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Independent separate legal representation for rape complainants in adversarial systems: lessons from Northern Ireland

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Abstract

In March 2018, Northern Ireland was divided by the acquittal of four men for rape, attempted rape, exposure, and perverting the court of justice in what became known as the ‘Belfast Rugby Trial’. The case resulted in considerable debate about the ill-treatment of rape complainants and prompted the Gillen Review into the Laws and Procedures in Serious Sexual Offences. Gillen proposed the introduction of separate legal representation (SLR) to safeguard complainants’ sexual history and medical records pre-trial. Since the Review was published, however, scepticism about the

applicability of complainant SLR within an adversarial context remains. We examine the arguments for and against SLR in adversarial systems and propose a ‘Gillen-plus’ framework for SLR that would not interfere with the accused’s rights or public interest and could provide the basis for reform across other adversarial jurisdictions. We question whether Northern Ireland’s unique socio-political context strengthens or weakens the justifications for introducing SLR.

1 INTRODUCTION

In March 2018, Northern Ireland was divided by the acquittal of four men for rape, attempted rape, exposure, and perverting the court of justice in what became known as the ‘Belfast Rugby Trial’. In particular, the text messages sent by the defendants Paddy Jackson and Stuart Olding, who play for the Ireland and Ulster rugby teams respectively, raised serious concerns about misogyny in men’s elite sport. The outcome of the nine-week trial provoked a series of protests under the hashtag #IBelieveHer.¹

Subsequent to this initial controversy, in April 2018, the Criminal Justice Board commissioned a review of the law and procedures in serious sexual offences in Northern Ireland.² Sir John Gillen QC (hereafter Gillen) undertook the review, informed by evidence obtained from high-level criminal justice professionals, legal stakeholders, academic researchers, and victim support services. In his report, Gillen

¹ S. McKay, ‘How the “Rugby Rape Trial” Divided Ireland’ *Guardian*, 4 December 2018, at <<https://www.theguardian.com/news/2018/dec/04/rugby-rape-trial-ireland-belfast-case>>.

² The Criminal Justice Board is responsible for overseeing and progressing justice-led Programme for Government commitments, agreeing shared priorities across justice, monitoring progress towards achieving them change and openness in the criminal justice system. The Board is currently chaired by the Permanent Secretary of the Department of Justice and comprises the Lord Chief Justice, the Chief Constable, the Director of Public Prosecutions, and senior officials from the Department of Justice.

noted that ‘sexual crime is one of the worst violations of human dignity’³ and documented the ways in which the criminal justice process exacerbates the impacts of victimization from the point of reporting through to the trial.

The Gillen Review set out a plan for transformative reform, containing over 250 recommendations, including a proposal for less adversarial approaches to the cross-examination of children and vulnerable adults, and extending the definition of ‘vulnerable’ to include complainants of sexual offences.⁴ This would involve introducing the pre-recording of evidence in cross-examination facilities, located remotely from the court and before the trial.⁵ More contentiously, Gillen proposed the introduction of publicly funded separate legal representation (SLR) for complainants.

As in most archetypal adversarial systems, Northern Ireland’s common law principles are underpinned by the need to safeguard the accused person’s rights to a fair and impartial trial. Within this context, complainants lack justiciable rights to protect their interests and privacy, as the adversarial contest between the state prosecutor and the accused precludes victims from actively participating in proceedings. The Gillen Review found that while a complainant’s status as mere ‘witness’ to proceedings is neither ‘novel nor uncommon’ in adversarial systems, ‘complainants are often shocked, and members of the public surprised, to discover that complainants do not have legal representation’.⁶ Although complainants may engage legal counsel to maintain access to information about the case’s progression, standing

³ Sir J. Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1, Final Report* (2019) i, at <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

⁴ Currently, in Northern Ireland, complainants of sexual offences are automatically defined as intimidated witnesses under the Criminal Evidence (Northern Ireland) Order 1999. In Scotland, sexual assault complainants are included in the definition of ‘vulnerable’: see Victims and Witnesses (Scotland) Act 2002, s. 10(c)(i).

⁵ Gillen, *op. cit.*, n. 3, p. 12.

⁶ *Id.*, p. 13.

in the trial is prohibited. Moreover, engaging counsel is costly and complainants are already entitled to receive information from the Police Service for Northern Ireland (PSNI) under the *Victims' Charter* (see s. 28 Justice Act (Northern Ireland) 2015).

Drawing on the recommendations of the Gillen Review,⁷ we consider the viability of introducing publicly funded complainant SLR to represent complainants on evidence relating to their sexual history and sensitive third-party materials. We begin by considering the state's response to sexual violence within the context of Northern Ireland's past. Next, we outline Gillen's proposal, noting its scope and rationale, arguing that reform may address some of the barriers to justice that confront complainants of sexual violence and may provide a useful mitigation for the Good Friday Agreement's inadequate consideration of gendered experiences of justice and conflict.⁸ Yet we also contend that Gillen's proposals for SLR are less radical than they first appear. Dissenting from the notion that SLR would inherently clash with the fair trial rights of the accused or would be unwieldy or unworkable, we propose a new framework for extending Gillen's recommendations, a 'Gillen-plus' model that encompasses wider challenges to privacy and support to seek recourse should the complainant's rights be breached. Such a model would be potentially applicable across a range of adversarial jurisdictions and would ultimately produce better-quality evidence and spare complainants from the intrusive questioning that is still widely documented throughout common law jurisdictions.

2 THE SOCIO-POLITICAL CONTEXT IN NORTHERN IRELAND

⁷ The Gillen Review recommendations are being implemented by a newly formed and multi-agency Strategic Justice Group on Sexual Harm, which is overseen by the Criminal Justice Board, a strategic oversight panel headed by the Minister for Justice.

⁸ The Good Friday Agreement in 1998 involved a political peace agreement between the British and Irish governments, which aimed to ameliorate the harms caused during the Troubles.

Northern Ireland is an independent legal jurisdiction with a distinctive legal culture. During the Troubles (1969–1998),⁹ criminal justice institutions became the predominant tool used to respond to political violence, leading to mainstream distrust of the criminal justice system and fierce defence of any perceived threats to due process.¹⁰ Northern Ireland’s history has created a justice system that is especially robust in seeking to ringfence human rights and tentative about reforms that could be perceived as encroaching upon the defendant’s right to a fair trial, including the consideration of SLR for complainants of sexual offences.¹¹

The Troubles also led to different trajectories in the debates around victims’ and complainants’ rights, with England and Wales committing to Victim Charters¹² and the enunciation of rights in the early 1990s, while Northern Ireland introduced its first Code of Practice for victims of crime in 1998.¹³ In the same year, the Good Friday Agreement encouraged a degree of complainant recognition through the Criminal Justice Review Group, which enhanced ‘responsiveness and accountability’ to victims.¹⁴ Since 1998, there has been a move towards victim-centric justice processes as part of transitional justice and shifting the status of complainants from ‘outsider *par*

⁹ While any succinct definition of ‘the Troubles’ is inherently reductive, they can be generally understood as a period of heightened civil unrest and political conflict over historical questions of national identity, religion, and the constitutional status of the province: see D. McKittrick and D. McVea, *Making Sense of the Troubles: The Story of the Conflict in Northern Ireland* (2002).

¹⁰ N. Carr, ‘The Criminal Justice System in Northern Ireland’ in *Criminology*, eds S. Case et al. (2017).

¹¹ However, there remain notable concerns about due process since the peace process, particularly in relation to measures of security. For further discussion, see Y. Daly and J. Jackson, ‘The Criminal Justice Process: From Questioning to Trial’ in *Routledge Handbook of Irish Criminology*, eds D. Healy et al. (2018) 280.

¹² In England and Wales, the first Victims’ Charter was published in 1990 (Home Office Communication Directorate, 2001). The Victims’ Charter was made statutory by the Labour government in 2004 and the renamed Code of Practice for Victims of Crime came into effect in 2006. It was last updated in 2015 (Ministry of Justice, 2015), but is currently undergoing further review.

¹³ S. Kilcommins and L. Moffett, ‘The Inclusion and Juridification of Victims on the Island of Ireland’ in *The Routledge Handbook of Irish Criminology*, eds D. Healy et al. (2016) 388.

¹⁴ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (2000) 13.1.

*excellence*¹⁵ to the ‘centre of contemporary discourse’.¹⁶ Despite this apparent progress, scholars such as Gilmartin have argued that the peace process failed to adopt an adequately gendered framework, leading to a response to victimization that focused on ‘guns and government’ and ignored issues related to sexual violence.¹⁷

During the Troubles, the province had one of the lowest levels of recorded crime in Europe, arising from ‘self-policing’ within republican and loyalist communities.¹⁸ Cases of rape and domestic abuse went unreported due to fear of reprisals.¹⁹ Complainants were generally reluctant to testify in trials as the criminal justice system ‘was seen as a source of [secondary] victimisation’.²⁰ Reports of sexual and domestic violence grew in the period after the Good Friday Agreement, with Gilmartin observing that

[f]or all the official rhetoric regarding Northern Ireland’s status as the site of a more secure and peaceful dispensation, data collected over the course of the last two decades indicate that violence against women increased exponentially in the immediate aftermath of the paramilitary ceasefires of 1994. ... The prevailing narrative of a post-war society belies the violent reality of women’s daily lives in Northern Ireland.²¹

¹⁵ M. Ryan, *Penal Policy and Political Culture in England and Wales: Four Essays on Policy and Process* (2003) 68.

