

Centre for Women's Justice submission on the need for independent legal advice and representation for sexual violence survivors

6 June 2022

This submission is provided in response to the MoJ's consultation on support for victims subject to requests for personal information, outlined in a letter from Victoria Atkins MP on 10 May 2022.

Introduction

The criminal justice system is not delivering for victims in rape and other sexual offences cases at present. This is widely accepted and has spawned numerous recent inquiries including the Government's end-to-end Rape Review, the Joint Thematic Inspection of Police and CPS Response to Rape, Operation Bluestone and Soteria, identifying an investigation culture which is focused on victim credibility rather than on investigating suspects. Charge rates hit an all-time low of around 3% in 2019/20¹ and attrition rates have soared².

Victims express low confidence in the system and say that their experience of the process compounds the trauma of the original offence. Victims are acutely aware that the suspect / defendant has lawyers all the way through the process, whilst they do not, and they have no-one to 'fight their corner' if necessary, who is fundamentally there to see things from their perspective and represent their interests. We propose that every sexual violence victim should have access to independent legal advice if a particular problem, or question arises, to have a lawyer liaise on their behalf with the police or CPS where necessary, and provide representation in court in those relatively rare instances where this is required.

Receiving advice from a person who is independent and 'on your side' is hugely beneficial for the individual's sense of trust, engagement and ability to process information. Even where the advice is negative, or confirms that a police or prosecution decision cannot be challenged, it enables victims to feel that they have explored their concerns and understand their options.

CWJ's experience of providing independent legal advice to rape survivors

CWJ has been providing free legal advice to ISVA clients, and directly to a further number of rape survivors, for over three years. Advice is provided both by our in-house lawyers and by external lawyers on our pro bono panel. Over three years 2019 to 2021 we received 689 legal enquiries via ISVA services and dealt with many further enquiries from women directly. We have received enquiries via 36 different

¹ End-to-end Rape Review 2021

² London Rape Review saw an increase from 58% to 65% between 2019 and 2021

ISVA services across the country. We have no doubt that there is a huge unmet need for legal advice amongst rape survivors. Our submission is informed by our extensive experience in dealing with the legal issues raised by survivors of sexual violence.

Legal advice must be provided by independent qualified lawyers

It is essential that legal advice be given by lawyers who are wholly independent of criminal justice or other state agencies. This is the only way that victims will feel that their lawyer sees the matter entirely from their perspective, with their interests at heart, and feel able to accept the advice given.

Most importantly, legal advice must be given by lawyers and not by ISVAs or other non-legally qualified support workers. The ISVA role involves a range of skills, many from a therapeutic background, and ISVAs are not legally trained and cannot and should not be expected to provide legal advice. This would place wholly unrealistic and unfair demands on ISVAs.

In our experience some queries raised by ISVAs and their clients are far from straightforward and require legal analysis and research. Our legal enquiries team includes three solicitors with 14, 15 and 18 years' experience respectively and we can confirm that some of the questions posed are no simpler than those that solicitors deal with in many other situations. We frequently have to consult legislation, policies and guidelines, and consider criminal and civil procedure. In a number of enquiries received we consult with barristers on our panel before providing advice.

The legal issues raised by ISVA clients are no less complex than legal issues in any other area of law, and walk of life, and there is no reason why ISVA clients should not need an independent, qualified lawyer with specialist knowledge in the relevant field, just like any other individual in receipt of legal services.

Achieving better outcomes for victims requires lawyers to take a robust approach to police decisions and sometimes negotiate with police or prosecutors, for example over the reasonableness of data requests. The evaluation report on the Northumbria pilot Sexual Violence Complainants' Advocates Scheme noted that the solicitors in the pilot were all experienced individuals willing to stand up to police officers where necessary. ISVAs are unlikely to, and cannot be expected to take a confrontational attitude, and need to preserve constructive working relationships with officers. The involvement of a lawyer, taking a separate role to the ISVA, is more likely to resolve a situation in the victim's favour. A legal analysis is also essential so that legal errors can be identified where ISVAs may accept the approaches of criminal justice partners which are presented to them as the norm.

Finally, it is essential that legal advice to survivors be provided by qualified lawyers, so that legal professional privilege applies. This is a fundamental aspect of our legal system which enables a trusting and frank exchange of information and advice. Legal advice in this context requires the same protections as in any other.

What kind of independent legal advice and representation should be provided?

