

**Consultation Response to Victims and Witnesses of Crime Bill by Eamon Keane, Jacqueline Kinghan, James Chalmers and Fiona Leverick.**

Introduction: We are all academics based at the University of Glasgow, Scotland, with significant expertise relating to criminal justice, including the law of evidence and procedure, appellate jurisdiction and legal aid. Our professional profiles are found below. Two of us, Professor Kinghan and Mr Keane, also run a university law clinic which provides legal advice and representation to victim/survivors in sexual offences cases in Scotland, the first of its kind in the United Kingdom. Together, we completed in 2025 a comprehensive research project examining models of independent legal representation (ILR) for complainants in adversarial criminal justice systems, funded by the Scottish Government. In 2024 we were awarded funding by the Royal Society of Edinburgh to host two workshops on *Reforming Rape Prosecutions: International Comparisons and Lessons*, one of which related specifically to ILR for witnesses in sexual offences cases.

We have confined our responses to certain questions in relation to Clause 26 which relates to the introduction of ILR for complainants in sexual offences cases.

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## **Clauses 24 to 27 - Criminal evidence and procedure**

**Clause 26 introduces provisions for complainants in sexual offence cases in the Crown Court, to make oral or written representations to the court, be legally represented and entitled to be present at any hearing of an application for documents or records which relate to the complainant and which they could have a reasonable expectation of privacy in relation to. It makes similar provisions in relation to applications made to the court relating to the complainant's sexual history. Do you agree with the inclusion of Clause 26 in the Bill?**

Yes

**Please provide information to support your answer here:**

The value of ILR in respect of certain pre-trial applications is clear and recognised by the Gillen Review. Both types of application identified, if granted, relate to material and evidence of an especially sensitive and confidential nature. Further, both types clearly have the potential to engage a complainant's Article 8 ECHR right to privacy. Whilst this doesn't necessarily mean that ILR requires to be introduced to ensure Convention compliance, there is clearly a risk that in the absence of a system of robust judicial decision making in these areas, there is the potential for the process to fall foul of Article 8.

For all of these reasons, one of us has previously advocated for a similar system of ILR in Scotland in relation to sexual history and character evidence (Keane & Convery, [\*Proposal for Independent Legal Representation for Complainers where an application is Made to Lead Evidence of their Sexual History or Character\*](#)). ILR has now been provided for in legislation in Scotland, via section 106 of the Victims, Witnesses, and Justice Reform (Scotland) Act 2025 (although unlike NI, this is only in relation to applications to admit sexual history and character evidence). A system of ILR in relation to disclosure of personal records was introduced in Scotland earlier following the decision in *WF v Scottish Ministers* [2016] CSOH 27 given the Strasbourg caselaw relating to medical records and the positive obligations of contracting states under Article 8. In our view, providing ILR in the context proposed assists in ensuring that complainants understand the law relating to these matters, affords them agency during a particularly difficult part of the criminal justice process and ultimately ensures that their position can be adequately represented to the court in furtherance of their rights.

Whilst we are not experts in relation to criminal practice in Northern Ireland, we note in passing that, similar to other jurisdictions in the United Kingdom, high attrition rates and low conviction rates are endemic in sexual offences prosecutions in the jurisdiction. Whilst ILR certainly isn't a panacea, any measure that seeks to improve things in that context is to be commended.

**Do you have anything further to add on Clauses 24 to 27 of the Bill relating to Criminal Evidence and Procedure?**

Yes

**Please provide information to support your answer here:**

We have considerable research expertise and experience in relation to the introduction of ILR in the Scottish context. We were commissioned by the Scottish Government to develop an evidence-based understanding of different models of delivery of ILR in adversarial legal jurisdictions, which resulted in a detailed report: [\*Independent Legal Representation and the Victims, Witnesses, and Justice Reform\*](#)

[\(Scotland\) Bill: A Review of Potential Models of Delivery](#). Via the Emma Ritch Law Clinic (ERLC), we are involved in the provision of ILA and ILR to victims of sexual violence – the ERLC was established by Keane and Kinghan in 2023 and Keane is the Clinic’s Principal Solicitor. At present ILR is delivered on an ad hoc basis. In addition, Eamon Keane is a member of the Scottish Government’s ILR Implementation Working Group and recently co-edited a special edition of an academic journal, *the International Journal of Evidence and Proof*, dedicated to international perspectives on ILA and ILR. All of this means that we are well placed to identify issues that will need to be considered when implementing ILR in NI. These are set out below under four headings: (a) the model of implementation; (b) trauma-informed practice; (c) procedural issues and (d) building capacity.