¹⁶ D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001) 11; see also M. Iliadis et al., ‘Improving Justice Responses for Victims of Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation’ (2019) 45 *International J. of Comparative and Applied Criminal Justice* 105.

¹⁷ N. Gilmartin, ‘Gendering the “Post-Conflict” Narrative in Northern Ireland’s Peace Process’ (2019) 43 *Capital & Class* 89.

¹⁸ A. M. McAlinden and C. Dwyer, *Criminal Justice in Transition: The Northern Ireland Context* (2015).

¹⁹ Kilcommins and Moffett, *op. cit.*, n. 13.

²⁰ *Id.*, pp. 387–388.

²¹ Gilmartin, *op. cit.*, n. 17, p. 96.

It is thus perhaps unsurprising that attrition rates in sexual offence cases continue to be high in Northern Ireland. Consistent with the international literature, the Gillen Review suggests that police cynicism and intrusive court practices heighten the trauma experienced by complainants in justice processes and increase the likelihood of withdrawal.²² This is likely to contribute to high rates of ‘improper attrition’, referring to ‘[a]ttrition that arises from non-evidential, illegitimate grounds [which] includes all cases that are pushed out of the criminal justice system ... [due to] fear, prejudice, poor investigation or procedures, weariness/frustration, or unjustifiable legal rules’.²³

There has been an increase in rapes and sexual assaults reported to the PSNI in the past two decades, but attrition rates remain notably high. For example, in 2017/2018, the PSNI recorded 967 reports of rape,²⁴ compared with just 318 reports in 1998/1999, representing an increase of 204 per cent in 20 years.²⁵ Similarly, in 2017/2018, the Public Prosecution Service received 530 rape files from police,²⁶ representing an increase of 34.2 per cent on the previous year; and yet only nine rape convictions were recorded.²⁷ Currently, less than 1 per cent of recorded rapes and only 18 per cent of prosecuted cases result in conviction. To put these figures into broader

²² Gillen, *op. cit.*, n. 3; see also 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; C. McGlynn, ‘Rape Trials and Sexual History Evidence: Reforming the Law on Third Party Evidence’ (2017) 81 *J. of Criminal Law* 367; A. Sanders and I. Jones, ‘Victims in Court’ in *Handbook of Victims and Victimology*, ed. S. Walklate (2007) 282; O. Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (2018).

²³ C. Hanly et al., *Rape and Justice in Ireland* (2009) 366.

²⁴ Police Service for Northern Ireland (PSNI), *Police Recorded Crime in Northern Ireland* (2019).

²⁵ This reflects a general trend in Northern Ireland, as with the rest of the United Kingdom (UK), of annual increases in the number of rapes reported to police. The number of recorded rapes in England and Wales notably increased by over 600 per cent during the same period: Office for National Statistics (ONS), *Focus on Violent Crime and Sexual Offences* (2013); ONS, *Sexual Offences in England and Wales: Year Ending March 2017* (2018).

²⁶ Of these, 49 resulted in a decision to prosecute for an offence of rape. NISRA (2018) Statistical bulletin: cases involving sexual offences 2017/18. Public Prosecution Service for Northern Ireland, 11 October, Belfast, <[https://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Stats%20and%20Research/Sexual%20Offences/Sexual%20Offences%20Bulletin%202017-18%20\(and%202016-17\)%20Final.pdf](https://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Stats%20and%20Research/Sexual%20Offences/Sexual%20Offences%20Bulletin%202017-18%20(and%202016-17)%20Final.pdf)>.

²⁷ *Id.*

perspective, England and Wales has been widely criticized for its low conviction rates: just under 5 per cent of recorded cases and 58.3 per cent of prosecuted rapes.²⁸

Relatedly, within Australia, of the 140,000 documented reports of sexual violence for the period 2007–2017, police rejected 12,000 reports on the basis that they did not believe that an offence had occurred, and more than 34,000 reports (or 25 per cent) were ‘cleared’ or ‘resolved’ by police without investigation, arrest, or legal action²⁹ – more than half of which were withdrawn by the complainant.

While evidential rules have sought to restrict irrelevant and intrusive defence questioning of sexual history,³⁰ as well as private communications,³¹ research suggests that unwarranted defence tactics prevail internationally.³² As the Belfast Rugby Trial highlighted, Northern Ireland is no exception. The trial lasted for 42 days and the jury deliberated for under four hours before reaching a ‘not guilty’ verdict.³³ The complainant stated that her decision to report was motivated by the clandestine nature of rape, which involves ‘a game of power and control ... [in which the perpetrators] rely on your silence’.³⁴ Yet public discussion of the trial ultimately focused on her potential retraumatization caused by four sets of cross-examination, which questioned why she ‘froze’ instead of ‘cry[ing] out for help’ and called her ‘hazy’ recollection of events ‘false’ and ‘delusional’.³⁵ Questioning the complainant’s apparent lack of resistance undermined the reliability and credibility of her evidence by drawing on

²⁸ ONS, *op. cit.* (2018), n. 25.

²⁹ I. Ting et al., ‘Rough Justice: How Police Are Failing Survivors of Sexual Assault’ *ABC News*, 27 January 2020, at <<https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364?nw=0>>.

³⁰ See Criminal Evidence (Northern Ireland) Order 1999, art. 28; Criminal Law (Rape) Act (IRE) 1981, s. 3(1); Criminal Procedure Act 2009 (Vic), s. 352(b).

³¹ See Criminal Law (Sexual Offences) Act (IRE) 2017, s. 39.

³² T. Booth et al., ‘Family Violence, Cross-Examination and Self-Represented Parties in the Courtroom: The Differences, Gaps and Deficiencies’ (2019) 42 *University of New South Wales Law J.* 1106; McGlynn, *op. cit.*, n. 22; Smith, *op. cit.*, n. 22.

³³ McKay, *op. cit.* (2018), n. 25.

³⁴ *Id.*

³⁵ *Id.*

‘real rape’ stereotypes, which, according to Estrich, require evidence of physical resistance and injury.³⁶

The Belfast Rugby Trial lends further support to decades of research that has critically analysed dominant representations of rape as characterized by false narratives about women and sexuality that serve to render women responsible for such violence.³⁷ Such issues associated with the investigation and prosecution of sexual offences ought to be examined against the historical, aforementioned socio-political context of Northern Ireland’s criminal justice system, where complainants’ distrust and scepticism in authorities and legal processes have prevented victims from reporting. Bearing these issues in mind, the impetus for complainant SLR is arguably strengthened.

3 THE GILLEN REVIEW

3.1 Rationale and scope for SLR

Noting such failures of adversarial systems, the Gillen Review produced a framework through which SLR could afford complainants free legal advice up until the commencement of the trial and representation to object to defence applications for the disclosure of the complainant’s previous sexual history and private medical or counselling records, or to ensure that such disclosure is restricted to the minimum necessary.³⁸ However, Gillen’s recommendations for complainant SLR are limited to the disclosure of sexual history evidence, and medical and counselling records at the

³⁶ S. Estrich, *Representing Rape: Language and Sexual Consent* (1987).

³⁷ E. Dowds, ‘Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force’ (2019) 83 *Modern Law Rev.* 35.

³⁸ Gillen, *op. cit.*, n. 3, p. 187.

pre-trial stage.³⁹ This may include representation at ground rules hearings (GRHs), first formalized in England and Wales in 2013, which enable more effective judicial control over the nature and duration of questioning of child witnesses.⁴⁰ Early evaluations of these hearings have been largely positive, with the bar and judiciary generally in favour,⁴¹ and another study showing that child witnesses were asked fewer suggestive, and less complex, questions under cross-examination.⁴² Although the international prevalence of GRHs is relatively limited,⁴³ this approach has begun to penetrate other common law jurisdictions, and is also now used for a broader range of witnesses, including rape complainants, to determine matters such as the pre-screening of questions and setting time limits on cross-examination.⁴⁴ Gillen endorsed the inclusion of complainant SLR at GRHs in Northern Ireland, stating that legal representatives should ‘resist applications for disclosure’ where the relevance of applications to adduce third-party evidence can be brought into question.⁴⁵

However, the proposals fall short of representation within the trial itself, with the final report stating that ‘consideration be given to and a cost analysis made of extending legal representation during examination-in-chief and cross-examination at the trial itself after the recommendations above ... have been piloted and analysed’.⁴⁶

³⁹ *Id.*

⁴⁰ See, generally, P. Cooper et al., ‘Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court’ (2015) 6 *Criminal Law Rev.* 417.

⁴¹ E. Henderson, ‘“A Very Valuable Tool”: Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales’ (2015) 19 *International J. of Evidence & Proof* 154.

