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Victim legal representation and the adversarial criminal trial: A critical analysis of proposals for third-party counsel for complainants of serious sexual violence

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Abstract

The past several decades have witnessed a shift toward victim interests being considered and incorporated within adversarial systems of justice. More recently, some jurisdictions have somewhat contentiously considered granting sex offences complainants' legal representation at trial. In Australia, the Royal Commission into Institutional Responses to Child Abuse (2017), the Royal Commission into Family Violence (2016) and the Victorian Law Reform Commission (2016) considered the potential role of legal counsel for complainants in the criminal trial process. While contrasting quite significantly with the traditional adversarial framework—which sees crime as contested between state and accused—legal representation for complainants is not unprecedented, and victims may already retain counsel for limited matters. Despite broader use of victim legal representation in the United States, Ireland and Scotland, and as recently considered by the Sir John Gillen Review in Northern Ireland, legal representation for sex offences complainants is only just developing in Australia. Notwithstanding recent reference to legal representation for complainants where sexual history or reputational evidence may be adduced, there exists no sufficient guidance as to how such representation may be integrated in the Australian criminal trial context. This article explores the implications of introducing such counsel in Australia, including the possible role of non-legal victim advocates.

Keywords

complainant, Gillen Review, rape shield, sexual violence, victim legal representation

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Introduction

Numerous recent inquiries and Royal Commissions have examined various matters affecting victims of crime and their recourse to justice in Australia. The Victorian Law Reform Commission ('VLRC') (VLRC, 2016),[1] the Royal Commission into Institutional Child Abuse (Cth) ('RCCA') (RCCA, 2017) and the Royal Commission into Family Violence (Victoria) ('RCFVV') (RCFVV, 2016)[2] focus attention on the rights of complainants in an attempt to enhance protection, standing and access to justice. These inquiries have considered the role of victim complainants in criminal proceedings and whether standing ought to be enhanced by the availability of legal counsel. Despite legal representation for victims having some precedence in the pre-trial criminal process,[3] complainants are not presently afforded representation and party standing in the criminal trial. The situation in Australia may be generally compared to similar adversarial jurisdictions, where complainants are not ordinarily afforded representation, despite certain jurisdictions offering limited representation or proposing reform, most often in the pre-trial phase. The Sir John Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland, Parts 1–3*, offers some indication as to the appetite for reform, around meeting the needs of vulnerable complainants of serious sexual violence in particular (Gillen, 2019).[4] A stronger case for representation and third-party intervention may be made for specific needs groups, such as sex offences, intimate partner and child victims, than for the representation and standing of victims generally (Bowden et al., 2014; Garkawe, 1994). Unlike most inquisitorial jurisdictions, there seems to be limited scope for granting complainants standing as accessory or subsidiary prosecutor in adversarial, common law jurisdictions.

Prospects for reform are very much centred on the discrete needs of particular victim groups, and the offering of appropriate protections to strengthen the evidence required from those victims, in order to ensure the victim does not withdraw their complaint out of fear of secondary victimisation (Kennedy et al., 2012). The proposal for legal representation for victims is therefore supported by the need to protect complainants against adversarial court processes, and aggressive cross-examination in particular, strengthening the veracity of the evidence of the victim in court. Fairness to the accused remains a key concern. The path forward is therefore to acknowledge the evidentiary risks faced by these discrete groups, in particular when giving evidence in open court, rather than to proceed to reform the criminal trial out of a general desire to enhance victim participation and agency as stakeholders of justice. The proposition that representation be granted in order to enhance therapeutic justice outcomes is thus an important but secondary consideration. Finding an acceptable role for victim legal representation may mean that victim counsel is granted a specific role in the criminal process, to protect the victim's capacity to testify with integrity, without detracting from the accused's right to ask relevant questions and test the prosecution case. While this is always a difficult balancing act, addressed in European human rights jurisprudence as one of ensuring 'proportionality' and 'fairness' between trial participants,[5] the better course may be to develop the role of victim legal representation as focused on particular phases of the criminal process where secondary victimisation risks the delivery of clear, precise and probative evidence. This would ordinarily include discrete pre-trial phases where the Crown

1. See Justice Victims and Other Legislation Amendment Act 2018 (Vic) and Justice Legislation Miscellaneous Amendment Act 2018 (Vic) for passage of recommendations into law.
2. Also see House of Representatives Standing Committee on Social Policy and Legal Affairs (2017).
3. See sexual assault communication privilege s. 299A of the Criminal Procedure Act 1986 (NSW); Div 1B Evidence Act 1995 (NSW). Also see Braun (2013).
4. See preliminary report, Gillen Review (2018). Also see https://www.justice-ni.gov.uk.
5. *Dooson* v *The Netherlands* (1996) ECHR 20524/92. Also see Lord Steyn in *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118, 'The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.'

or defence sought to access evidence of the complainant otherwise protected by law, or during trial where the complainant may then be directly examined on such evidence. There may be other limited opportunities for reform, for instance, where the bench offers a Markuleski direction: *Casey* v *R* [2020] NSWCCA 177; *R* v *Markuleski* (2001) 52 NSWLR 82. Even so, in order to fairly assess the veracity of the accusation and prosecution case it may be necessary to expose the victim to potential discomfort, even humiliation, in court. Despite other protective mechanisms not explored in this paper,[6] provision of legal counsel may not be able to protect the victim complainant from all aspects of the rigours of the fair trial owed to the accused by law. This can involve confronting cross-examination, particularly where leave is fairly granted to examine a complainant on their sexual history and experience.[7]