#### *(a) Model of implementation*

Our research has shown that there are clear advantages to the creation of a specialist dedicated salaried service to provide ILR for complainants, as well as disadvantages. This model, however, when compared with alternative models such as the ‘judicare’ model of delivery where any practising solicitor may apply for public funding to perform the role, is in our view preferable in the context of delivery of ILR. This is because there is already a foundation for ILR provision in the SOLA scheme, and because specialist salaried resource includes greater ease of monitoring and evaluation, potential benchmarking of rates of pay, development of expertise, greater capacity to deliver a trauma informed legal service, a single point of contact for complainants and mutual support amongst lawyers providing the service.

Our research identified some disadvantages that may arise from the salaried specialist resource model, including low rates of pay, capacity issues, and potential conflicts of interest around cases. An important way of overcoming some of these limitations is to have some degree of ad hoc private provision (i.e. by way of a roster or panel of lawyers) to deal with conflicts of interest, a need for specialist expertise, or unexpected capacity issues.

The *Consultation on Proposals for Inclusion in a Victims and Witnesses of Crime Bill* published in November 2024 noted that it is envisaged that the SOLA scheme will provide the ILR service, and that public funds will not be available for the instruction of other solicitors, “save in the most exceptional of cases” (para 6.9). We are not sure what is envisaged here, but we recommend that sufficient ad hoc funding be made available should e.g. a potential conflict arise. This might be, for example, where multiple complainants require to be represented in one case in respect of applications to admit sexual history evidence, and their positions fundamentally conflict from an evidential perspective; where the SOLA scheme has previously acted for a witness who now finds themselves as the defendant; or any other conflict of interest arises. Further, any model considered would have to also anticipate other professional matters such as resource for the situation where there is a breakdown in trust and confidence between the witness and the solicitor acting at the SOLA scheme; and the importance of affording choice to complainers, should the need arise, depending on the particular circumstances of a case. Consideration should be given too for funding to be provided to allow the solicitors acting under the SOLA scheme to instruct counsel in appropriate cases. Our research found that the possibility of doing this in especially complex matters had distinct advantages in terms of providing specialist legal expertise and expert advocacy skills.

As we have outlined, we believe however there are key advantages to the provision of a specialist salaried service, chief amongst them the greater potential for trauma informed legal service delivery. It strikes us that careful thought and planning will need to be given to how the scheme transitions from a service with non-practising solicitors providing largely legal advocacy and generalist advice to one providing legal representation in certain situations. From a professional perspective, the creation of a

clear solicitor/client relationship brings into play a number of factors that will need consideration. These include professional indemnity insurance, the regulation of the relationship via issuing of terms of business, rules on advertising and obtaining clients, conflict checks, practice management and accountancy rules, confidentiality and sharing of office space, and consideration of relationships with the prosecution.

We note that sufficient financial resource will also be required to ensure adequate time is available to spend with clients. In our research, we noted that in some of the international models of ILR we analysed, matters might be straightforward and dealt with more quickly, for example if there is consent to disclosure and/or agreement by way of written submissions. In other cases, however, more time might be needed to draft more complex written submissions, make oral representations or attend multiple hearings. The design of any ILR service must be flexible enough, and afford sufficient time for lawyers, to be able to deal with wide-ranging potential issues.

#### *(b) Trauma-informed practice*

With respect to trauma-informed provision, our research findings show that working with complainants in sexual violence cases demands a unique set of skills and a different approach to clients and casework. It is important that clear timelines to minimise delay are in place, that adequate time to build the trust and confidence of complainants is facilitated and that lawyers are alive to the impacts of trauma and adjust their communication appropriately. We also note the importance of resource for the provision of specific training and ongoing reflective supervision in order to help minimise the risk of vicarious trauma to the lawyers providing ILR.

#### *(c) Procedural issues*

Our research has shown that introducing ILR into adversarial jurisdictions, even within narrowly defined confines, such as pre-trial procedural hearings as envisaged here, is fraught with complexity and requires careful consideration and planning. We note that the proposed new Article 27G(3) of the Criminal Evidence (Northern Ireland) Order 1999 states that detailed processes will be specified in rules of court, and it is at this stage that the technical detail of matters will require to be considered.

The proposals for ILR planned will require to be structured around what we term ‘a triggering event’, i.e. the initial application or intimation of a prospective application which sets in motion the right to ILR. Our work has shown that referral pathways following the triggering event are of crucial importance. Many jurisdictions operate a model of prosecution referral whereby the prosecutor, following the triggering event, with consent, refers the complainant to the service delivering ILR directly by providing their details and stating that the service may contact them. This is, for example, how ILR provision in the Australian jurisdictions of Victoria, New South Wales and Queensland, as well as Ireland, operate. This model has at least two advantages: it is likely to lead to higher uptake of the service and, provided consent to share information is obtained, it can reduce the risk of re-traumatisation caused by the complainant having to repeat their story to multiple agencies.