⁴² H. Henderson, ‘An Evaluation of English Crown Courts with and without Special Measures Implemented in Section 28 of the Youth Justice and Criminal Evidence Act’ (2019) PhD thesis, University of Cambridge.

⁴³ B. Earhart et al., ‘Judges’ Delivery of Ground Rules to Child Witnesses in Australian Courts’ (2017) 74 *Child Abuse & Neglect* 62.

⁴⁴ P. Cooper and M. Mattison, ‘Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model’ (2017) 21 *International J. of Evidence & Proof* 351; Gillen, *op. cit.*, n. 3, pp. 175–177; V. Munro, *The Impact of the Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review* (2018).

⁴⁵ Gillen, *op. cit.*, n. 3, p. 173.

⁴⁶ *Id.*, p. 187.

Gillen refrains from recommending complainant SLR or providing this limited rights-based approach at trial. This may be due to existing safeguards on complainants' sexual history,⁴⁷ which mean that the need for SLR 'should only rarely arise' in any event.⁴⁸ This stands in contrast to prior research that reveals that protections on complainants' sexual history and character evidence are overwhelmingly 'evaded, circumvented and resisted'.⁴⁹ In light of such findings, there may be scope for an expanded role of complainant SLR to ensure that any questioning at trial follows the spirit of what was agreed in the legal argument.⁵⁰

Similarly, Gillen's denotation of sexual history and medical or counselling evidence as the only challenges to complainants' privacy that require the remedy of legal representation ignores the growing concern about the role of digital communications and other sensitive third-party materials in sexual offence cases.⁵¹ In England and Wales, police and the Crown Prosecution Service (CPS) withdrew their digital data extraction 'consent' forms in July 2020 after they were found to be unlawful and discriminatory.⁵² In the joined cases of *Bater-James & Mohammed v. R*, the Court of Appeal went beyond Gillen's narrow focus on medical or counselling records and sexual history evidence, suggesting that privacy rights extend to cover digital communications:

⁴⁷ Criminal Evidence (Northern Ireland) Order 1999, art. 28.

⁴⁸ Gillen, op. cit., n. 3, p. 174.

⁴⁹ L. Kelly et al., *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (2006) 77; see also McGlynn, op. cit., n. 22; M. Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (2020); Smith, op. cit., n. 22.

⁵⁰ Iliadis, op. cit. (2019).

⁵¹ See, for example, the debates around Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI), *2019 Rape Inspection: A Thematic Review of Rape Cases by HM Crown Prosecution Service Inspectorate* (2019) at <<https://www.justiceinspectors.gov.uk/hmcpai/wp-content/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf>>.

⁵² National Police Chiefs' Council, 'Police and Prosecutors to Replace Consent Form for Digital Evidence' *National Police Chiefs' Council*, 16 July 2020, at <<https://news.npcc.police.uk/releases/police-and-prosecutors-to-replace-consent-form-for-digital-evidence>>.

The trial process is not well served if the defence are permitted to make general and unspecified allegations, and then seek far-reaching disclosure in the hope that material may turn up to make them good. ... There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded.⁵³

Additionally, an investigation by the Information Commissioner's Office found that police and CPS requests for digital data were inadequately considered in terms of relevance and proportionality on complainants' privacy rights.⁵⁴ Evaluation of a pilot SLR scheme in Northumbria identified that seeking consent to access personal data was the most common and significant intervention made by the complainants' advocates.⁵⁵ This highlights a gap in Gillen's recommendations, whereby a complainant could have legal support when asked to disclose their general practitioner's notes, but not when asked to disclose their school records or digital communications, which may feature the exact same private (and potentially prejudicial) information.⁵⁶

⁵³ *Bater-James & Mohammed v. R* [2020] EWCA Crim 790, at [70]–[78].

⁵⁴ Information Commissioner's Office, *Mobile Phone Data Extraction by Police Forces in England and Wales: Investigation Report* (2020), at <https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf>.

⁵⁵ E. Daly and O. Smith, 'Mapping the Prevalence and Nature of Legal Advocacy in Adversarial Jurisdictions' (forthcoming).

⁵⁶ Research revealed that complainants were being questioned about mental health based on their text messages: see E. Daly, 'Digital Evidence in Rape Trials' (2020) *Realities of Rape Trials* conference, University of Limerick. Elsewhere, in England and Wales, the Sexual Violence Complainant Advocates' evaluation found that similar questions were asked of complainants in relation to their school records (for example, based on the school nurse's notes about sexual history or mental health), despite these notes not constituting official medical records. In some cases, the CPS also requested the General Certificate of Secondary Education results for adult complainants, which needed justification for relevance.

Gillen highlighted the potential of publicly funded SLR to address some of the key barriers to justice that complainants experience prior to, and during, the trial. In particular, the Gillen Review identified the ways in which SLR may offer protection against intrusive questioning, especially where defence counsel seek to lift the ‘rape shield’ by asking offensive questions when pursuing their defence of consent. In these instances, complainants may feel that ‘they themselves are placed on trial’⁵⁷ and seen as ‘collateral damage’, in a process that is replete with myths and misconceptions and that denies complainants an independent voice.⁵⁸

The rationale underpinning this proposal is underscored by the need to prevent further harm to complainants of sexual offences. As discussed below, this drive to mitigate secondary victimization aligns with recent trends in international best practice, including Article 8 of the European Convention on Human Rights (protection of privacy and family life). The European Union Victims’ Rights Directive likewise promotes the need for additional supports and legal protection for vulnerable complainants:

Persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships [or] victims of gender-based violence ... should be provided with specialist support and legal protection.⁵⁹

⁵⁷ Gillen, *op. cit.*, n. 3, p. 163.

⁵⁸ *Id.*, pp. 173–175; see also Iliadis, *op. cit.* (2019), regarding SLR in the Republic of Ireland.

⁵⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>>.

The lack of legal advice and representation for rape complainants during the criminal process emerged in the Gillen Review as a major impediment to the administration of justice. The imperative to better support sexual offence complainants in their efforts to participate in the justice system, including through the timely provision of information, and during pre-trial phases and in limited contexts within trial itself, where key decisions are often made and confidential information is subpoenaed, is thus crucial.

3.2 The response to the Gillen Review

Within 12 months of the Gillen Review's publication, an Implementation Board was established, and on 9 July 2020, an Implementation Plan was released. However, the recommendation for SLR for the protection of complainants' sexual history or personal records was omitted from the plan, and, instead, separate legal advice and representation were identified as strategic priority areas, but only insofar as they relate to the 'provision of agreed legal advice pre-trial to ensure complainants have advice in relation to their privacy' and 'the provision of representation to ensure complainants are in a position to make informed decisions and understand their rights'.⁶⁰ Hopefully, the Department of Justice will launch this pilot regime by April 2021, but it is not anticipated that the pilot will fall under the scope of legal aid, as this would require legislative changes and would further delay the pilot launch. It is too early to determine

⁶⁰ Gillen Review Implementation Team, *Gillen Implementation Plan: The Gillen Review into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2020) 6, at <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/the-gillen-review-implementation-plan.PDF>>.

whether legal aid funding for SLR will be considered post-evaluation, as this will depend on the outcome of the pilot.⁶¹

The Gillen Review found that, ‘with very few exceptions, there was strong support for ... the introduction of a measure of independent legal representation for complainants’.⁶² There was also general public consensus in support of introducing SLR, with 89.5 per cent of survey respondents agreeing with Gillen’s recommendations.⁶³ A separate survey distributed to Northern Ireland’s Women’s Regional Consortium found that 96 per cent of women agreed with the introduction of SLR for complainants of sexual offences.⁶⁴ The Law Society of Northern Ireland, the Northern Ireland Human Rights Commission, and the PSNI also supported the introduction of SLR.

The only ‘substantive objection’ to the notion of introducing publicly funded SLR came from the Northern Ireland Bar.⁶⁵ The Bar Council expressed serious reservations about Gillen’s proposals.⁶⁶ Citing the role of the prosecution, the Council objected to the notion of SLR on the basis that

the prosecutor owes duties [to the complainant] as set out in the Victim and Witness Charters ... [and] once a case comes to trial and the issues of previous sexual experience, or disclosure of medical documents are encountered, a senior prosecution counsel being conversant with all of the

⁶¹ This information was obtained from a private communication between the researchers and a member of Northern Ireland’s Department of Justice involved in the Victims, Witnesses and Gillen Review Policy team.

⁶² Gillen, *op. cit.*, n. 3, p. 180.

⁶³ The Gillen Review distributed an online survey on the issue and 419 responses were received, of which 89.5 per cent agreed to the implementation of this suggestion (94.1 per cent were female and 78.2 per cent were male).

⁶⁴ Gillen, *op. cit.*, n. 3.

⁶⁵ *Id.*, p. 185.