Although this article primarily considers reform of the criminal process, cognate civil, family and administrative processes, in particular those relevant to intimate partner and child victims, are also relevant and comparative analysis of such cross-jurisdictional developments may assist measured reform of the criminal trial (Cossins, 2009; Boyd and Hopkins, 2010).[8] The role of non-legal victim advocates, currently offered most widely in the United States,[9] may have a significant role to play to better support victims in criminal and related processes. Victim advocates do not conflict with the requirements of adversarial court processes in the way that legal representation can. This is because victim advocates largely assist victims out of court, with a range of issues, from compensation claims through to access to counselling. Combined with a broader educative and experiential remit, victim advocates may provide a workable adjunct to victim legal representation where such counsel have a limited and focused role of the trial process, or where such counsel are otherwise unavailable.

The Sir John Gillen Review

The Gillen Review has directly considered the question of whether the adversarial court processes of Northern Ireland ought to provide publicly funded legal representation for complainants of serious sexual violence. The Review starts with an acknowledgement that rape victims do not have any legal standing in criminal court processes,[10] despite the impact of the criminal trial process on the victim being a central consideration in prosecutorial decisions.

The Gillen Review (2019) sets out a framework of reform through which vulnerable victims may be protected during criminal court processes, where the victim may be cross-examined on their sexual history, or where otherwise confidential medical or counselling records are subpoenaed. Although victims have the right to retain counsel under the Victim Charter of Northern Ireland, this representation is limited to keeping the victim informed about the progress of the investigation and the conduct of the

6. See, for example, special protections granted to the complainant under Criminal Procedure Act 1986 (NSW) Pt 5.
7. See section 'Complainants, evidence and the need for representation' below. Leave to lift the 'rape shield', essentially to question the complainant on their sexual history and experience, is likely to involve intrusive and possibly aggressive questioning that is likely to distress complainants and cause secondary victimisation. Furthermore, the prospects of this occurring and especially in a way where the complainant is without (legal) support, may lead to the withdrawal of the complaint and the likely end of most trials.
8. As to cognate family law provisions protecting the child, see Family Law Act 1975 (Cth), s. 68 L; *Bennett and Bennett* (1990) 102 FLR 370; *Waghorne and Dempster* [1979] FamCA 55; *Evidence Act 1995* (Cth), s. 18; *P and P and Legal Aid Commission of NSW* (1995) 19 Fam LR 1; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184; *RCB as litigation guardian of EKV, CEV, CIV and LRV* v *The Honourable Justice Colin James Forrest* [2012] HCA 47. As to legal intervention in support of child witnesses and victims generally, see Whitcomb (2003) and ALRC (2007). As to Intimate Partner Violence ('IPV') protections, see ALRC (2010) and Kaye et al. (2017).
9. See, for example, the Victim Advocacy Program of the San Juan County Sheriff's Office, Utah, https://sanjuancounty.org/index.php/victim-advocate. For comparison, see also the Witness Assistance Service (ODPP, NSW), https://www.odpp.nsw.gov.au/witness-assistance-service. As to the rise of intermediaries in the Australian context, see Powell et al. (2015).
10. European Union, Directive of the European Parliament and of the Council (2012) 2012/29/EU, 25 October 2012, Establishing minimum standards on the rights, support and protection of victims of crime, and replacing council framework decision 2001/220/JHA, art. 13 and 14, gives victims a right to legal assistance, though only where they have standing before the court.

trial.[11] Standing in the trial, or in the pre-trial phase where key decisions are often taken, is not granted. The argument is that general representation focused on information exchange does not meet all the needs of crime victims, nor does it assist the court to make decisions that situate the victim to provide clear and probative testimony to the jury.

In England and Wales, the Stern Review (2010), discussed in the Gillen Review (2019), noted the lack of evidence and a tendency toward anecdotal evidence on the value of separate legal counsel for victims (Stern, 2010). Despite a lack of firm evidence of the specific merits of representation, the Stern Review did encourage further consideration of the potential benefits of supporting victims during the trial process:

> When we looked at the role of these lawyers for the victims, it seemed to us that the contribution they made to the victim's experience was an important one. In France they can call witnesses on behalf of the victim and address the court as to the amount of compensation payable to the victim. In Ireland, although the representation is limited, it represents an important recognition that there are times during the trial process where victims must be allowed to participate in the trial as more than witnesses—in order to protect their own rights and interests (Stern, 2010: 98).

