheme) – was seen as key to the design and implementation of an effective ILR service. The importance of involving complainers in service design was stressed.

The relationship between the prosecution and the ILR provider was seen as the crucial relationship that contributes to the smooth running of an ILR service, but it is a relationship that has the potential to be problematic if not well managed. ILR providers spoke of the delicate balance that needs to be maintained between providing independent advice and representation, while also maintaining good working relationships with prosecutors.

Research participants suggested that the proposals in the Bill relating to the disclosure of evidence as currently drafted risk overcomplicating the disclosure process, creating delays and unnecessary work for the Crown. A simpler system would be for the ILR provider to apply to the court for disclosure – in those cases that require it – within seven days of receipt of the application or another specified period and intimate that application to the Crown and defence, who would then have the opportunity to object within a specified period of time. These matters could be granted by the court administratively if there is no objection.

Interviewees raised other issues with the Bill as presently drafted. First, the legislative regime that covers the use of Crown disclosure applies only to the defence. Given that Crown disclosure in sexual offences cases contains sensitive information, there is a need that the relevant rules on disclosure are amended, so that they extend to those who provide ILR for complainers. Second, there is presently no requirement for the complainer's legal representative to indicate to the court itself that they are acting.

Research participants spoke of the danger of over-crowding of the space if different agencies – such as the prosecution, ILA providers and any support services providing non-legal support to victims – are all potentially involved with the complainer. This has the potential to confuse complainers, as well as lead to re-traumatisation if they need to provide the same information to multiple agencies. The need for delineating different roles to avoid such confusion or overlapping of responsibilities was identified, as well as the need for agencies themselves to be clear as to the role of each other.

10.2.4 Trauma-informed practice

The need for an ILR service to be trauma-informed was a key theme from the data collection. Working with complainers in cases of sexual violence demands a unique set of skills and a different approach to casework and to clients. It is clear that a generalised approach without adequate training and ongoing reflective supervision will fail to meet the needs of clients, and will not protect lawyers from the risks of vicarious trauma and burnout.

Four themes emerged from the interviews concerning what is required for a truly trauma-informed approach to ILR. First, there is a need for clear timelines that minimise delay so that there is adequate time to build the trust and confidence of complainers. Secondly, there is a need to ensure that information is conveyed in ways that are alive to the impacts of trauma and that communication styles are adjusted accordingly. Thirdly, there is a need for bespoke training and ongoing reflective practice, drawing upon

multidisciplinary expertise. Finally, it is important to manage complainer expectations about the limitations and extent of the provision of ILR and to signposting to other support services if necessary.

A further key finding of the research is that there is a risk of vicarious trauma and burnout for lawyers providing an ILR service, especially if this work forms all, or the vast majority of, their caseload. Several proposals were made by interviewees to minimise this risk, including allocating resource and time to peer support, the facilitation of breaks and the importance of reflective supervision.

10.2.5 Models of delivery and funding

The key distinction across the models studied was whether the ILR service was delivered by salaried or private practice lawyers. The salaried model was the most common and there were several variations of this. In one jurisdiction the salaried lawyers were located within the legal aid service. In others, they were located across both legal aid and a third sector organisation. This latter arrangement had the advantage of being better able to deal with conflicts of interest, where the accused was already being represented by a legal aid lawyer, although this was primarily an issue in the Australian jurisdictions, where it is typical for the state legal aid service to employ lawyers directly. Across all salaried models, provision was made for some degree of ad hoc private provision, either to deal with conflicts of interest or capacity issues. Some of the salaried models briefed counsel for court appearances; others (in those jurisdictions where rights of audience were not an issue) did not.

The advantages of a salaried model include the development of expertise in relation to service provision; easier integration of principles of trauma-informed practice; a single point of contact for clients with potential access to other support services; greater ease of monitoring and evaluation; potential benchmarking of rates of pay; lawyers can rely on the technical and administrative support of the wider organisation; and they can support one another, including during periods of leave, thus reducing the likelihood of burnout.

The main disadvantage is that there can be capacity issues, which might arise if the rates of pay are not attractive enough or (in services that employed only one or two salaried lawyers) because there is insufficient cover for periods of staff absence. There also needs to be a system for dealing with conflicts of interest, especially if the salaried lawyers are located within legal aid.

