

Joint written evidence submitted by Rape Crisis England & Wales, End Violence Against Women coalition, Centre for Women's Justice and Rights of Women (VPB10)

Submission to Victims and Prisoners Bill Committee

Independent legal advice for rape victims and survivors

1. This submission is produced jointly by four women's sector organisations: Rape Crisis England & Wales, End Violence Against Women coalition, Centre for Women's Justice and Rights of Women (see appendix for more details on our work).
2. We are leading organisations working on addressing sexual violence in England and Wales and between us have a wealth of expertise on the investigation and prosecution of rape and other sexual offences (referred to as 'rape' for ease). We also have a thorough understanding of how rape victims and survivors¹ experience the criminal justice system. Two of our organisations have direct experience of providing independent legal advice to rape survivors across England and Wales.

Summary

3. There is a fundamental loss of faith in the criminal justice system amongst rape victims and survivors, with high attrition rates identified as a persistent problem over many years. Victims and survivors consistently state that they experience the criminal justice system as an additional harm and trauma that compounds the harm and trauma of the sexual violence they have suffered.
4. Rape and other sexual offences are unique criminal offences in that 'victim credibility' is at the heart of the police investigation, such that victims and survivors often feel that they are themselves under investigation. Rape myths and stereotypes also influence police decision-making, and the likelihood of jury bias plays into charging decisions.
5. It is evident that rape survivors need somewhere to turn when they come up against an issue in the legal process where their interests are not protected. They need advice from expert lawyers who are entirely independent of criminal justice bodies. Access to advice from lawyers who are 'on the side of' the survivor greatly boosts their confidence to engage with the criminal justice system. We see this in our own daily practice providing legal advice at CWJ and RoW, and it was clearly demonstrated in the evaluation of the pilot carried out in Northumbria (see paragraph 26 below).²

¹ We use these terms interchangeably, "victim" is the term commonly used in the criminal justice system whilst "survivor" is the term favoured by the women's sector

² <https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf>

6. Our proposal does not envisage any change to the role of victims in the criminal justice process and only minimal changes to the rights of audience that currently exist. Survivors would not be legally represented in their routine dealings with the police in the way that defendants are, but would deal directly with the police as they do now. They would seek advice from a lawyer if and when an issue arose that was causing them concern, and would receive assistance limited to that specific issue until it is resolved.
7. Lawyers assisting victims and survivors would not play a role at trial or represent their client before the court, other than in two specific circumstances: applications for access to or disclosure of materials that contain sensitive personal data about them, and applications for their previous sexual history to be admitted at trial.

The exceptionalism of rape in the criminal justice system

8. In no other criminal offence is there a direct focus on the victim rather than the suspect in the investigation process. This has been well-recognised. For example, the Joint policing inspectorates report into rape investigations dated July 2021³ states: *“To victims...all too often investigations and prosecution decisions suggest a lack of belief and trust, as if it is their credibility which is the focus of the system. Some of those victims then withdraw support for the prosecution of their cases.By contrast, suspects are often not subjected to the same scrutiny during the investigation”*.
9. The Law Commission consultation on evidence in sexual offences prosecutions, launched in May 2023⁴ similarly states that *“Due to the lack of direct supporting evidence or other witnesses, sexual offences cases focus on the relative credibility of the complainant and defendant. This has led to a disproportionate focus on and examination of the background and personal records of the complainant, not found in other comparable criminal contexts.”*
10. A range of measures have been introduced into the criminal process in recognition of the unique difficulties in rape cases, including judicial directions, restrictions on evidence of previous sexual history, specialist CPS units and ‘ticketing’ for specialist rape prosecutors. There is also an urgent need for specific protections for survivors’ therapy records, which are set out in our Second Reading briefing⁵ and we have prepared a separate submission to the Committee on that topic. Similarly, access to independent legal advice in these cases is needed to address the inherent challenges and contradictions

³ A joint thematic inspection of the police and Crown Prosecution Service’s response to rape, Phase one: From report to police or CPS decision to take no further action <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/joint-thematic-inspection-of-police-and-cps-response-to-rape-phase-one.pdf>

⁴ paragraph 3.86

⁵ Rape Crisis England & Wales, the Centre for Women’s Justice, End Violence Against Women Coalition (2023) Keep Counselling Confidential: The problems and solutions with the disclosure of counselling notes: <https://www.endviolenceagainstawomen.org.uk/wp-content/uploads/2023/05/Keep-Counselling-Confidential-FINAL-10th-May-23.pdf>

we see where the interests of survivors do not align with the approaches taken by the police and prosecution.

11. Legal advice and representation is required for two purposes: firstly, to boost the confidence of survivors when engaging with the criminal justice process, and secondly to ensure their rights are respected where their interests diverge from the interests of the police, CPS and other criminal justice agencies.