The Gillen Review (2019) has gone further by examining the feasibility of separate representation for victim complainants in sex offences trials, in particular, to protect witnesses from overly intrusive questions and where the prosecution or defence seeks to lift the 'rape shield'.[12] The preliminary report indicates that representation for victims may be warranted out of the need to secure the efficacy of the testimony of the complainant, thus:

> For many complainants, the absence of a legally trained advocate acting on their behalf is both shocking and upsetting. Complainants are often left feeling vulnerable and exposed, merely seen as 'collateral damage' in a process to which they are not a party and have no independent voice. Some research shows that complainants' fear of mistreatment by the criminal justice system is a factor in under-reporting and that a lack of willingness to testify on the part of complainants can lead to prosecutorial withdrawal.
>
> Research suggests that providing legal representation to complainants to support them through the criminal justice process can be effective at reducing secondary trauma, reducing attrition and thus may improve low conviction rates. It is the most effective way of supporting complainants during trials.
>
> The adversarial focus that underpins cross-examination at trial provides a risk of re-traumatisation for complainants. The use of advocates who are legally trained means that complainants are likely to see less use of the myths and misconceptions that may be invoked currently by defence teams. These are damaging on many levels. (Gillen, 2018: 127–128)

The focus on the retention of counsel to prevent re-traumatisation and secondary victimisation was maintained in the final report. Limiting secondary victimisation is justified out of the need to maintain the basic human rights of sexual offences complaints,[13] but also out of the need to maintain victim's confidence in justice processes such that reporting rates are maintained, if not increased.

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11. Victim Charter of Northern Ireland, Department of Justice. See Justice (Northern Ireland) Act 2015 (Northern Ireland), s. 28.
12. See *R* v *Beserick* (1993) 66 A Crim R 419. A case involving indecent and sexual assault of juvenile boys, the Crown led history evidence to demonstrate subsequent sexual activity between the accused and a witness. The court held (at 422) that '. . . the evidence is admissible in order to place the evidence of the offence charged into a true and realistic context, in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act occurring without any apparent reason'. The Crown may also lead history evidence as propensity evidence, see *B* v *The Queen* (1992) 175 CLR 599; *Harriman* v *The Queen* (1989) 167 CLR 590 and *S* v *The Queen* (1989) 168 CLR 226; *R* v *Fletcher* (2005) 156 A Crim R 308; *R* v *Zhang* (2005) 158 A Crim R 504; as to tendency and coincidence evidence, see ss. 97–98 of the Evidence Act 1995 (NSW).
13. In the Australian context, these rights are generally afforded by Charters or Declarations of Victim Rights. Across Europe, these fundamental rights to fair and dignified treatment may be provided by EU Victims' Directive. Also see Northern Ireland

Significantly, however, counsel is justified for a second reason connected to but independent of the prevention of secondary victimisation. This specifically includes the use of counsel to protect the interests of the victim in order to secure and maintain the victim's confidence in their own testimony. This confidence is identified in the Gillen Review (2019) as foundational to the integrity of evidence that then proceeds before the jury:

> The adversarial focus, which underpins cross-examination at trial, provides a risk of re-traumatisation for complainants. The use of advocates who are legally trained, means that complainants are likely to see less use of the previous sexual history myths and misconceptions that may be invoked currently by defence teams. These are damaging on many levels.
>
> When complainants are offered this level of support it can lead to them being a more effective witness. The stress that complainants are under when giving evidence can be reduced when a legal advocate is present as they are more confident in their presence . . .
>
> There is evidence in the literature to show that court-related stress can make complainants more vulnerable to suggestion by counsel as a result of retrieval failures of short-term memory, which reduces the quality of testimony. In addition, this causes incomplete description of events and an increase in errors and inconsistencies in testimony, with that testimony taking longer to provide (Gillen, 2019: 175–76).

The focus of the Gillen Review (2019) regarding the provision of legal counsel for sex offences complainants is thus twofold: the prevention of secondary trauma as connected to securing the confidence of the complainant in order to maintain the integrity of their evidence. Reform is recommended based on the need to support the integrity not only of the victim complainant as an important participant and stakeholder of justice, but to strengthen the integrity of the criminal trial process itself, and of the role of the victim as vital to the reporting and prosecution of serious sexual violence in particular. Therapeutic benefits are noted (see Bandes, 2016), however, the principal rationale for the development of victim legal representation remains one of maintaining the veracity of proceedings and the probity of the evidence that the victim complainant is capable, or indeed willing, to provide.

The recommendations of the Gillen Review are focused on out of court reform to provide a level of publicly funded independent legal representation to complainants, from the initial complaint to police through to trial, to better support complainants and their families. It is envisaged that such lawyers would perform adjunct or support work, although the final report is rather unclear as to how that may proceed in practice, including the limits of such a role both in and out of court. Although out of court support may be performed perhaps even more effectively by non-legal victim advocates as seen internationally and as discussed below, it demonstrates how integrating legal representation into the criminal trial, even into discrete phases of the trial, is difficult and complex. Despite this, the Gillen Review does make important inroads for support of legal counsel for complainants with some view to protecting and enhancing the current safeguards of the criminal trial requiring that matters proceed by fair process within which evidence is properly adduced and tested.

The Gillen Review (2019), however, is not without its limitations. Neither the preliminary nor final reports of the Gillen Review are drafted around a review of the law of evidence or trial process. This is a significant deficit. These foundational doctrinal perspectives are neglected for a public policy approach that dwells on criminological evidence that proceeds by self-selecting survey, case study and anecdote (Gillen, 2019: 32–48 and throughout). This is a systemic weakness of the Gillen Review, additionally marred by underdeveloped reporting regarding pilot and other nuanced studies considering the potential

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Victim Charter to dignified and respectful treatment, maintaining articles 3, 6 and 8 regarding the fair trial and proportionate treatment of complainants under the European Convention of Human Rights. See n. 10.

role of counsel for victim complainants.[14] Furthermore, the final report does not provide a workable roadmap for trial reform, in particular regarding jury trials where the inclusion of third-party representation will likely distract the jury from its remit—a consideration of a contested version of the evidence beyond reasonable doubt. While the Gillen Review does not seek to principally problematise the law of consent (see Gillen, 2019: 19–20), further work is required of how third-party representation may obfuscate the jury's articulation of this most complex and at times perplexing field. Thought must go toward the procedural aspects of providing a workable trial model that considers such impacts before the court, and especially before the jury.