⁶⁶ See, for example, *id.*, pp. 131, 153, 155, 239.

circumstances, having access to all the witnesses, knowing how decisions are reached and being familiar with the disclosure in the case, could adequately deal with these matters.⁶⁷

Anecdotal reports inside the Department of Justice suggest that there is growing concern about the difficulty of convincing trial counsel of the need for SLR. However, Gillen argues that the Bar Council's objection

fails to address the private interests of the complainants which they are entitled to have protected ... [and] the rights of privacy of complainants adds persuasively to the reasons why separate legal representation ought to be available at the State's expense.⁶⁸

Some pushback was expected as, if implemented, the recommendations would pose a direct challenge to the working culture of the Bar (and, to a lesser extent, other professions). Lawyers' behaviours are shaped by the adversarial framework; lawyers are conditioned to approach their working culture – perhaps unconsciously – from 'their own standpoint of interpretations of reality contained in the law'.⁶⁹ In many common law jurisdictions, legal education and training is rooted in the adversarial tradition, meaning that zealous advocacy is ingrained in criminal lawyering.⁷⁰ Advocacy training manuals invoke the imagery of 'butchering', 'breaking', and

⁶⁷ *Id.*, pp. 185–186.

⁶⁸ *Id.*, p. 186.

⁶⁹ C. Campbell, 'Legal Thought and Juristic Values' (1974) 1 *Brit. J. of Law and Society* 13.

⁷⁰ K. Kovach, 'New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem-Solving' (2001) 28 *Fordham Urban Law J.* 935.

‘destroying’ opposing witnesses.⁷¹ The results of a survey of 587 English and Welsh victim-survivors suggested that a majority of those who reported to police found the justice process more traumatic than the original offence, with one respondent stating, ‘I have come to terms with the rape, but I don’t think I will ever come to terms with the investigation’.⁷²

Hopefully, such attitudinal barriers will not stifle reform. Northern Ireland’s unique socio-political context means that it is even more pertinent that the protection of citizens’ rights is not left solely in state hands. Furthermore, Gillen’s observation that there is ‘a lack of public understanding and confidence, and profound professional concern about, the process of the law in investigating, processing and determining these cases’ lends further support to the timeliness of the arguments for SLR.⁷³

4 THE LANDSCAPE BEYOND NORTHERN IRELAND

Gillen alluded to the procedural challenges impacting complainants’ engagement with justice processes, many of which lead to ‘improper’ attrition, such as aggressive and humiliating cross-examination techniques, and the myths underpinning sexual offence investigations and prosecutions. Such issues are not unique to Northern Ireland; research over the course of the past three decades has consistently documented their prevalence throughout common law jurisdictions. For example, Westmarland found that in the context of sexual violence offences, while complainants were less likely than accused persons to initiate ‘breach of human rights’ cases, they were more likely

⁷¹ L. Ellison, *The Adversarial Process and the Vulnerable Witness* (2001) 104.

⁷² O. Smith and E. Daly, ‘Worse than the Rape: Victim-Survivor Experiences of Criminal Justice Interventions to Sexual Offences in England and Wales’ (forthcoming).

⁷³ Gillen, *op. cit.*, n. 3, p. 2.

to be successful than accused people when they did bring cases under the European Convention on Human Rights.⁷⁴

Australia provides another example of a failed approach to prosecuting sexual offences. Over the past five years, three separate commissions of inquiry have considered matters affecting complainants of sexual violence and their recourse to justice.⁷⁵ In all three Australian inquiries, the absence of representation for complainants during the criminal justice process surfaced as a major factor contributing to the feelings of isolation and fear that drive the lack of reporting of these crimes and the high attrition rates.⁷⁶ Reflective of the international trend, prospects for reform in Northern Ireland therefore need to be centred on the discrete needs of sexual offence complainants and the provision of protections to minimize the likelihood of secondary victimization and subsequent attrition from the criminal trial process.

The increasing use of sensitive digital and third-party evidence is particularly striking in sexual offence cases across adversarial systems. In England and Wales, HMCPSI found that 40 per cent of CPS requests for police to gather additional digital material (and 30 per cent of requests for additional third-party sensitive material) in ‘administrative finalized’ case files were not ‘necessary or proportionate’.⁷⁷

⁷⁴ W. Westmarland, ‘Rape and Human Rights: A Feminist Perspective’ (2005) PhD thesis, University of York. Alongside Human Rights Act cases in England and Wales, Westmarland analysed law reports from 19 cases brought under the European Convention on Human Rights. These 19 cases related to ten countries: Austria, Bulgaria, Cyprus, France, Italy, Germany, the Netherlands, Poland, Turkey, and the UK.

⁷⁵ Royal Commission into Family Violence (RCFV), *Report and Recommendations: Volume III* (2016) at <<http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Vol-III.pdf>>; Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA), *Final Report: Recommendations* (2017) at <<https://www.childabuseroyalcommission.gov.au/final-report>>; Victorian Law Reform Commission (VLRC), *The Role of Victims of Crime in the Criminal Trial Process* (2016) at <https://www.parliament.vic.gov.au/file_uploads/VLRC_Victims_Of_Crime-Report_2016_sMw0x7nm.pdf>.

⁷⁶ VLRC, id.; RCFV, id.

⁷⁷ HMCPSI, op. cit., n. 51. Digital material includes medical and counselling records. It may also refer to issues raised by medical or counselling records, as well as sexual behaviour and/or activity that is covered by sexual history restrictions. ‘Admin finalized’ refers to when CPS files are closed for reasons other than a legal decision. This may not mean that the case has actually ended, but rather occurs when

Comparably, in charged cases, 28 per cent of additional digital material requests and 18 per cent of additional third-party material requests were deemed to be irrelevant. To put these figures into context, the number of cases that were deemed to have *insufficient* requests ranged from 2.3 per cent to 5.8 per cent across case types.⁷⁸ Such developments should be viewed in the context of *R v. E*, which ruled that digital devices should not automatically be considered relevant in rape investigations.⁷⁹ A similar case in Scots law, *Branney v. HM Advocate*, concluded that

[i]t is by no means clear that ... a bare statement that a complainer had suffered from severe depression as a result of the appellant's conduct would have provided legitimate ground for exploring her mental health in evidence. We are unaware of any automatic association between depression and lack of credibility.⁸⁰

These considerations underscore the importance of Gillen's recommendations. While the recommendations do not represent a shift from the traditional adversarial approach, SLR remains uncommon and highly controversial in adversarial jurisdictions. This is partly attributable to the value placed on the principle of equality of arms, which posits that an allegation of crime and evidence relating to it should be disputed between two equal parties: the state and the accused. However, as discussed further below, complainants' interests do not always align with those of the state. An example of this relates to where plea negotiations are made that reduce the nature

the CPS has no updates on a case for more than 90 days. The English and Welsh Rape Review is seeking to understand the reasons for a significant rise in the number of 'admin finalized' rape cases.

⁷⁸ *Id.*

⁷⁹ *R v. E* [2018] EWCA 2426.

⁸⁰ *Branney v. HM Advocate* [2014] HCJAC 78, para. 22.

and/or severity of charges. Flynn argues that plea negotiations not only minimize the offender's culpability but also 'operate with little transparency and with no legally acknowledged consideration given to the process, or in turn, the victim',⁸¹ which acts as another reminder of the limited consideration and involvement that is afforded to complainants in criminal justice processes. Although uncommon, SLR for complainants is by no means exceptional; it is available in some form in Australia (New South Wales, Queensland, and South Australia),⁸² Canada (Manitoba and British Columbia), India, the Republic of Ireland,⁸³ Namibia, Scotland, and the United States (US) (New Hampshire, West Virginia, Wisconsin, and the US Military).⁸⁴ Moreover, as mentioned, even where SLR does not exist, calls for its introduction have increasingly featured in international commissions of inquiry.⁸⁵

Although the adversarial/inquisitorial dichotomy has some value as a model, the terms should not be used as definitive typologies. Recent trends in harmonization and 'borrowing',⁸⁶ managerialism,⁸⁷ and therapeutic/problem-solving approaches⁸⁸

⁸¹ A. Flynn, 'Bargaining with Justice: Victims, Plea Bargaining and the Victims' Charter Act 2006 (Vic)' (2011) 37 *Monash University Law Rev.* 76.

⁸² SLR has been available to complainants of sexual offences in New South Wales, Australia, since 2011 to prevent or restrict the disclosure of their sexual assault communications (Criminal Procedure Act 1986 (NSW), s. 299A). Section 16(3)(b) of the Victims of Crime Act 2001 (SA) gives the South Australian Commissioner for Victims' Rights power to intervene to provide assistance and representation to victims in court; see also M. Iliadis, op. cit., n. 49; Kirchengast et al., op. cit.. In Queensland, SLR is available to counselled persons for representation at domestic violence and criminal law proceedings to determine if leave will be granted to subpoena protected counselling notes (regarding a related sexual assault) and/or if material produced under a subpoena can be disclosed (Evidence Act 1977 (QLD), Division 2A).

⁸³ Proposals to extend the remit of the scheme in the Republic of Ireland were recently announced by the government: see Department of Justice, *Supporting a Victim's Journey* (2020) at <http://www.justice.ie/en/JELR/Pages/Supporting_a_Victims_Journey>.

⁸⁴ Daly and Smith, op. cit., n. 55.