How would independent legal advice for victims and survivors work?

12. As stated above, independent lawyers would assist victims and survivors on specific issues that arise where legal expertise is required. They would not play a role in the day-to-day communications between survivors and the police. Where their input is required, they will provide advice to a survivor, or can prepare written representations to the police or prosecutor on a particular matter. If necessary, they can liaise directly with the police or CPS on the survivor's behalf. In specific applications, and with amendment of some aspects of the Criminal Procedure Rules, they could represent victims and survivors before the court specifically in applications relating to personal data requests and previous sexual history evidence. There are examples of these roles operating in the UK and in other jurisdictions, which we expand on below.
13. Lawyers advising and representing victims and survivors are required to adhere strictly to their professional duty not to coach any client, a duty that applies to all lawyers in litigation. Lawyers are well aware that any failure to adhere to this could undermine a prosecution and harm their client's interests. In our experience, lawyers are also mindful of the need to ensure that information is not provided to a victim/survivor which could taint their evidence at trial, which would also undermine the prosecution and harm their client's interests.
14. It is important to stress that upholding the rights of victims and survivors in our existing laws can co-exist with upholding the rights of defendants. This proposal would not afford victim-survivors party status in legal proceedings and does not conflict with either fair trial rights, or the duty of the Crown to act in the public interest. It is helpful to look at where independent legal advice and representation exists in other jurisdictions, and operates compatibly with defendants' rights, both in adversarial and inquisitorial systems (see paragraphs 28 to 31 below).

Principles of effective independent legal advice

15. For independent legal advice to operate effectively it should:

- a. Be provided by lawyers, not Independent Sexual Violence Advocates (ISVAs)⁶ or others with a holistic advocacy and support role. The legal issues raised by survivors are complex, case-specific and require the same degree of legal knowledge and expertise as other legal contexts;
- b. Be provided by lawyers sitting in an organisation that is entirely separate from any criminal justice bodies, is independent and importantly, perceived by the public (including survivors) as independent;
- c. Be available free of charge for all survivors to access, and accessible at point of need (i.e. when the legal issue arises within the legal process, not through a waiting list);
- d. Go further than one-off advice. Legal casework is required such as reading and drafting correspondence and documents, and representation where necessary, with continuity in the lawyer-client relationship.

What issues should legal advice cover?

16. In our experience, there is a wide range of issues on which survivors commonly seek, and benefit from, legal advice, and a myriad situations that can arise in different cases. We summarise some of these below. To instil confidence for survivors to engage in the criminal justice process, and to appropriately reflect their voice and interests through their criminal justice journey, independent legal advice cannot be limited only to specific legal issues.⁷
17. In addition, it is simply not practicable for lawyers to tell their clients that they can answer and assist them with certain questions but not others. In reality, individuals' queries and problems do not come neatly packaged, and a number of issues will often intersect. For a relationship of trust to function between a lawyer and survivor, the lawyer must be free to address all the issues raised, so long as they fall within the criminal justice process that the survivor is engaged in.
18. We understand that the Government is considering a scheme limited to legal advice on personal data requests only. This would leave a vast range of legal needs unmet and be a missed opportunity to create a scheme that builds confidence more generally for survivors to engage with the criminal process. In addition, if such a limited service were introduced, in order to make their roles workable, the lawyers would inevitably find themselves having to advise outside the parameters, placing a huge strain on their time and the funding for the scheme.

⁶ ISVAs support survivors in Rape Crisis and other sexual violence support services, are not legally trained and not permitted to give legal advice under Home Office guidance

⁷ We do not believe that there is a role for lawyers in assisting survivors to decide whether to report to the police, which is a role performed by ISVAs in "informed choice" sessions, nor any need for lawyers to attend video-recorded interviews with survivors. We mention this as both these roles have been mooted in the past.

19. We break down issues for legal advice and assistance into four categories:

Requests for disclosure of victims and survivors' personal data

20. The interests of victims/survivors of rape diverge from those of the Crown when the police and CPS frequently make excessive requests for downloads of survivors' mobile phones and their third-party materials.⁸ The Crown's duties are to act in the public interest, rather than to protect the privacy rights of victims/survivors. Legal advice and representation would include making representations to the police and CPS where requests do not amount to a reasonable line of enquiry, and liaising with police and CPS to seek agreement on appropriate parameters to limit data requests, such as date parameters or limiting to certain issues or sections of records.
21. If a bespoke regime is introduced for judicial scrutiny of requests for access and disclosure of therapy records in rape cases (as set out in our separate submission to the Committee), legal advice for survivors would be essential to enable this to operate, both in terms of advising survivors during the process and providing representation in those rare cases where a court hearing takes place.
22. We have learnt from a senior lawyer working in a Government funded service providing legal advice to victims in Australia (the New South Wales Sexual Assault Communications Privilege Service),⁹ that the New South Wales law on disclosure of therapy records was initially poorly implemented after it was introduced in 1997. However, after a change in the law in 2010, which introduced a statutory right to independent legal advice for victims, there was a drastic improvement so that the law functions effectively on a routine basis.