The final recommendations of the Gillen Review should therefore not be accepted without further consideration as to how the law of evidence and trial process may accommodate counsel for victim complainants within the context of the overarching requirements of the fair trial at common law. This necessarily includes consideration of limitations placed on the Crown, against the rights and duties owed to the accused, which may not be overcome without due examination of these longstanding and constitutive aspects of adversarial justice.

The Australian inquiries

In Australia, three main inquiries have separately assessed representation for victim complainants. The VLRC (2016), the RCFVV (2016) and the RCCA (2017) have each considered representation, or looked to the possibility of further reform or inquiry for the need for legal representation. The NSW Sentencing Council (2017: 24–28) recently considered ways of assisting victims in the sentencing process but declined to consider legal or alternative forms of representation in its final report. Across the various inquiries, none of which convened to squarely consider the appropriateness of victim legal representation, consensus has emerged, in criminal proceedings, that: (i) the victim is not a party to proceedings, (ii) discrete risk to the integrity of the interests of the victim, their privacy or safety, warrants possible legal representation, (iii) the adversarial character of the trial ought to remain unchanged and (iv) alternative (non-legal/lawyer) mechanisms ought to be explored that are compatible with the nature of adversarial engagement.

The Role of Victims of Crime in the Criminal Trial Process (VLRC)

The VLRC raised the important distinction of the victim as 'participant' and as 'party' to proceedings. They considered the desirability of representation for victims generally, but by questioning the compatibility of the victim as party in a tripartite adversarial system, access to legal representation was limited to specific needs intervention, thus:

> . . . the Commission concludes that victims should not be a party or have a general right to participate in court during the criminal trial process. However, there are particular aspects of the criminal trial process in which victims can or should be able to participate (VLRC, 2016: 118).

And further:

> Victims need legal representation, independent of the prosecution, to ensure that they do not lose the right to protect their confidential communications in a situation where their interest conflicts with the prosecution's. Sometimes prosecutors may be reluctant to oppose an application, even where the victim objects. Sexual assault counsellors told the Commission that conflicts between the interests of the prosecution and the victim can arise frequently. According to the Child Witness Service, the problem can be particularly acute when a child victim and their parent do not agree. (VLRC, 2016: 145)

14. See, as an example of the Australian focus, unreferenced and explained pilot studies or reforms in the preliminary Gillen Review (2018: 11, 125, 224–225, 238, 251, 255, 266, 267, 307, 388, 389, 391, 398).

Out of recognition that the trial is otherwise governed by the principles of adversarial exchange between the parties, victims should not be afforded general legal representation generally throughout the trial. Victims are not parties but participants, and as such, take part in a trial through the prosecution making decisions in the public interest. There is a role to play for victim legal representation for special applications as noted.

Royal Commission into Institutional Responses to Child Abuse (RCCA)

The RCCA (2017) *Criminal Justice Report* recommended that there was no need for system wide reform to the adversarial trial beyond discrete reforms designed to make existing processes more effective. Accordingly, there was no recommendation to reform the representation of victims in the criminal justice system, despite a significant number of submissions advocating the assistance of counsel and reform of the adversarial trial more generally, for sex offences victims. The report substantially drew from and supported the VLRC (2016) position that victims are participants and not parties to proceedings. The report considered (see RCCA, 2017: 198–226) the need for representation through a series of submissions but did not assess the need for reform beyond these submissions:

> We acknowledge the experience and sincerity of those who have advocated that we should recommend inquisitorial models or legal representation for victims. However, we are not satisfied that we should do so. We consider that a number of the benefits of other models are achieved, wholly or in part, in at least some Australian states and territories (RCCA, 2017: 226).

Along with the VLRC (2016), the RCCA (2017) considered the role of intermediaries as providing suitable assistance for a child testifying in court.[15] An intermediary may be needed where the child has difficulty communicating with the court, with counsel or where behavioural, psychological or learning difficulties require questions and answers to be put to the victim complainant in a particular way. The role is controversial, because even though an intermediary is not an advocate, there may be some scope for interpretation on the part of the intermediary (see RCCA, 2017: Recommendation 59).