The key advantage of the private practice model was that it provided a measure of flexibility to lawyers and could relatedly therefore minimise burnout and the risk of vicarious trauma. It was also identified as an attractive model for reaching more remote geographic areas. However, several disadvantages were identified including challenges in integrating trauma-informed practice (especially relating to insufficient time available to spend with traumatised clients in order to build trust); the inability to develop specialist expertise in the provision of ILR; the difficulty of finding roster or panel lawyers at short notice; and the challenge of monitoring the quality of casework. Like

the salaried model, conflicts of interest can also arise, so the roster of lawyers needs to be large enough to deal with this.

Interviewees tended to observe a greater number of advantages and fewer disadvantages with the salaried model of provision. Additionally, the disadvantages of the salaried model were seen as more easily addressed compared to those of the private practice model. The risk of burnout can be lessened through allocating resource and time to peer support, the provision of breaks and reflective supervision. Capacity and conflict of interest issues can be addressed by having additional provision by way of an ad hoc panel of lawyers.

While it was not relevant in any of the other international models studied, research participants in Scotland also considered the possibility of contracting legal aid services for ILR. This would involve salaried lawyers undertaking the work by way of contracts commissioning the service to lawyers in private firms or other specialist providers. An advantage of this model was that it might afford more opportunity to monitor the service as compared to the more traditional judicare model of legal aid. It might also facilitate the development of a specialist service, and related specialist expertise, for those providers contracted to deliver the service as compared to a case-by-case judicare model. In addition, it might allow for longer periods of service delivery under contact as compared to short-term grant funding. However, a disadvantage of this model was a perceived lack of choice for complainers. The model has also been said to be associated with risks, especially in smaller jurisdictions like Scotland, relevant to non-delivery, abortive costs and market failure.

Regardless of the model adopted, it was clear that attention needs be paid to ensuring the rates of pay and working conditions are attractive to recruit, and retain, suitably qualified lawyers.

10.2.6 Evaluation and measuring success

In terms of how an ILR service might be evaluated, there is a broad distinction between victim measures and system measures. Victim measures relate to how victims feel as a result of engaging with the service. System measures relate to service outcomes, such as substantive legal outcomes, the take-up of the service or case processing times. The two are not unrelated – an increase in case processing times (a system measure) might impact negatively on complainer wellbeing (a victim measure).

When asked how they would gauge success, the majority of research participants focused on victim measures such as complainer satisfaction as the most important evaluative measures of an ILR scheme. In a sense, this is perhaps not surprising, given that most of the comparative interviews were undertaken with those who operated the schemes, not with those from organisations that were responsible for funding them. The two victim measures that repeatedly came up were increased agency for complainers and improved complainer wellbeing. Both of these factors can also have a positive impact in terms of preventing complainer withdrawal from the prosecution process. As well as the positive benefits to complainers arising from ILR, participants noted that

complainer wellbeing might be adversely affected if introducing ILR had the knock-on effect of introducing delays into the progress of the case.

System measures (such as substantive legal outcomes, the take-up of the service, or case processing times) can be informative but the first two examples, in particular, need to be regarded with caution. Complainer satisfaction may be positive even where the outcome was not the one that the complainer desired, if it increased the sense of agency that the complainer felt they had over the issue. Figures on the take-up of the service need to take account of the possibility that applications made by the defence (and therefore the number of complainers seeking ILR) decrease, because the knowledge that the complainer would be legally represented would deter the making of frivolous applications or ones that had little chance of success.

A further finding from the research is that there is a lack of transparency around the evaluation of existing ILR schemes. Publicly available data is almost non-existent, which limits the opportunity for an international community of practice to develop. We have already noted that the establishment of a community of practice for lawyers delivering ILR within the Scottish jurisdiction would be helpful. In the same vein it would also be beneficial to develop a wider international community of practice among comparable jurisdictions that operate ILR schemes.

10.3 The Scottish context

In the previous section we set out the key lessons that can be drawn from the operation of ILR services in comparable jurisdictions. However, it is not as straightforward as simply transplanting the features of an ILR service from another jurisdiction into the Scottish criminal justice context, however successful that service might be. The comparable jurisdictions we examined that have an operational ILR service are Canada, Ireland, New South Wales, Queensland and Victoria. As operational models, the Australian jurisdictions in particular have a lot to commend them. Yet they operate in their own specific jurisdictional context. For example, in Australia all legal practitioners have rights of audience in the highest courts. The ILR service is restricted to applications to access private records – at the time of writing no Australian jurisdiction provided ILR for sexual history applications. The legal aid service is also organised differently, employing solicitors as salaried lawyers to provide legal aid services. As such, there was an existing infrastructure where ILR could relatively easily be ‘slotted in’, especially in Victoria where there already existed a victims’ legal service operating out of legal aid.