⁸⁵ See for example VLRC, op. cit., n. 75. In Victoria, Australia, Recommendation 60 in the RCFV's *The Role of Victims of Crime in the Criminal Trial Process* recommended that all Magistrates' Court of Victoria headquarter courts and specialist family violence division courts introduce, within two years, 'facilities for access to specialist family violence service providers and legal representation for applicants and respondents': RCFV, op. cit., n. 75, p. 62; see Iliadis et al., op. cit., n. 16 for an analysis of Recommendation 60.

⁸⁶ R. Colson and S. Field (eds), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (2016).

have cast the utility of the distinction into doubt. Jackson has argued that the jurisprudence from Strasbourg has spearheaded a shift away from our tendency to categorize systems according to the adversarial or inquisitorial spectrum, and that the Court has developed a new model of proof that is better characterized as ‘participatory’,⁸⁹ while Spencer contends that ‘pure systems no longer exist’.⁹⁰ It is notable that Sweden, Denmark, and Norway (often described as ‘quasi-adversarial’) have established comprehensive SLR for rape complainants throughout the justice process, including participation at trial.⁹¹

While the legal representative’s role may differ in purpose and scope across jurisdictions, Wolhuter distinguishes the different models of SLR as (1) ‘auxiliary’, which grants the victim’s legal representative full procedural rights and standing at trial; (2) ‘adhesion’, which offers the victim’s legal counsel participation on issues relating to compensation; and (3) ‘rights-based’, which offers victims support and protection of privacy rights during certain limited stages.⁹² In a mapping exercise of twelve ‘pure’ adversarial and eight quasi-adversarial countries, Daly and Smith found that only five countries offered no form of SLR, suggesting that SLR is not all that uncommon within legal systems that employ adversarial frameworks.⁹³ In the seven

⁸⁷ J. McEwan, ‘From Adversarialism to Managerialism: Criminal Justice in Transition’ (2011) 31 *Legal Studies* 519.

⁸⁸ M. King et al., *Non-Adversarial Justice* (2014).

⁸⁹ J. D. Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?’ (2005) 68 *Modern Law Rev.* 737.

⁹⁰ J. R. Spencer, ‘Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?’ (2016) 20 *International J. of Human Rights* 601.

⁹¹ K. Braun, *Victim Participation Rights* (2019).

⁹² L. Wolhuter, ‘German and Swedish Procedures as Models for the Empowerment of Racial Minority Women in Rape Trials’ (2010) 38 *International J. of Law, Crime and Justice* 1.

⁹³ Daly and Smith, *op. cit.*, n. 55. Adversarial countries included Australia, Canada, England and Wales, India, the Republic of Ireland, Namibia, New Zealand, Northern Ireland, Scotland, South Africa, South Sudan, and the US. Quasi-adversarial countries included Brazil, Denmark, Finland, Iceland, Italy, Japan, Norway, and Sweden. The adversarial countries with a total absence of SLR were England and Wales (although SLR was piloted under the Sexual Violence Complainants’ Advocates scheme in Northumbria between 2018 and 2020), New Zealand, Northern Ireland, South Africa, and South Sudan. Of these,

‘pure’ adversarial countries, the form of SLR reflected the more limited rights-based model. Gillen’s recommendations fit within this rights-based remit, focusing on specific points of risk to complainants’ privacy rights and stopping short of support at trial.⁹⁴ This approach to SLR represents an ‘incremental and mindful step’ towards protecting complainants’ privacy in adversarial systems,⁹⁵ while simultaneously aligning with international standards that seek to acknowledge and position complainants’ interests alongside those of the state and the accused, as demonstrated in the following section.

5 SLR: A BENCHMARK OF BEST PRACTICE?

Theories of rape jurisprudence argue that justice processes should offer dignity, recognition, and voice to rape complainants,⁹⁶ and such values are increasingly reflected in contemporary trends in international and transnational law. The Council of Europe’s Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (not yet ratified by the UK) requires the state to provide effective legislation on these principles.⁹⁷ The Convention requires that ‘measures ... be adopted to protect the privacy’ of complainants, including ‘protection ... from intimidation, retaliation and repeat victimisation’.⁹⁸ It also requires member states to enact legislative changes that enable victims ‘to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and

New Zealand and South Africa have specialist sexual violence court systems to allow for greater collaboration with non-legal advocates and much stricter rules on adducing sensitive personal evidence.

⁹⁴ Gillen, *op. cit.*, n. 3.

⁹⁵ Iliadis, *op. cit.*, n. 49, p. 178.

⁹⁶ C. McGlynn and N. Westmarland, ‘Kaleidoscopic Justice: Sexual Violence and Victim-Survivors’ Perceptions of Justice’ (2019) 28 *Social and Legal Studies* 179.

⁹⁷ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011).

⁹⁸ *Id.*, art. 56(1)(f), art. 56(1)(a).

considered’.⁹⁹ These changes are encouraged alongside the need to ‘provide victims with appropriate support services so that their rights and interests are duly presented and taken into account’.¹⁰⁰

The European Court of Human Rights acknowledges that the treatment of sexual offence complainants has breached their human rights in multiple European countries.¹⁰¹ For example, *Y v. Slovenia* ruled that being cross-examined by the accused could amount to a breach of the survivor’s personal integrity under Article 8 of the European Convention on Human Rights. In the ruling, the Court stated:

A person’s right to defend himself [*sic*] does not provide for an unlimited right to use any defence arguments. ... While the defence had to be allowed a certain leeway to challenge the applicant’s credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses.¹⁰²

Case law under the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) also demonstrates the importance of complainants’ rights, as *Goeckce v. Austria* ruled that a defendant’s rights cannot supersede a domestic abuse survivor’s right to life or physical and mental integrity.¹⁰³ Similarly, in *V.K. v. Bulgaria*, CEDAW found that criminal proceedings must adopt a gendered analysis of

⁹⁹ *Id.*, art. 56(1)(d).

¹⁰⁰ *Id.*, art. 56(10)(e).

¹⁰¹ J. Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008). One example is *MC v. Bulgaria* [2003] (No. 39272/98, ECHR, December 2003), which, although not related to cross-examination, is noteworthy because it ruled that rape does not need to include force or physical resistance. This means that states have a positive obligation under Articles 3 and 8 of the European Convention on Human Rights to effectively investigate and punish all forms of rape.

¹⁰² *Y v. Slovenia* (No. 41107/10, May 2015) paras 106–108.

¹⁰³ *Goeckce v. Austria* (C/39/D/5/2005).

violence in order to avoid gender role stereotyping and provide adequate protection against discrimination: ‘The State party has an obligation to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women in all matters relating to marriage and family relations.’ In this regard, CEDAW observed that preconceived gender stereotypes, as well as historical understandings of rape and sexuality, such as the notion that a woman could not be raped in marriage, continue to impact complainants’ rights and prospects for a fair trial.¹⁰⁴

These gendered analyses have been accompanied by broader recognition of the importance of participation as a normative value. The concept of complainants being able to exercise voice in criminal proceedings is well embedded in international criminal justice. Under Article 68(3) of the Rome Statute, the International Criminal Court (ICC) (which follows a largely adversarial format) has the discretion to permit the concerns of complainants and have them considered at whatever stages in the proceedings that it thinks fit, where the personal interests of victims are affected. Although there is no absolute right to SLR, where the leave of the Court is obtained, victims may choose their own representatives, who in turn may present their views and make submissions when their interests are likely to be affected.¹⁰⁵ Participation is considered a benchmark of best practice in truth commissions, inquiries, and grassroots transitional justice mechanisms.¹⁰⁶ Such international insights suggest that any normative or practical barriers to participatory rights for complainants can be overcome, even within the confines of an adversarial paradigm.

¹⁰⁴ *V.K. v Bulgaria* (C/49/D/20/2008).

¹⁰⁵ For an overview of participatory mechanisms at the ICC and other international tribunals, see, generally, T. Kirchengast, *Victims and the Criminal Trial* (2016) 23–30.

¹⁰⁶ J. Doak, ‘Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments’ (2015) 21 *International Rev. of Victimology* 139.

Even those who oppose SLR accept that all trial participants – not just the accused – have interests that must be taken into account for a trial to be considered fair, even if this does not equate to a legally upheld ‘right to a fair trial’.¹⁰⁷ While in principle there appears to be nothing overtly sinister in balancing the rights and interests of all trial participants, in practice the structural limitations of the adversarial system arguably prevent the ‘balancing’ of the rights of defendants and complainants because their rights are not inherently equal.¹⁰⁸ For example, while questions about a complainant’s previous sexual history are generally prohibited in most adversarial jurisdictions, exceptions to this rule may be granted due to the potential *relevance* of such evidence for a rape allegation and the accused’s guilt to be determined. That said, SLR, where provided to complainants in defined circumstances, may help to protect complainants’ privacy and interests and serve to strengthen their existing rights to protection against overly hostile questioning. Such a role for complainant SLR may be achieved without unduly interfering with the due process rights of the accused.¹⁰⁹

While the debates surrounding complainants’ rights in adversarial systems have remained somewhat tenuous, authors such as Doak, O’Connell, and Wemmers, for example, position complainants’ rights within a human rights framework, arguing that denying complainants any rights is akin to denying them human rights.¹¹⁰ As noted by Wemmers,

¹⁰⁷ L. Hoyano, ‘Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants’ (2015) 2 *Criminal Law Rev.* 107.