However, rules of professional conduct for solicitors regulating how they obtain business can impact on this model, depending on other factors such as e.g. whether legal aid is generally available for the work. In Scotland, for example, rule B.3.2 of the Law Society of Scotland Practice Rules would prohibit the direct referral approach,<sup>1</sup> although it would not preclude the Crown providing complainants with

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<sup>1</sup> The relevant rule states that: “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

information about a dedicated service of ILR provision, assuming the complainant then took the next step of instructing a solicitor at that service directly.

Given that it is envisaged that a state funded specialist resource is to be created to provide ILR in Northern Ireland, careful thought will have to be given as to how the referral pathway operates so as not to fall foul of rules of professional practice. Whilst again, none of us are practising lawyers in NI, nor are we legal specialists in relation to the jurisdiction, we note that the SOLA scheme perhaps has potentially avoided these issues to date given that the lawyers involved do not, as we understand matters, retain practising certificates, and in any event nor is there wider availability of funding for the work they undertake amongst the rest of the profession.

In relation to referral pathways, it is also critical that strict timelines are put in place regarding notification of initial applications and sharing of information. We note that, especially for complainants in sexual violence cases, delay and poor communication risks exacerbating the risk of re-traumatisation. As such, we suggest that careful thought be given to the process of sharing of information. The proposed new Article 27G(3)(c) of the Criminal Evidence (Northern Ireland) Order 1999 states that rules of court will “make provision for the manner in which confidential or sensitive information is to be treated in connection with the application, and in particular as to its being disclosed to, or withheld from, parties to the proceedings”. This is important, as our work has shown that there should be a clear legal basis to accommodate the sharing of information with the ILR provider in relation to the matter for which ILR is granted. It is not, however, necessarily easy to structure. When the details come to be worked out, it would be wise to consider what precisely will require to be shared with those acting for complainants in individual cases, the mechanism that will be needed to facilitate this (including whether e.g. further changes need to be made to codes of professional practice which govern the sharing of such information), and how the system proposed will accommodate requests for further disclosure of evidence to the ILR provider in exceptional cases, and the rights of the prosecution and defence to object to same.

The regulation of the disclosure of evidence to ILR providers is one issue that has proven problematic in Scotland. Originally the Victims, Witnesses, and Justice Reform (Scotland) Bill envisaged a system whereby the prosecution would review files, identity relevant material, and then seek an order of the court to disclose to the ILR provider. However, criminal justice stakeholders widely perceived this approach to be cumbersome and unworkable in the context of the pressure on the criminal justice system. In the final form of the legislation (s 106 of the 2025 Act), this was recognised. After an application is made to admit sexual history or character evidence, the prosecutor must notify the complainer of the application. The complainer’s legal representative may request a copy of any evidence referred to in, or relevant to, the application. In turn, the prosecution must notify the accused of this request and must send the requested evidence to the complainer’s legal representative as soon as reasonably practicable after the end of a statutorily defined “objection period”. It is only if an objection is made that the prosecution must apply to the court for a ruling on whether the evidence should be sent or the objection upheld, thus avoiding the potential delays and additional court and prosecution workload inherent in the system which was proposed in the Bill as introduced. Further, complexities inherent in the handling of the evidence in question by solicitors in Scotland acting for complainants has resulted in an understanding that the professional regulator of Scottish solicitors (the Law Society of Scotland) will require to issue guidance on the matter in due course.

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intention to solicit business from that person.” In a context where one assumes that some service users may be the clients of others, and there is funding available for the ILR work, one can see how a direct referral model in Scotland would prove problematic.

A further issue not mentioned in the Bill, but to which thought requires to be given, is the matter of appellate rights of complainants in this context. There is a strong argument in favour of granting complainants a right to appeal pre-trial decisions in relation to sexual history and/or the recovery of evidence in line with the rights generally provided to the prosecution and the defence in respect of such matters.

*(d) Building capacity*

As noted earlier, we are in favour of the proposals for ILR. Based on our own experience, we think it might be worthwhile thinking about how to ensure, as far as possible, that junior lawyers in the jurisdiction are interested in the work of legal services for victim/survivors of sexual violence. Through the ERLC at the University of Glasgow, we have been able to offer supervised experiential learning for a number of law students, in the process instilling in them trauma informed practice skills, and a real interest in working in the area in future. It may be that, as part of the development of proposals in Northern Ireland, thought is given to potentially involving one or both of the Schools of Law in the jurisdiction (in respect of which there exists already expertise relating to sexual offences and gender-based violence).