None of these things are the case in Scotland. In the other jurisdictions too, there are specific features of the jurisdictions that are pertinent to the way the ILR service operates. In Ireland, which has a system of ILR for sexual history applications and sensitive records, representation is facilitated largely after the trial has begun and the types of application for which ILR is available tend to be relatively straightforward and are rarely contested. In Canada a fused legal profession means that rules on rights of audience do not create a need to instruct independent expert pleaders.

Data collected from the interviews with Scottish stakeholders, and other interviewees, demonstrated that there are a number of key features of the Scottish context that need to be taken into account when designing an ILR service. These include:

- The professional ethical rules which govern how lawyers may obtain clients in a particular jurisdiction dictate the contours of what is possible in terms of the precise way in which referral mechanisms operate.

- In the Bill, ILR is proposed in respect of sexual history and character evidence applications (section 275 applications), unlike the majority of the jurisdictions we studied where it is only available in respect of applications to access sensitive records.

- Many section 275 applications are opposed, and the policing of the boundaries of permitted applications remains a contentious feature of Scottish practice.

- The Scottish Legal Aid Board administers publicly funded legal assistance, but does not, within the criminal justice system, with the exception of the Public Defence Solicitors' Office, itself employ salaried lawyers to provide it.

- There is only limited free legal advice available for complainers in sexual violence cases in Scotland at present.[640] No comprehensive state-funded service currently exists.

- Only advocates and solicitor-advocates have rights of audience in the High Court of Justiciary, where the vast majority of section 275 applications are considered, and they require to be instructed by a solicitor or other designated body or professional.

- We were told that an ageing demographic of criminal legal aid defence solicitors and fewer new trainees and early career solicitors doing defence work has led to a lack of available solicitors to undertake criminal defence business.

10.4 Key conclusions

This study has comparatively examined different international models of delivery for ILR. In view of the particularities of the Scottish context, in this section we summarise our conclusions in relation to the themes that arose in our data collection. These conclusions are those considered to be most pertinent in the Scottish context, which might guide policy makers and practitioners in relation to next steps with the design and delivery of a new system of ILR in Scotland.

[640] Emma Ritch Law Clinic, University of Glasgow School of Law.

10.4.1 Referral pathways

Effective communication with complainers appears critical to the success of ILR in practice: the proposal contained in the Bill to allocate responsibility to the Crown for informing a complainer of their rights to ILR in Scotland at section 275 hearings is logical, sensible and in line with comparative international practice. That said, scrutiny requires to be applied to their effective performance of this role, given its importance to the uptake of ILR and to trauma-informed practice. In view of our research findings regarding concerns about the Crown's current practice in relation to communication with complainers, a short-life working group could be established at the earliest opportunity to specifically address the methods and means of communication, and other matters related to ILR service delivery, drawing upon examples of best practice elsewhere.

Communication with complainers should be timeous in order to facilitate effective delivery of ILR: swift action by the prosecutor in terms of contacting the complainer following the triggering event is of the utmost importance to the effective operation of an ILR scheme, especially given the time parameters within which ILR must be provided. It is clear from the data collection that complainers should be contacted as soon as possible by the Crown and provided with the necessary information to achieve effective ILR delivery. It seems feasible that the Crown might attempt to do this no later than three working days after the triggering event i.e. the lodging and/or intimation of the section 275 application. If additional resources are required for them to perform this role, that might be considered given the importance of efficiency, as identified in the research, to minimise delay in providing the necessary information.

The role of docket and other witnesses needs to be carefully considered: there is no obvious way to ensure consistent and effective representation of such witnesses via consistent referral pathways under the proposed system of ILR, other than by amending section 274 of the Criminal Procedure (Scotland) Act 1995 to ensure said witnesses are now protected by this provision. Careful consideration is needed as to whether this provision may require amendment to ensure consistency of provision.

10.4.2 Relationships with stakeholders

It is important that a diverse group of criminal justice stakeholders and those with lived experience be consulted as service design plans develop: other international models of delivery demonstrate the value of a forum of communication by which issues can be aired post-implementation and can be addressed. To this end, the Scottish Government might similarly ensure that all criminal justice stakeholders are involved in service design and that design processes include the perspectives of victim-survivors of sexual violence.