¹⁰⁸ A. Gerry, ‘Victims of Crime and the Criminal Justice System’ in *Human Rights in the Investigation and Prosecution of Crime*, eds M. Colvin and J. Cooper (2009) 447.

¹⁰⁹ Doak, *op. cit.*, n. 101; Kirchengast et al., *op. cit.*

¹¹⁰ Doak, *id.*; M. O’Connell, ‘Victims’ Rights Must Be Taken Seriously When They Enter the Courts’ *Advertiser*, 3 January 2018, at <<https://www.adelaidenow.com.au/news/opinion/michael-oconnell-victims-rights-must-be-taken-seriously-when-they-enter-the-courts/news-story/83737ce6e3db29ce31504ea889d6ec24>>; J. Wemmers, ‘Victims’ Rights Are Human Rights: The Importance of Recognizing Victims as Persons’ (2012) 15 *Temida* 71.

[c]rimes constitute violations of their [complainants'] rights as well as acts against society or the state. While human rights instruments, such as the Universal Declaration of Human Rights, do not mention crime victims specifically, a number of rights are identified, which can be viewed from the victim's perspective. As individuals with dignity, victims have the right to recognition as persons before the law.¹¹¹

International trends are increasingly reflected in domestic case law. In the English case of *R(TB) v. Stafford Combined Court*, Lord Justice May argued that 'procedural fairness is something mandated not merely by Article 6, but also by Article 8'.¹¹² In Australia, the RCIRCSA likewise cited victims' experiences of procedural injustice as a major factor contributing to their dissatisfaction with justice processes,¹¹³ particularly in relation to prosecutorial decision making and oversight in sexual offence cases.¹¹⁴ We submit that, given the complexities of sexual offence law, a rape complainant would be insufficiently equipped to make meaningful representations about their private data without legal advice. Such advocacy, and the need for it to be covered by legal aid, was accepted in the Scottish judicial review *WF, Petitioner*.¹¹⁵ In adopting Gillen's recommended model of SLR, Northern Irish prosecutors would be better able to focus on the optimal balance of interests and the primacy of the defendant's right to a fair trial, as they would be released from the burden of being the sole representative of the complainant's interests. This may also bolster public

¹¹¹ Wemmers, id., p. 71.

¹¹² *R(TB) v. Stafford Combined Court* [2006] EWHC 1645. This tenor is also reflected in Lord Steyn's speech *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, in which the 'triangulation of interests' (at 118) was expressly acknowledged by the House of Lords.

¹¹³ RCIRCSA, op. cit., n. 75.

¹¹⁴ RCIRCSA, *Report of Case Study No 15: Response of Swimming Institutions, the Queensland and NSW Offices of the DPP* (2017); Crime and Misconduct Commission, *The Volkers' Case: Examining the Conduct of the Police and Prosecution* (2003) 8.

¹¹⁵ *WF, Petitioner* [2016] CSOH 27.

confidence in the justice system. In this regard, the response to the Belfast Rugby Trial demonstrated the potential impact on trust caused by the perceived poor treatment of victim-complainants. It is for this reason that Gillen argued that ‘for the rule of law and the administration of justice to maintain public confidence, it needs always to navigate between the Scylla of legal expertise and the Charybdis of popular sense’.¹¹⁶

O’Connell argues that complainants’ rights are integral in a ‘modern “transformed” criminal justice system [and that] such a system should be capable of striking a balance between the interests of the victim, the accused and the state’.¹¹⁷ Furthermore, while recognizing the requirements of the adversarial trial, including to protect the due process rights of the accused, Doak suggests that ‘a fair trial does not mean a trial which is free from all possible detriment or disadvantage to the accused’.¹¹⁸ Hoyano similarly affirms the importance of the protection of a fair trial, but claims that this can be achieved while taking into account a ‘quadrangulation [of interests] between the defendant, the alleged victim, other witnesses, and the public’.¹¹⁹ In this vein, Hoyano argues that

[i]t is not only the defendant who can lay claim to the right to a fair trial, but all participants, and so the court has an obligation to ensure that judicial processes are conducive to a trial that is fair to all.¹²⁰

¹¹⁶ Gillen, *op. cit.*, n. 3, p. iv.

¹¹⁷ O’Connell, *op. cit.*, n. 110.

¹¹⁸ Doak, *op. cit.*, n. 110, p. 247.

¹¹⁹ L. Hoyano, ‘What Is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial’ (2014) 2014 *Criminal Law Rev.* 4, at 24.

¹²⁰ *Id.*

The concept of a fair trial, then, should revolve around a collective view of justice, which seeks to ensure the integrity of the verdict by protecting the rights and interests of the accused *and* the complainant.

5.1 Countering the critics

Despite these shifts, resistance to SLR continues. Third-party participatory rights are perceived as being directly opposed to the normative parameters of the adversarial trial system; objections tend to centre on the perceived threat to the accused's right to a fair trial and the longstanding principle of equality of arms.¹²¹ Since the adversarial system relies so heavily on the delicate balance of power achieved through the clear delineation of roles of the prosecution and defence, the system could be perceived as 'out of balance' if another party were involved in the case who could actively work against the interests of the defence. The perception of 'dual representation' for the complainant is commonly cited by lawyers and law reform bodies as one of the main reasons why SLR is seen as unworkable.¹²²

As Braun acknowledges, this could certainly be seen to undermine fair trial rights 'if defendants had to defend themselves against two accusers',¹²³ but this view fails to acknowledge that complainants have legitimate interests or rights, which may compete not only with the fair trial rights of the accused but also with the interests of the prosecution. These include the right to privacy regarding the disclosure of medical/counselling/social work records and to be free of the inhumane or degrading treatment that may arise from character attacks or cross-examination on previous

¹²¹ Hoyano, *op. cit.*, n. 107; Kirchengast et al., *op. cit.*

¹²² VLRC, *op. cit.*, n. 75; Iliadis, *op. cit.*, n. 49.

¹²³ K. Braun, 'Legal Representation for Sexual Assault Victims: Possibilities for Law Reform?' (2014) 25 *Current Issues in Criminal Justice* 828.

sexual history evidence. The prosecutor is charged with protecting the public interest (which includes the defendant, the complainant, and society at large), but the rights outlined above constitute the discrete interests of complainants, which do not necessarily align with the public interest. The collective approach to justice outlined above is not best achieved via the prosecutorial role, as Raitt argues:

The balancing of the multiple interests for which the Crown has responsibility – including the public interest, the complainer, and the accused – invariably gives primacy to the accused’s right to a fair trial. It cannot be otherwise. The difficulty with this position is that there is no opportunity for the complainer’s legitimate privacy interests to be canvassed forcefully and competitively against other interests by an independent legal representative with all the entitlements of partiality that entails. If we are to be faithful to the adversarial tradition, the least we can do is to ensure that distinctive, meritorious interests are not handicapped from the outset.¹²⁴

The introduction of complainant SLR may ‘save the prosecutor from having to juggle two roles which are ultimately incompatible’.¹²⁵ Arguably, complainants’ rights, privacy, and interests can only be protected effectively through some form of SLR,¹²⁶ and, as mentioned, there are many different models of SLR in existence around the

¹²⁴ F. E. Raitt, ‘Disclosure of Records and Privacy Rights in Rape Cases’ (2011) 15 *Edinburgh Law Rev.* 46.

¹²⁵ J. Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’ (2005) 32 *J. of Law and Society* 294, at 307.

¹²⁶ *Id.*; Kirchengast, *op. cit.*, n. 105; F. E. Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (2010).

world.¹²⁷ Formal party status for victims is relatively common in inquisitorial jurisdictions, but the judge-led, inquiry-based nature of these processes means that this status is perceived to be less problematic than in an adversarial context.¹²⁸ Even extensive rights of audience for legal representatives could be seen to violate the principle of equality of arms, particularly if these representatives are given the opportunity to cross-examine witnesses (including the accused). That position would be further exacerbated if the legal representative were to be granted access to privileged documents ordinarily reserved for the prosecution and/or defence. The extent to which the equality of arms principle is threatened would ultimately depend upon the parameters of the representative's role within the adversarial context.

For these reasons, we do not believe that formal party status or extensive rights of audience are viable means for protecting the interests of the complainant. Rather, the role of the legal representative should be confined to specific matters of evidence and procedure that touch on the interests and rights of complainants, and the rights assigned to the representative would enable them to test the rationale for, and present counter-arguments to, contentions advanced by the parties.¹²⁹ These areas of interest are well documented in the literature, including the use of protective measures (such as alternative means of giving evidence through the use of video testimony, anonymity, and clearing the public gallery), making submissions on applications for the disclosure of medical/personal records, and making submissions on applications to adduce sexual history.¹³⁰

¹²⁷ See Iliadis, *op. cit.*, n. 49; Raitt, *id.*; Smith and Daly, *op. cit.*, n. 72.