Royal Commission into Family Violence (RCFVV)

The RCFVV (2016) did not significantly consider the need for victim legal representation but did make a recommendation for future development of legal representation for victims in a specialised family violence court:

> The Victorian Government ensure that all Magistrates' Court of Victoria headquarter courts and specialist family violence courts have the functions of Family Violence Court Division courts [within two years]. These courts should therefore have . . . dedicated police prosecutors and civil advocates [and] facilities for access to specialist family violence service providers and legal representation for applicants and respondents . . . (RCFVV, 2016: Recommendation 60)

Recognition of the discrete and specific needs of intimate partner violence victims supports the provision of separate legal representation for reasons similar to those seeking to challenge discovery of confidential counselling communications. While representation for victims for such applications has some history, representation for intimate partner violence, in an applied or specialised criminal court model, does not.[16] Further work is needed on the potential impact of the provision of legal counsel on

15. Also see Justice Legislation Amendment (Victims) Act 2018 (Vic) amending the Criminal Procedure Act 2009 (Vic) inserting ss. 389F–389J.
16. Although family violence courts may operate as a hybrid jurisdiction of civil and criminal law, with enhanced victim support, albeit akin to non-legal victim advocates, see ALRC (2010: 1485–1521).

criminal court processes. Relatedly, private legal representation may already assist victims for defended Apprehended Domestic Violence Order applications. Various private firms and LegalAid provide such assistance, in addition to service and support work to help better position victims in their lives outside court.[17]

Victim legal representation: comparative adversarial jurisdictions

In NSW, private counsel may be presently retained where the victim seeks to challenge the issuing of a subpoena or a protected confidence or counselling communication in sexual assault trials.[18] Assistance, including legal assistance, may be available from LegalAid NSW in such instances.[19] Victims may also retain counsel for coronial inquests.[20] Where there is a relevant public interest, LegalAid NSW may also provide legal assistance for such proceedings.

In 2002, Scotland considered a scheme to protect vulnerable witnesses during cross-examination. More recently, publicly funded representation was granted where an accused sought discovery of the complainant's confidential medical records.[21] Ireland has introduced reforms to support vulnerable and at-risk victims and witnesses in sexual assault trials.[22] Ireland has introduced legal representation for victims where their sexual history or character is questioned in court. Section 39 of the Criminal Justice (Sexual Offences) Act 2017 (Ireland) provides that independent legal representation may stand for the victim where a disclosure application is made. The court is required to hold a hearing to assess the content of the counselling record as produced by the custodian of the record. All relevant parties are entitled to stand and be heard before the court, including the custodian of the counselling record. Section 39(16) provides that legal representation be administered by the Legal Aid Board. The legislation usefully provides the relevant conditions to be imposed where the court grants disclosure, wholly or in part.

In the United States, the Crime Victim Rights Act 2004 (US) amends the United States Code ('USC') and provides victims substantive rights to justice, to address the court, and to seek review of prosecution decisions, in particular.[23] These rights are generally exercisable on judicial review, as an administrative rather than criminal process. Victims in federal proceedings may seek remedy where denied their right to confer with the state attorney under § 3771(a)(5). Relief may be sought by writ of mandamus, an order

17. See, generally, https://www.legalaid.nsw.gov.au/what-we-do/family-law/domestic-violence-unit.
18. See above n. 3.
19. LegalAid NSW hosts the Sexual Assault Communications Privilege Service (SACPS), which provides assistance and advice including representation in court, where a victim or other protected confider seeks to challenge the issuing of a subpoena for access to otherwise protected or confidential records, see www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service.
20. Coroners Act 2009 (NSW), s. 57. Coronial inquests are classed as a civil process.
21. Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (Scotland); Vulnerable Witnesses (Scotland) Act 2004 (Scotland). Scotland allows representation under Article 8 of the European Convention of Human Rights, per *WF for judicial review of a decision of the Scottish Ministers to refuse to make a determination for legal aid under section 4(2)(C) of the Legal Aid (Scotland) Act 1986* [2016] CSOH 27. See Munro (2016: 151–164) and Raitt (2010). For a summary, see Kirchengast (2016: 78–79). Also see Doak (2008: 143).
22. Sexual Offences Act 2001 (Ireland), s. 34. See Criminal Justice (Victims of Crime) (Amendment) Bill 2018 (Ireland). Also see Raitt (2013) and Hoyano (2015, 2019).
23. 18 USC § 3771 Crime Victims' Rights: (a) Rights of Crime Victims: A crime victim has the following rights: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; and (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

quashing the original plea-deal made, referring the attorney back to rights granted under 18 USC § 3771 to consult with victims and make the decision in accordance with the requirements of the Federal Code (Beloof 2005; Cassell, 2010; Cassell et al., 2014). As regards sex offences complainants, the USC, Federal Rules of Evidence 28 USC Art. IV § 412(c), provides protections and right to counsel, ordinarily identified as within the pre-trial criminal process:

> Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
>
> (c) Procedure to Determine Admissibility.
>
> (1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:
> (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
> (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
> (C) serve the motion on all parties; and
> (D) notify the victim or, when appropriate, the victim's guardian or representative.
> (2) *Hearing.* Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

In the matter of *United States* v *Stamper* (1991) 766 F Supp 1396 (WDNC 1991), the District Court ruled in a pre-trial evidentiary hearing that counsel for 'all three parties' were able to examine witnesses, which included the victim.

In all jurisdictions, private counsel is not necessarily equal to the prosecution and defence, but represent the victim during discrete (pre-trial) applications, where the victim is particularly vulnerable and where victim participation may be especially justified. Standing does not necessarily mean equal party standing nor standing as of right, for instance, the Scottish pilot of 2002 provided access to representation as amicus curiae, requiring leave of the court. Not all applications are necessarily classed as criminal processes. There may be applications under administrative or civil law, although sexual assault communications privilege applications would generally be identified as a criminal process.