It is worth considering the extent to which the provisions in the Bill on the disclosure of evidence may need amendment: the research findings demonstrate the importance of developing criminal procedure in this area. For example, the independent

legal representative might apply to the court for any disclosure they consider necessary within seven days of intimation (or other specified period), of the application or later than that on cause shown. Thereafter the Crown and defence could have seven days (or other specified period), or later on cause shown, within which to intimate any objection to the requested disclosure. In the absence of any objection the court should be able to determine the matter in chambers, administratively, through an interests of justice test. If the disclosure sought is opposed than the matter will require to be heard at the Preliminary Hearing or other administrative hearing with consideration of the substantive section 275 application continued to a further hearing. Relevant legislation and guidance could also be amended to regulate the independent legal representative's use of disclosure obtained during their instruction.

Written guidance serves to effectively delineate different roles and responsibilities: introducing ILR into the criminal justice system has the potential to confuse, especially where different agencies are involved in communicating or providing services to complainers. There is a need to ensure that all stakeholders are aware of their own roles and responsibilities and the roles and responsibilities of others. There is also a need to simplify as far as possible the number of different agencies that are communicating with complainers. Written guidance, or a memorandum of understanding, will help to effectively delineate different roles in the space.

It is important to manage expectations and ensure clarity about the limitations and extent of the provision of ILR and its role in the adversarial system: lawyers face challenges when complainers seek advice and representation, or otherwise need support, outside of the confines of their role. Ensuring clarity from the outset about the extent of the service is important. Having partnerships in place with wider support services may help to facilitate meaningful signposting and minimise referral fatigue.

10.4.3 Trauma-informed practice

Timelines for ILR referrals should be clearly specified: trauma is exacerbated where complainers do not have sufficient time to receive advice and representation, and to build trust and confidence with their legal representative, given the highly sensitive nature of the issues involved in section 275 applications. As set out above, complainers must be timeously notified of their right to representation. This might be done, for example, immediately following the triggering event and no later than three working days from the triggering event. The Crown already has channels of communication with complainers and docket witnesses. The research highlights that, should there be communication failures in this respect, the entire system of ILR could be adversely impacted. Consideration might therefore be given to judicial oversight of the matter at the Preliminary Hearing or First Diet, through inclusion of a question on the Written Record of Preparation relating to the matter.

Specific training in trauma-informed lawyering should be delivered by those with appropriate background expertise: for example, counsellors, psychologists and/or other mental health specialists should design and deliver training, together with lawyers who bring experience from practice of advising and representing survivors of sexual

violence. For those acting in this space, the commitment to trauma-informed training should be ongoing and not simply delivered once via an online module without considering its importance to ongoing reflective practice.

Reflective practice should be built into models of supervision and carefully monitored: the data collection made clear that reflective supervision helps to ensure advice and representation is refined to ensure trauma-informed principles are adhered to. It was also noted as an important part of minimising the risk of vicarious trauma and burn-out. Monitoring reflective practice will be easier in salaried models of delivery.

Allocate resource to embedding trauma-informed practice: discrete training, as well as reflective supervision, is necessary for successfully embedding trauma-informed approaches and minimising vicarious trauma. The research highlights the importance of time and resource for successfully embedding a trauma-informed approach, drawing upon multi-disciplinary expertise related to sexual violence.

There is value in supporting the establishment of a community of practice for lawyers delivering ILR: this will promote the exchange of learning around best practice and provide support to minimise vicarious trauma. It may improve rates of long-term retention in roles and help lawyers to develop specialist skills in trauma-informed practice.

10.4.4 Models of delivery

A salaried model appears to be the most appropriate model for delivery of ILR in Scotland: it affords the opportunity to develop a concentration of specialist expertise in the provision of ILR, monitor casework, build capacity and provides comparatively more time to build trust with clients and take a trauma-informed approach. It also facilitates the ability to act more quickly under pressure of time, such as where an application is made late, and should provide a team approach and wider support for lawyers, which minimises burnout and promotes lawyer retention. It was the model associated with the most benefits and fewest drawbacks in our data collection, and its disadvantages are easier to address than those of the private practice model.

Salaried models located in not-for-profit settings bring a number of added benefits: these include the availability of wider support services, ensuring more holistic service provision, being able to draw upon wider expertise in victim support and relying on wider networks in knowledge exchange and developing best practice.