In order to be effective, legal advice needs to include access to relevant documents, this is usually email exchanges with police and prosecutors and other written decisions. Lawyers need to have the opportunity to consider the reasons for decisions carefully, in the context of the individual case. Sometimes lawyers need to consult policies, guidance and legal authorities. Lawyers may need to take further instructions from survivors. They need to draft letters that survivors can use, or negotiate directly on their behalf with police officers or prosecutors. This includes responding to reasons put forward for requests for data, stressing the correct approach to be adopted, and sometimes identifying a narrower more appropriate set of parameters that meets the requirements of all. Often this process unfolds over a period of time, with correspondence going back and forth with police officers and prosecutors, and so there needs to be continuity between the legal adviser and the client. Lawyers need to be funded to do such casework, so that they can effectively address the situations of their clients, just like lawyers in any other setting.

More rarely there may be applications to the court where the victim will be entitled to be separately represented in applications for orders for disclosure of third party materials³ or digital data.

In our view, the legal advice needs of victims in sexual violence cases can only be met through a **bespoke role**, where independent lawyers with the relevant expertise carry out this work within a distinct scheme. This could be through salaried lawyers based within ISVA services, or other charities or law centres. It could also be made up of solicitors in private practice signed up to a specialist scheme, with its own training and funding arrangements. Ideally, they would work closely with ISVA services. Access to counsel's advice would also be required in some cases.

In our view the needs of victims in sexual offences cases cannot be met through the existing legal aid system. Solicitors at CWJ between us have many decades of experience of working in legal aid firms and we are very familiar with how they operate. The current legal aid scheme will not fill the gap that exists for the following reasons:

- There is no existing pool of solicitors with the relevant expertise who routinely provide this type of advice already as part of their existing practice. The work involves a cross-over of civil and criminal law. Criminal solicitors do criminal defence work and do not have experience in victims' rights. Civil practitioners generally only take on litigation, such as civil claims and judicial review, rather than advice work. They often have no expertise in victim's rights either.
- We would estimate that well over half of those we assist do not meet the financial eligibility test for legal aid. Often the process of assessing financial eligibility is lengthy and intrusive, with various financial documents required which clients have to find. We know of cases where rape survivors have dropped out of the process during this assessment with solicitors. As noted above, many enquiries are relatively urgent, where the legal aid assessment itself would take longer than the advice. A system of legal advice and

³ See *R(TB) v CPS and South Staffordshire Healthcare Trust* [2006] EWHC 1645 (Admin)

representation which aims to redress the balance for victims in the criminal justice system should be free at point of receipt without means testing.

Legal advice needs of victims in sexual offences cases

In our experience victims seek and need legal advice on a broad range of issues, and this should not be limited to privacy and data issues. Whilst these are important, a great many enquiries we receive at CWJ relate to the VRR process, the investigation process, parole etc. Limiting legal advice to privacy rights will greatly reduce the impact of a legal advice scheme, and will not meet the broader aim of building trust and confidence of victims.

Within the hundreds of legal enquiries received by CWJ in sexual offences cases the following are most common:

- **Disproportionate requests for third party materials**
- **Inappropriate intrusive requests for downloads of survivors' mobile phones and other digital data**
- **Requests for assistance with Victim's Right to Review (VRR):** During the three years 2019 – 2021 we received 369 enquiries relating to VRR, of which half related to procedural queries, for example around time limits or how to obtain an explanation for a decision to take No Further Action (NFA) and half to the substantive negative charging decision. We frequently assist with preparing representations in support of the VRR request and have had a high success rate in having investigations re-opened, cases referred to CPS by the police, and some VRRs have led to decisions to charge. Of those that have reached trial most have resulted in convictions and guilty pleas. Assistance with the VRR process is an essential aspect of empowerment for victims in the criminal justice system and can directly help address the low charging rates in rape cases.
- **Issues arising during the investigation process:** the following are some examples but there are many more:
 - extreme delays, sometimes of several years, in progressing investigations
 - investigations closed without the suspect being interviewed (which also deprives the victim of access to the VRR process);
 - Inter-jurisdictional issues where offences have happened abroad and UK police will not take actions, including following the Domestic Abuse Act 2021 which introduced new jurisdiction provisions;
 - Issues surrounding potential defendant bad character evidence not being utilised, and evidence of domestic abuse as context for sexual violence;
 - advice about victims accessing data about them on police systems.

- **Re-opening investigations:** We receive requests for advice following police refusal to re-open investigations closed some years ago. If there is fresh evidence or earlier inadequate investigations or wholly unjustified decisions, then Article 3 ECHR can provide a remedy based on the investigative duty.
- **Unduly lenient sentencing referrals to the Attorney-General:** time limits for requests under this scheme are extremely tight with no power to extend therefore swift advice is essential.
- **Victims' rights in parole process:** this can include queries about a victim's submission before a Parole Board decision, and potential challenges to a perpetrator's move to open conditions.

It would be a huge missed opportunity if any new legal advice service introduced was limited to privacy data issues only. Advice on a range of other issues affecting survivors of sexual violence can greatly enhance their engagement in the criminal justice process and help redress the balance in terms of access to legal input for those caught up in a complex system.