Victim's Right to Review (VRR)¹⁰

23. In the VRR scheme, a victim/survivor's interests are clearly at odds with those of the police or CPS, as the victim/survivor is directly challenging their decisions. Legal advice and assistance enables survivors to: obtain a meaningful explanation from the police and CPS of the reasons for a decision to take No Further Action (NFA), assess the validity of reasons given for an NFA decision, where appropriate draft legal representations. For example, we find that many cases are closed on the basis of rape myths and stereotypes, without important evidence being gathered or on an incorrect application of the law. Without legal advice, survivors struggle to challenge criminal justice

⁸ Disproportionate and excessive requests for survivors' personal data have been identified in a range of official reports, summarised and linked at paragraphs 7 and 8 of our submission on therapy records

⁹ <https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

¹⁰ The Victim's Right to Review is a system which allows victims to ask for a review of any qualifying decision by police or CPS to close a case without charges being brought

agencies when errors are made. In this way, independent legal advice assists with embedding good practice and improves charging rates.

Police and CPS complaints

24. There is a clear divergence of interests when survivors want to make a formal complaint about the service they have received. Procedurally correct complaints supported by independent legal advice result in better use of complaints processes, improve the accountability and practice of organisations, and enable victims/survivors to feel heard. There is a clear need for legal advice on drafting requests for reviews to the Independent Office for Police Conduct where there are grounds to do so, and advising the victim/survivor when there is a case to answer for police misconduct.

All other issues that arise during the criminal justice journey

25. The availability of legal advice on any problematic issue encountered is highly beneficial to the sense of empowerment of victims/survivors, reducing attrition, and improving practice through improved accountability. There is a very wide range of issues on which victims/survivors benefit from legal advice. Examples of queries and issues on which victims/survivors have received legal advice include:

- Police failing to gather potential defendant's bad character evidence;
- Jurisdictional issues where sexual crimes have been committed while the survivor was abroad;
- Questions on what constitutes certain offences under the Sexual Offences Act 1956 and 2003;
- Survivors with autism being refused an intermediary by the police;
- Police telling survivors not to apply for criminal injuries compensation before trial, so that deadlines for compensation are missed;
- Survivors being asked to waive legal privilege;
- CPS refusing to make applications for early video-recorded cross examination of the victim as a vulnerable witness.

Independent legal advice in the UK and other jurisdictions

26. In Northumbria, between 2018 and 2020, there was a successful pilot for independent legal advocacy called the Sexual Violence Complainants' Advocate Scheme (SVCA). The scheme included legal advice provision for personal data requests and VRR. The survivors who took part gave positive feedback, as did most of the police and prosecutors who were directly involved with the lawyers on the scheme. Police and prosecutors were clear that the accused's right to a fair trial was not affected. The evaluation¹¹ recommended that independent legal advocacy be rolled out nationally. Our

¹¹ <https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf>

briefing for the second reading of this Bill contains quotes and case studies from the pilot.¹²

27. The Centre for Women's Justice and Rights of Women are the only services which currently provide specialist independent legal advice to rape survivors, and we know from our day-to-day work that there is a significant level of unmet need. As small charities we can only assist a very limited number of survivors, and our resources do not enable us to provide the full service that survivors require.
28. Independent legal advice for victims and survivors exists in many other jurisdictions, including many European countries, Australia, Japan, California and Ireland.¹³
29. In New South Wales in Australia, a specialist Government-funded service, the NSW Sexual Assault Communications Privilege Service,¹⁴ provides advice and representation and receives referrals from the police, as well as self-referrals.
30. In Ireland, a scheme operates for independent representation through a barristers' panel for victims and survivors in applications for previous sexual history.¹⁵
31. In Europe, whilst the legal systems of many countries differ from ours in the UK in that they are inquisitorial, or quasi-adversarial, it is notable nevertheless that a great many countries have some form of independent legal advice for victims, and the UK is unusual in this respect.