Complainants, evidence and the need for representation

Research mounts as to the need to better support sex offence complainants in the criminal trial out of a need to secure their integrity and therefore, the quality of their evidence. Significantly, this is an imperative that is justified out of the need to secure quality, probative evidence. While victim rights and recourse to justice remains important, securing victim agency and participation is a secondary justification. An emphasis on evidence and trial process means that the objects of the trial, to test evidence to the criminal standard within the notional procedural restrictions that afford protection to vulnerable complainants, always remains the concerted focus. This may mean that not all questions may be put to the complainant by the prosecution or defence. It is generally recognised that some limits on defence questioning may be necessary where the court lacks a supervisory capacity to disallow questions or where not objected to by the opposing party.[24] Londono (2007) indicates that harassment of the complainant, the asking of intimate questions about menstrual cycles or underwear, for instance, may be of little forensic assistance to the jury and ought to be limited or excluded, albeit relevance is key.

24. See n. 12. The prosecution may also seek to lift the 'rape shield'. In such a case, there may be no distinct opposing, adversarial party, further justifying separate representation for complainants during this phase.

Questions about sexual history or experience are generally already excluded in most common law jurisdictions, and in all Australian jurisdictions.[25] Present 'rape shield' laws supplement other provisions regarding cross-examination of complainants' sexual history.[26] Restrictions are ordinarily a creature of statute and grounds for exclusion are either enumerated by statute or reside within the discretion of the court. This protection restricts both parties, except in Western Australia, where the prohibition relates to the defence only.[27] The rationale for such exclusion reside in the 'twin myths', that sexual history evidence of the complainant would support the inference that the complainant was more likely to have consented to the sexual activity or that they were less worthy of belief.[28] Specific jury directions or warnings may also accompany such prohibitions in order to bolster or highlight the unique circumstances of sexual offending and the conduct or testimony of complainants.[29]

There are, however, exceptions to this 'rape shield'.[30] In such instances, defence counsel may cross-examine the complainant, with leave of the court. The exclusions generally extend to circumstances where the following may be relevant to the jury's assessment of the allegation made, and the guilt of the accused:

- the complainant's sexual experience or lack of sexual experience, or of sexual activity or lack of sexual activity taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offence and where the events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;
- evidence relating to a relationship that was existing or recent at the time of the commission of the alleged sexual offence and where the accused person is alleged to have had intercourse with the complainant and the accused person does not concede intercourse and where the evidence is

25. Crimes Act 1914 (Cth), ss. 15YB–15YC; Criminal Procedure Act 1986 (NSW), s. 293; Evidence Act 2001 (Tas), s. 194 M; Evidence (Miscellaneous Provisions) Act 1991 (ACT), ss. 48–53; Evidence Act 1929 (SA), s. 34I; Criminal Procedure Act 2009 (Vic), ss. 343–345, 352; Criminal Law (Sexual Offences) Act 1978 (Qld), s. 4; Evidence Act 1906 (WA), ss. 36A–36BC; Sexual Offences (Evidence and Procedure) Act 1983 (NT), s. 4. Also see Youth Justice and Criminal Evidence Act 1999 (UK), s. 41.
26. There are generally two approaches to the provision of a 'rape shield' in Australia and elsewhere—discretionary or rules-based. Granting a judge discretion on the balance of the probative value of evidence may risk possible humiliation to the complainant where evidence of a questionable probative value is allowed. A rules-based model may be over- or possibly under-inclusive, risking fairness to the accused.
27. Evidence Act 1906 (WA), ss. 36A–36BC.
28. See *R* v *Goldfinch* (2019) SCC 38 regarding inadmissibility of history evidence where the accused was seeking to introduce evidence of an ongoing sexual relationship between themselves and the complainant at time of alleged assault. *R* v *Goldfinch* addresses the 'twin myths', that the complainant was more likely to have consented to the sexual activity or was less worthy of belief. Writing for the majority, Karakatsanis J (with Abella, Gascon and Martin JJ agreeing) indicates how evidence that supports the 'twin myths' is statute barred, thus '[s]ection 276(1) [of the Criminal Code, RSC 1985, c C-46] prohibits the use of sexual activity evidence to support one of the twin myths identified in *R* v *Seaboyer* [1991] 2 SCR 577. In doing so, it gives effect to the principle that these myths are simply not relevant at trial and can severely distort the trial process. Accordingly, if the sole purpose for which sexual activity evidence is being proffered is to support either of the twin myths, it will be ruled inadmissible under s. 276(1)'. However, Karakatsanis J goes on to indicate the complexities regarding the admissibility of sexual history evidence in a proscribed statutory context, '[b]ut that does not mean sexual activity evidence will always be ruled inadmissible. While sexual activity evidence adduced by or on behalf of the accused is presumptively inadmissible, such evidence may be admitted where it satisfies a three-part test under s. 276(2).' Section 276(2) of the Criminal Code, RSC 1985, c C-46 provides four grounds upon which history evidence may be ruled admissible, specifically, '(a) is not being adduced for the purpose of supporting an inference described in subsection (1) [the 'twin-myths'] [of s 276]; (b) is relevant to an issue at trial; and (c) is of specific instances of sexual activity; and (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.'.
29. As to absence or delay of complainant see, for example, Jury Directions Act 2015 (Vic), ss. 51–53; Criminal Procedure Act 1986 (NSW), s. 294. Also see generally Jury Directions Act 2015 (Vic) Pt 5.
30. There is significant variance between jurisdictions as to what may be considered an exception. Much depends on whether the jurisdiction has a discretionary or rules-based system of excluding sexual history evidence. The NSW position represents a rules-based system of exclusions.