¹²⁸ Braun, *op. cit.*, n. 123; Smith, *op. cit.*, n. 22.

¹²⁹ Iliadis, *op. cit.* (2019).

¹³⁰ Braun, *op. cit.*, n. 91; Braun, *op. cit.*, n. 123; Iliadis, *op. cit.*, n. 49; T. Kirchengast, 'The Integration of Victim Lawyers into the Adversarial Criminal Trial' in *Proceedings of the 4th Annual Australian and New Zealand Critical Criminology Conference*, eds M. Lee et al. (2011) at

Aside from the inappropriate use of sexual history evidence, evidence of other past behaviour and sensitive third-party material has been routinely adduced as part of victim-blaming tactics by the defence in order to undermine the complainant's credibility as a witness.¹³¹ SLR could therefore also be valuable where the defence submits an application to adduce such evidence. Although the law surrounding applications to adduce 'bad character' evidence of non-defendant witnesses was not included within the Terms of Reference of the Gillen Review, this is also an area where SLR could potentially provide useful intervention.

While the law in England and Wales, and in Northern Ireland, was strengthened in 2003 and 2004 respectively, the defence is still entitled to apply to the court for leave to introduce 'bad character' evidence, albeit subject to a more stringent 'enhanced relevance test', whereby attacks on the character of a non-defendant witness must be justified in terms of substantial relevance to credibility.¹³² Yet such applications are still routinely made and granted. In the English case of *R v. S (Andrew)*, a defendant charged with indecent assault against a sex worker was denied leave to cross-examine her in relation to previous convictions for theft and burglary on the grounds that these were irrelevant to her credibility.¹³³ The defence case rested on an allegation that she had demanded further payment for services and had threatened to 'cry rape' if it was not forthcoming. Ordering a retrial, the Court held that the defence

<<https://ses.library.usyd.edu.au/handle/2123/7376>>; Raitt, op. cit., n. 126; Smith, op. cit., n. 22.

¹³¹ D. Abrahms et al., 'Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity' (2003) 84 *J. of Personality and Social Psychology* 111; Z. Adler, *Rape on Trial* (1987). This stems from the fact that the majority of rape trials hinge on the question of consent (or reasonable belief thereof), as the complainant and the accused are the only percipient witnesses, and therefore frequently boil down to a battle of credibility between the two.

¹³² Article 5 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 states that leave of the court may only be given where it is important explanatory evidence; or has substantial probative value in relation to a matter that is at issue in the proceedings, and is of substantial importance in the context of the case as a whole; or where all parties to the proceedings agree to the evidence being admissible. This mirrors the English provision contained in Section 100 of the Criminal Justice Act 2003.

¹³³ *R v. S (Andrew)* [2006] EWCA Crim 1303.

should have been granted leave to cross-examine the complainant on these earlier convictions, since they could be relevant to her propensity to act dishonestly and may thus have supported the defence case that she had sought to blackmail the defendant. While creditworthiness remains a ground for the admissibility of such evidence, SLR should also be available to make submissions on behalf of complainants where the defence applies for leave of the court to adduce such evidence.

5.2 Extending the remit of Gillen’s recommendations

Although the adoption of Gillen’s recommendations in full would position Northern Ireland as an international trailblazer, we remain concerned that they do not go far enough to provide a sufficiently robust check on late sexual history applications, as counsel must be able to respond to the complainant’s evidence as it emerges in trial. As such, access to SLR should not be confined to pre-trial hearings. Representatives should be able to protect complainants’ rights and interests by objecting to specific questions, especially in light of research evidence indicating that advocacy practice often departs from formal evidential and procedural rules, as well as from specific judicial instructions/guidance issued in the pre-trial phase.¹³⁴

Significant gaps between the aims and practical outcomes of legislative protections for complainants’ sexual history are notable in Iliadis’ research, in which she found that while defence applications for notice of intention to cross-examine on prior sexual history should be made pre-trial, they are commonly made ‘close to, or after the commencement of the trial, [and] sometimes shortly before the complainant is

¹³⁴ Iliadis, *op. cit.* (2019); Kelly et al., *op. cit.*, n. 49; Smith *op. cit.*, n. 22.

due to give evidence'.¹³⁵ She also identified that limiting the role of the legal representative to the pre-trial phase limits their capacity to defend complainants' privacy and interests, especially where late applications are made.¹³⁶ In line with Iliadis's findings,¹³⁷ we see merit in an expanded role for complainant SLR beyond the pre-trial stage, to give the representative licence to defend complainants' privacy at later stages where defence counsel seek to adduce the complainants' prior sexual history or otherwise sensitive third-party records. This framework for SLR would usurp neither the public interest nor the equality of arms principle, as the legal representative's role would be limited to the hearing of, and/or objection to, the legal argument as to whether the complainant's sexual history evidence or sensitive third-party material should be permitted as evidence in court.

Gillen's recommendations largely encompass these SLR innovations, though his report shied away from urging the immediate adoption of the right to intervene in the questioning of complainants in front of jurors,¹³⁸ arguing that the presence of counsel to oppose defence applications to adduce previous sexual history and private records 'should only rarely arise' and would occur 'at a time-limited pre-trial hearing to determine this issue (provided it is not belatedly raised at trial)'.¹³⁹ Gillen's recommended provision for SLR is therefore limited to pre-trial hearings, at least until such time as a cost analysis in relation to extending SLR to the trial itself can take place.¹⁴⁰ Under Gillen's more limited proposal, complainants would be left unrepresented if late applications to adduce such history were made. This could be

¹³⁵ Iliadis, *op. cit.* (2019), p. 8.

¹³⁶ Iliadis, *op. cit.* (2019).

¹³⁷ *Id.*

¹³⁸ However, this could be addressed by the SLR raising a concern via the Crown, as trials routinely feature private discussion among counsel and with other members of the court. Furthermore, the jury would not be present for submissions in legal arguments and so would not be prejudiced by having a representative for the complainant present in court.

¹³⁹ Gillen, *op. cit.*, n. 3, p. 174.

¹⁴⁰ *Id.*, p. 187.

especially problematic considering that prior research by Bacik et al. in Ireland found that ‘the defence may be giving notice of intention to make a Section 3 application [to cross-examine on prior sexual history] even where there is little or no real prospect of them doing so’, and that such applications were being made late to ‘intimidate’ complainants and ‘discourage’ them from pursuing prosecution.¹⁴¹

Even in those quarters where the normative case for SLR is accepted, practical objections have been raised. There is a perception that – like any means of victim-survivor participation – the trial would be rendered so lengthy and unwieldy that it would be unworkable in practice.¹⁴² However, with prudent judicial management, and providing the scheme were devised within very specific limits, there is no reason why SLR should not be able to operate effectively in an archetypal adversarial context (see above). Indeed, the broader trend towards protecting complainants’ rights suggests that the climate is ripe for reform. The use of SLR in quasi-adversarial systems such as Norway and Denmark has been largely unproblematic,¹⁴³ while SLR has been shown to have few disruptive effects in more archetypal adversarial systems, such as Ireland,¹⁴⁴ Canada,¹⁴⁵ and (albeit not without some logistical and resource-related issues) the ICC.¹⁴⁶

Adversarial models have already expanded to accommodate *amicus curiae*, McKenzie friends, children’s advocates, and intermediaries. Providing that SLR schemes are established with very clear parameters – as per the Gillen Review model,

¹⁴¹ Bacik et al. (2010) cited in Rape Crisis Network Ireland (RCNI), *Previous Sexual History Evidence and Separate Legal Representation: RCNI Position Paper on Previous Sexual History Evidence in Criminal Trials* (2012) 6, at <<http://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>>.

¹⁴² D. Weisstub, ‘Victims of Crime in the Criminal Justice System’ in *From Crime Policy to Victim Policy*, ed. E. Fattah (1986) 205.

¹⁴³ Braun, *op. cit.*, n. 91.

¹⁴⁴ Iliadis, *op. cit.* (2019).

¹⁴⁵ R. Mohr (2002) cited in Raitt, *op. cit.*, n. 126.

¹⁴⁶ C. Van den Wyngaert, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2011) 44 *Case Western Reserve J. of International Law* 475.

with the possibility of providing SLR where late applications are made during the trial or where other sensitive third-party material is adduced – there appears to be no reason why SLR should not be able to operate effectively in a context where criminal trials are already adapting to the above-noted international shifts in relation to criminal evidence and procedure. On this basis, we propose a ‘Gillen-plus’ model of SLR, whereby the representative could intervene not only in relation to sexual history and medical and counselling records, but also in relation to other sensitive material, such as digital and school records, or where leave is sought to introduce evidence of the complainant’s previous ‘bad character’. More significantly, the power to make representations on behalf of the complainant should continue into the trial phase to ensure that their rights and interests are protected in the event that late applications are made. It is also vital that complainants themselves are made aware of the specific powers and limits that govern the role of their legal representative. This would ensure a measured approach to justice that would not raise the hopes and expectations of complainants unnecessarily. Past research indicates that well-meaning attempts to introduce enhanced forms of victim participation in sentencing can lead to dissatisfaction through a sense of unmet expectations, thereby undermining any enhanced sense of procedural justice.¹⁴⁷

5.3 Funding SLR: a cost–benefit analysis

Concerns have also been raised in relation to funding. As with most SLR schemes, Gillen recommended that legal aid be provided, and expressed a preference that this should not be means tested.¹⁴⁸ However, with legal aid budgets under severe pressure

¹⁴⁷ M. Manikis, ‘Imagining the Future of Victims’ Rights in Canada: A Comparative Perspective’ (2015) 13 *Ohio State J. of Criminal Law* 163.