Why and how independent legal advice should be included in the Bill

32. Only by enshrining a right to independent legal advice in statute will this service be guaranteed for victims and survivors, beyond any particular pilots or schemes provided by the Government of the day.
33. The right can be framed as a new statutory duty on the Ministry of Justice to:
 - a. assess the need for legal advice and representation amongst victims and survivors in England and Wales who have reported sexual offences to the police;

¹² <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/2023/05/11th-May-final-ILAR-briefing.pdf>

¹³ In European countries models vary, from the victim being a party in the proceedings, to having different forms of more limited interested party status, but some form of independent legal advice and representation exists in Belgium, France, Germany, Italy, Sweden, Denmark, Finland, Norway and Iceland (sources: Masters dissertation by Jade Swaby at Women and Child Abuse Unit, London Metropolitan University, and Northumbria pilot App. 1)

¹⁴ <https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

¹⁵ See Law Commission consultation on evidence in sexual offences prosecutions May 2023 on the Irish model at page 91 paragraph 3.100

- b. prepare a strategy for the provision of independent legal advice and representation which meets that need;
- c. give effect to the strategy in carrying out its functions.

This is a similar formulation to the statutory duty in section 57 Domestic Abuse Act 2021, but at a national rather than local level.

34. The ambit of legal advice and representation should include all matters relating to the victim/survivor's engagement in the criminal justice process. However, the ambit of legal representation before the courts would be limited to those circumstances in which a victim/survivor has rights of audience. Currently this applies only in hearings on disclosure of third-party materials where a court chooses to invite participation by a victim/survivor under Criminal Procedure Rules 17.4-17.6.¹⁶ We refer to our separate submission on the need for specific protections for therapy records which set out our proposals for a bespoke regime for these. If such a regime is implemented it should include a similar provision to that in NSW, so that where an application is made to the court for an order for access to or disclosure of therapy records *"the court must satisfy itself that the person is aware of the relevant provisions and has been given a reasonable opportunity to seek legal advice"*.¹⁷
35. An amendment to this Bill does not require a detailed outline of the method by which the need for independent legal advice is met. However, it must provide for a national service, rather than a series of local services, to ensure that specialist legal expertise is developed, resulting in a more efficient and effective service. Only a national service will avoid a postcode lottery and ensure consistent and reliable legal advice for all victims and survivors.
36. An amendment must not rely on the legal aid scheme. The need for independent legal advice for all victims and survivors cannot be met this way for a range of reasons. There are significant advice deserts in civil legal aid. Furthermore, the Legal Advice and Assistance Scheme¹⁸ has low rates of pay and is widely viewed as a loss leader by firms who have public law and CAPA¹⁹ legal aid contracts (who are those with the relevant specialism), and so there would be very low take-up. This type of legal aid is generally only used as a precursor to obtaining a full legal aid certificate for litigation, which would not apply here in the vast majority of cases. The criminal legal aid scheme does not cover advice to victims, and if it were amended to include this criminal firms would need to appoint a civil law supervisor, so take-up would be low. In addition, low rates of pay for Legal Advice and Assistance

¹⁶ <https://www.gov.uk/guidance/rules-and-practice-directions-2020>

¹⁷ New South Wales Criminal Procedure Act 1986 Division 2 Section 299

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1986-209#ch.6-pt.5-div.2>

¹⁸ There are two types of legal aid: the Legal Advice and Assistance Scheme which covers advice but not court proceedings, has much lower rates of pay than legal aid certificates which apply to court proceedings

¹⁹ Claims Against Public Authorities

and police station advice schemes mean that these schemes are again viewed primarily as a loss leader to obtain larger cases, which would not apply here. Finally, we know that the majority of survivors do not qualify financially for legal aid.²⁰ A not-for-profit model provided free of charge to service users is the only model that can ensure an effective and accessible service for all victims and survivors.

Appendix – the four organisations behind this submission

Rape Crisis England & Wales (RCEW) is a charity working to end sexual violence and abuse. We provide specialist information and support to all those affected by rape, sexual assault, sexual harassment and all other forms of sexual violence and abuse in England and Wales. We are also the membership organisation for 39 Rape Crisis centres. Together, we aim to educate, influence and make change.

The End Violence Against Women Coalition (EVAW) is a leading coalition of specialist women's support services, researchers, activists, survivors and NGOs working to end violence against women and girls in all its forms. Established in 2005, we campaign for every level of government to adopt better, more joined up approaches to ending and preventing violence against women and girls, and we challenge the wider cultural attitudes that tolerate and condone this abuse.

Centre for Women's Justice (CWJ) is a legal charity which seeks to hold the state to account for failings in the policing and prosecution of violence against women and girls, and challenge discrimination within the criminal justice system. We carry out strategic litigation, provide independent legal advice, training and referrals to a specialist lawyers panel for frontline women's sector organisations, as well as drawing on case work to provide an evidence base to influence change in laws, policy and practice of criminal justice agencies.

Rights of Women (RoW) is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of violence against women and girls. Rights of Women provide specialist telephone legal advice lines for survivors, to increase their understanding of their legal rights, improve their access to justice and empower them to make informed choices where they come into contact with the criminal justice system.

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²⁰ The Centre for Women's Justice carries out provisional legal aid means assessments in some cases when trying to refer survivors to solicitors on its panel and finds that only a minority are eligible.