relevant to determine if the semen, pregnancy, disease or injury is attributable to the intercourse so alleged;

- where, at the time of the alleged commission of the offence, there was present in the complainant a disease that was absent in the accused, or where, at any relevant time, there was absent in the complainant a disease that, at the time of the commission of the alleged offence, was present in the accused;
- where evidence is relevant to whether the allegation of intercourse was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant;
- where similar such evidence has been given by the complainant in cross-examination by or on behalf of the accused person (either had sexual experience, or a lack of sexual experience, of a general or specified nature, or had taken part in, or not taken part in, sexual activity of a general or specified nature, and the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication), but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified; and where
- the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.[31]

Exceptions are provided out of recognition of the potential relevance of sexual experience to a rape allegation, and to the proper determination of the guilt of the accused to all elements of the offence charged.[32] The exceptions may be enumerated in legislation but are of sufficiently broad character that, once permitted to be examined, will grant defence (or possibly prosecution) counsel sufficient licence to ask deeply personal and potentially humiliating questions of the complainant.[33] Although the 'rape shield' provides a general protection for all rape complainants, protection of the complainant where leave is granted may fall ambiguously to the prosecution and court. In such instances, third-party counsel protecting the victim's right to be free from unnecessary, irrelevant or otherwise humiliating questioning may be specifically warranted.

The problem remains, however, of fairly testing the complainant's accusation in a way that always affords the accused a fair trial, ostensibly, the capacity to put the prosecution case to proof. This fair trial right is not easily ensured once victim counsel are introduced. In any event, a complainant's access to legal representation may not limit challenging or potentially humiliating questions where such questions are of substantial probative value to the jury. Such questions would need to be put to the complainant in order to ensure that all elements of the prosecution case are fairly tested by the accused.

31. Summarised from the Criminal Procedure Act 1986 (NSW), ss 293(4), (6).
32. See *R* v *Burton* [2013] NSWCCA 335. In this case, Simpson J (RA Hulme J and Barr AJ agreeing) states that at [70] '. . . Section 293 was introduced into the legislation (originally as s409B of the crimes act 1900) for the specific purpose of putting an end to offensive and demeaning cross-examination that proceeded on the basis that evidence of consent by a person (then invariably female) to sexual engagement with one person (Person A) provided the foundation for an inference that the person also consented to sexual engagement with another person (Person B). That process of reasoning has been banned from the criminal courts, first by s409B of the Crimes Act, and subsequently by section 293 of the criminal procedure act.' In *R* v *Burton*, Justice Simpson rules that sexual history evidence is inadmissible because it would unsatisfactorily weaken the Crown case, at [216], that '[a]dmission of that evidence would deflect the jury from a proper consideration of the true issues in the trial. It would permit a false issue to be raised—the inference proposed to be advanced that, because the complainant showed a sexual interest in the stranger, she would equally have been sexually interested in the respondent. By distracting the jury from its proper task, and raising a false issue, admission of the evidence would substantially weaken the prosecution case.'
33. All states and territories except NSW retain judicial discretion to admit sexual history or experience evidence. NSW thus provides the most restrictive 'rule-based' exceptions, enumerated in statute. See n. 49 for a summary.

Original 'rape shield' reform and resistance to reform

The case law regarding the sexual history or experience of complainants indicates a general reluctance to lift the protective 'shield' provided by statute. However, while the protective mechanisms now afforded by statute almost universally protect complainants in sex offences cases, this was not always the case.[34] Upon introduction of the laws greatly restricting admissibility and examination of evidence of the sexual history or experience of the complainant,[35] stays of proceedings were granted out of fear that such inadmissibility would deprive the accused the chance of a fair trial and thus acquittal (Kumar and Magner, 1997). The lack of fairness to the accused regarded the lack of discretion afforded to trial judges under the enabling provision, s. 409B of the Crimes Act 1900 (NSW) (now s. 293 of the Criminal Procedure Act 1986 (NSW)). The issue tested before the NSW courts was that, unlike other jurisdictions introducing a 'rape shield', s. 409B did not, in addition to the eight enumerated exceptions to non-admission under s. 409B,[36] grant judges the ability to admit sexual experience evidence at their discretion.