¹⁴⁸ Gillen, *op. cit.*, n. 3, p. 179.

throughout the common law world, there are legitimate concerns around their capacity to provide for this. Gillen also cited fiscal constraints as a key reason for him not recommending SLR at trial, stating that ‘the costs of solicitor and counsel sitting through an entire trial in every serious sexual offence, or indeed even every rape trial, would be prohibitive in an era of financial austerity’.¹⁴⁹ Notwithstanding this concern, experience in Ireland dealing with legal aid for previous sexual history applications has been relatively inexpensive, and Gillen noted that it seemed unlikely to constitute a significant financial burden given the comparative ‘rarity’ of such cases.¹⁵⁰

On this point, research conducted by Dame Vera Baird QC found that sexual history was introduced in 36 per cent of observed rape trials at Newcastle Crown Court.¹⁵¹ Hoyano criticized these findings in a survey of the Bar, arguing that such applications were only made in 18 per cent of rape cases, yet acknowledged a 32 per cent application rate for cases featuring adult female complainants.¹⁵² Evidence from Scotland tells a similar story, with Burman et al. identifying arbitrary questions about complainants’ sexual history in almost three-quarters of 231 rape cases over a 12-month period (1 June 2004–31 May 2005).¹⁵³ Northern Ireland’s neighbouring jurisdictions therefore provide a compelling case for introducing SLR pre-trial, and even during the trial, as Section 41 applications¹⁵⁴ are often made at this late stage.¹⁵⁵

¹⁴⁹ Id., p. 177.

¹⁵⁰ Id., p. 182.

¹⁵¹ R. Durham, *Seeing Is Believing: The Northumbria Court Observers Panel Report on 30 Rape Trials 2015–2016* (2016).

¹⁵² L. Hoyano, *The Operation of YCJEA 1999 Section 41 in the Courts of England and Wales: Views from the Barristers’ Row – An Independent Empirical Study Commissioned by the Criminal Bar Association* (2018) at <<https://www.criminalbar.com/wp-content/uploads/2018/11/REPORT-PROVIDED-FOR-CBA-WEBSITE-.pdf>>.

¹⁵³ M. Burman et al., *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007) at <https://www.sccjr.ac.uk/wp-content/uploads/2009/01/Impact_of_Aspects_of_the_Law_of_Evidence_in_Sexual_Offence_Trials.pdf>.

¹⁵⁴ Section 41 of the Youth Justice and Criminal Evidence Act constitutes the ‘rape shield’ provision in England and Wales.

¹⁵⁵ Smith, *op. cit.*, n. 22.

Emergent findings within the jurisdiction suggest that Northern Ireland may have an even higher prevalence of sexual history evidence: observations found sexual history evidence in nine out of 16 trials (56 per cent), despite sampling both adult rape cases and child sexual abuse, with the latter being less likely to feature these issues.¹⁵⁶

Gillen is misled to focus on the potential cost of SLR without acknowledging its potential savings. The Home Office estimated the cost of sexual offences in England and Wales as £12.2 billion each year (based on 2015 calculations). Of this, an estimated £9.8 billion was caused by the emotional consequences of both the crimes and the inadequate responses to those crimes. Research shows that improved criminal justice responses lead to better health and employment outcomes for complainants, as well as increasing public confidence in the justice system and preventing future offending.¹⁵⁷ Additionally, Westmarland et al. estimated that each rape conviction prevents an average of six further sexual offences when accounting for repeat offending.¹⁵⁸ This equates to an estimated saving of £197,160 per conviction, even after the cost of imprisonment.¹⁵⁹

At the same time, however, we argue that SLR must be adequately resourced and consideration of its introduction needs to be measured against potential cultural resistance, from policymakers and the legal profession alike. The working culture of the legal profession and the embedded practices of the adversarial tradition have previously acted to frustrate the reach of well-intentioned reforms for vulnerable witnesses.¹⁶⁰ As noted earlier, while the Law Society of Northern Ireland endorsed the

¹⁵⁶ L. Kennedy, 'Preliminary Findings from the Court Observer Panel' in *Gillen: Where Are We Now? Victim Support Annual Conference* (2020).

¹⁵⁷ Bacik et al., *op. cit.*

¹⁵⁸ N. Westmarland et al., *Cost-Benefit Analysis of Specialist Police Rape Teams: Phase Three Report* (2015).

¹⁵⁹ *Id.*

¹⁶⁰ Doak, *op. cit.*, n. 101; Ellison, *op. cit.*, n. 71.

recommendation for SLR, the Bar Council was reticent about its introduction,¹⁶¹ and there remains resistance to SLR in adversarial systems more generally.¹⁶² Ultimately, the success or failure of change leans on the extent to which the profession and, in particular, the judiciary are prepared to embrace cultural and structural changes to the handling of rape cases. Robust judicial case management is also undoubtedly required to ensure that advocates understand and comply with the introduction of SLR.

6 CONCLUSION

Gillen's call for publicly funded SLR to provide complainants with information and advice about the criminal justice process, and to represent complainants to object to disclosure of sexual history evidence and private material, will likely remain contentious. However, the international experience with measures of complainant SLR suggests that SLR, as proposed by Gillen, is not as radical as some would have it, but is justified by the need to enhance the complainant's confidence in their own testimony and to protect their privacy and interests. For this reason, and in order to protect the fragile sense of public trust in Northern Ireland's justice system, Gillen's recommendation for SLR should be implemented without delay. Further afield, the successful implementation of SLR might provide some reassurance to those who are sceptical about how the mechanism might work within an adversarial framework.

Gillen's proposals for complainant SLR are strengthened by Northern Ireland's unique socio-political context. That said, however, Northern Ireland is not the only adversarial jurisdiction seeing an increase in the use of 'digital strip searches', or of

¹⁶¹ Gillen, *op. cit.*, n. 3, pp. 131, 153, 155, 239.

¹⁶² Braun, *op. cit.*, n. 123; Iliadis, *op. cit.*, n. 49.

irrelevant questioning of sexual history, medical and counselling records, or other sensitive third-party material. For these reasons, we identify strong merit in an expanded role for SLR – a ‘Gillen-plus’ model – to include support for complainants in responding to intrusions of privacy, including, but not limited to, digital and school records, as well as ‘bad character’ evidence. We go one step further by arguing that the provision of SLR should extend beyond pre-trial processes so that complainants are supported in their efforts to protect their privacy and interests where such issues arise at trial. Broadening the remit of SLR will not only help to address some of the ongoing barriers to justice that complainants face, but will also position Northern Ireland as an international trailblazer, setting a roadmap for reform in other adversarial jurisdictions contemplating like reform.

Complainant SLR can mitigate the likelihood of secondary harm, while simultaneously enhancing complainants’ confidence and quality of evidence, as well as the integrity of the criminal justice system. In this regard, SLR may enhance complainants’ procedural and substantive justice experiences, which in turn could increase their engagement with the justice system and reduce the likelihood of their withdrawal. Significantly, SLR will also position complainant interests alongside those of the state and the accused, recognizing what Lord Steyn describes as a ‘*triangulation of interests*’.¹⁶³

Bearing the above considerations in mind, increasing evidence suggests that legal reform can only ever be a partial response to the issues raised in this article.¹⁶⁴

While we agree that ‘more law’ is not the only solution to criticisms of legal

¹⁶³ Lord Steyn cited in *R v. H* [2004] 2 AC 134, at 145–146, emphasis added.

¹⁶⁴ S. Walklate et al., ‘Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories’ (2018) 18 *Criminology and Criminal Justice* 15.

responses,¹⁶⁵ and that cultural change is also needed to deconstruct the so-called cultural scaffolding around the inadequate treatment of rape complainants,¹⁶⁶ we remain critical of the law's current response to complainants of sexual violence across adversarial systems. While legal mechanisms in themselves are not a panacea for the current failures of the law's response, this does not mean that there is *no* role for them. We argue that SLR is not intended as a replacement for wider social and cultural change, but is one tool in a kaleidoscope of justice mechanisms – a tool that will help to ensure that complainants' justice needs are met, and that their privacy, rights, and interests are considered both within and beyond Northern Ireland.

¹⁶⁵ Id.

¹⁶⁶ Y. Russell, 'Woman's Voice/Law's Logos: The Rape Trial and the Limits of Liberal Reform' (2017) 42 *Aus. Feminist Law J.* 273.