An ad hoc panel of legal aid lawyers will overcome some of the challenges of the salaried model: many of the disadvantages of the salaried model can be overcome with some provision for ad hoc private practice lawyers. These do not have to be heavily relied upon, as in some models, rather they would be needed on an ad hoc basis should conflicts of interest arise or specialist expertise be needed on a complex case. An ad hoc panel might also help to cover a wider geographic region on a case-by-case basis should in-person representation be required in more remote areas. Thought will require

to be given by policy makers, in collaboration with the profession and the Scottish Legal Aid Board, as to how this best can be facilitated.

10.4.5 Skills and expertise

Developing and maintaining specialist expertise in the field of ILR is critical to success regardless of the delivery model adopted: the data collection shows the delivery of ILR requires a discrete skillset and specialist trauma-informed approach. It is important that it is valued as a specialist service rather than being absorbed into other types of criminal legal aid delivery.

Rates of pay need to be carefully benchmarked to attract suitably qualified candidates: it is important that lawyers bring appropriate knowledge and expertise. Candidates with at least five years post-qualification experience, ideally with a background in criminal law and qualification as a solicitor advocate, would be most appropriate for the role in the Scottish context. Rates of pay should be reflective of this level of expertise and experience and carefully benchmarked with equivalent civil service and/or public sector legal roles.

A salaried model comprised of some in-house solicitor advocates may be appropriate for meeting requirements in relation to rights of audience: independent specialist pleaders with rights of audience in the High Court of Justiciary might be appropriate for the effective delivery of ILR. Recruitment of solicitor advocates would meet the requirements of practice and work well alongside a panel of other solicitor advocates and counsel to provide ad hoc specialist support as needed. Complainers' choice of representation needs to be respected in this context, as far as is possible.

10.4.6 Evaluation

An important measure of the success of an ILR service is the impact that it has on complainer wellbeing: this was the overwhelming consensus of those interviewed. This could be quantitively assessed – at least to an extent – by comparing the satisfaction levels of two separate groups of complainers who have engaged with the criminal justice system with and without ILR. The most valuable data will come, however, through qualitative methods.

Quantitative measures of the success of ILR will also be informative: these might include substantive legal outcomes, the number of complainers engaging with the service or case processing times. The first one in particular, however, needs to be regarded with caution. Client satisfaction may be positive even where the outcome was not the one that the complainer desired, if it increased the sense of agency that the complainer felt they had over the issue.

It would be beneficial for evaluation and learning around the ILR scheme to be made publicly available so it can be shared across different schemes: publicly available data relating to the evaluation of ILR schemes is almost non-existent. This limits the extent to which stakeholders in one jurisdiction can learn from another. As

such, it would be beneficial to establish a wider international community of practice among comparable jurisdictions that operate ILR schemes.

10.4.7 ILR and legal practice

It is important to consider the appropriate scope of initial delivery of ILR based on the key findings of this report: it may be appropriate to deliver ILR first in the High Court of Justiciary, this being where most section 275 applications occur. This would allow experience to be developed in the delivery of ILR before a fuller roll out. This approach also benefits from the fact that ILR would occur at first in a forum involving advocates and solicitor-advocates, and the oversight of Senators of the College of Justice. A phased commencement of relevant provisions could be restricted to the High Court sitting in certain locations, and potentially include specified Sheriff Courts.

It is important to consider how ILR might be provided at trial where a late application is made: where a section 275 application is made late, at trial, on special cause shown, there is no principled basis as to why ILR should not be delivered in that context for complainers. The experience of Ireland shows that a system can be designed to facilitate such representation with minimal delay, as long as sufficient resources are allocated in order to make it work. A salaried model of provision (potentially with an in-house solicitor advocate) might be agile enough to act in such circumstances with very little delay should the complainer wish to instruct a representative. It does, however, become more difficult to protect complainer choice of representative, without unduly delaying the trial.

The lawyers who provide ILR will require to perform their role carefully and ongoing training will be required: there is a risk of giving the impression of coaching. However, there are appropriate ethical and professional rules in place which should mitigate the risk of same, as long as lawyers are alive to the issues.

There will be instances where matters can be easily dealt with by way of written submissions: where the complainer consents to what is sought in a section 275 application or where matters are otherwise uncontentious, written submissions to the judge in the context of agreement between the parties will minimise delay and remove the requirement for a lawyer to attend a hearing dealing with a section 275 application in these circumstances. It is worth paying further attention to the form of written submissions and the procedural mechanisms which might standardise their use in practice. Where an application is to be opposed by the complainer, attendance of their legal representation will always be appropriate.

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