Resistance to the limitations of s. 409B operate in the context of the inherent jurisdiction of a court to stay proceedings on the basis that the accused has or will be denied a fair trial. Regarding s. 409B applications, this occurs in the context of the prohibition against the examination of the complainant on their history or experience. In *R* v *Morgan* (1993) 30 NSWLR 543, evidence of experience was admitted where the sexual intercourse for which leave was sought occurred two hours after the alleged rape. The trial judge reasoned that leave should be granted because a woman would not engage in sex immediately following a rape. The inability to examine such conduct therefore raises the prospect of a stay of proceedings. Mahoney AJ puts it succinctly by indicating the proprietary nature of this inherent power, thus:

> Where the non-compliance with the law goes to the substantial propriety of the trial and its fairness, the court in my opinion, will intervene. It will not do so if the non-compliance with the law is peripheral.[37]

However, *Grills* v *R; PJE* v *R* (1996) 70 ALJR 905 makes clear the court's ability to stay proceedings does not extend to circumstances where the trial judge perceives on the evidence that the trial of the accused is unfair as a result of legislation validly passed. Justice Sperling states:

> A court cannot, in my view, decline to exercise its jurisdiction on the ground that, in its opinion, the trial would be unjust because of the operation of a statutory law relating to the way the trial is to be conducted. The Parliament has the prerogative to say how a trial is to be conducted. The courts cannot over-rise that prerogative by refusing to exercise their jurisdiction.[38]

Such stays were thus identified on appeal as against the intention of parliament seeking to protect vulnerable complainants against harsh defence practices and cross-examination. The stays were vacated, and the trials resumed. The first iteration of 'rape shield' laws and the judicial reaction to them did provide, however, an opportunity for reconsideration of the fairness of the 'rape shield' as it applied in NSW courts. The Attorney-General asked the New South Wales Law Reform Commission ('NSWLRC') to consider the prohibition of the admissibility of history evidence in 1998. Despite the

34. See broad exceptions introduced in England and Wales by *R* v *Evans* [2016] EWCA Crim 452. See Dent and Paul (2017). Also see *R* v *A (No.2)* [2001] UKHL 25.
35. See Crimes (Sexual Assault) Amendment Act 1981 (NSW) inserting s. 409B (the 'rape shield' regarding the admissibility of evidence relating to sexual experience) into the Crimes Act 1900 (NSW). This provision may now be found under s. 293 of the Criminal Procedure Act 1986 (NSW).
36. See n. 31 for a summary of these statutory grounds.
37. *R* v *Morgan* (1993) 30 NSWLR 543, 552.
38. *Grills* v *R; PJE* v *R* (1996) 70 ALJR 905.

NSWLRC recommending s. 409B be replaced with a discretionary provision, no substantive changes have emerged (NSWLRC, 1998).

The prohibition against admitting sexual experience evidence thus proceeds on a restrictive statutory basis in NSW albeit other jurisdictions afford trial judges the ability to admit such evidence in their discretion.[39] Nevertheless, the NSW standards still grant trial judges the ability to admit evidence on grounds including, and where the probative value outweighs prejudicial effect: the complainant's sexual experience or lack of sexual experience where that experience is connected to a set of circumstances in which the alleged prescribed sexual offence was committed; where, at the time of the alleged commission of the offence, there was present in the complainant a disease that was absent in the accused; where the allegation follows discovery of pregnancy or disease in the complainant; and/or where similar such evidence has been given by the complainant in cross-examination by or on behalf of the accused person (see NSWLRC, 1998). These grounds are arguably wide enough to expose the complainant to the prospect of cross-examination on sexual history or experience evidence where relevantly raised in evidence.

Practice and procedure: Lifting the 'rape shield', the (potentially) protective role of counsel and the jury

While evidence of sexual experience is admissible when sufficiently connected to the sexual offence alleged on the indictment, the history of cases admitting evidence contrary to 'rape shield' protections indicates how complainant victims may be particularly vulnerable and in need of legal representation and intervention. Even still, such representation must be assessed against the overarching requirement to provide the accused access to justice and a fair trial.

Various cases detail the issues around which evidence as to history or experience may be led before the jury. Evidence is generally adduced to establish a connected set of circumstances, to demonstrate an existing relationship with the accused, to explain physical evidence, to explain infection, disease or pregnancy, or to rebut the prosecution evidence (NSWLRC, 1998: 220–227). The cases demonstrate the sensitive and intimate nature of history and experience evidence.[40] Even where leave is not granted to adduce such evidence, the application itself, albeit not in the presence of the jury, potentially exposes the complainant to a raft of submissions from both prosecution and defence as to the potential relevance of their history and experience. The leave application alone would be particularly distressing to the complainant, let alone where leave is granted, and the evidence proceeds before the jury to be subject to the usual modes of examination.

Recent cases continue to demonstrate how the admission of sexual history evidence remains controversial and contested, and subject to ongoing legal challenge.[41] The main challenge under the law of evidence relates to the extent to which history or experience evidence may establish consent, in particular, the giving of consent or its withdrawal or modification during the sexual encounter.[42] The case law goes to the very point of the problem here—the extent to which consent may be vitiated by information or evidence on the complainant's tendency to consent where probative information as to the consent of the complainant is available. The need for such history evidence may be exacerbated where consent must

39. Criminal Procedure Act 1986 (NSW), s. 293(2); Evidence Act 2001 (Tas), s. 194M(1)(a); Evidence (Miscellaneous Provisions) Act 1991 (ACT), s. 50; Criminal Procedure Act 2009 (Vic), ss. 341–342, Criminal Law (Sexual Offences) Act 1978 (Qld), s. 4(1); Evidence Act 1929 (SA), s. 34I(1)(a); Evidence Act 1906 (WA), s. 36B.
40. See, for example, *Toohey* v *Metropolitan Police Commissioner* [1965] AC 595; *R* v *Beserick* (1993) 66 A Crim R 419; *R* v *Masters* (1986) 24 A Crim R 65; *R* v *White* (1989) 26 A Crim R 251; *R* v *Linskey* (1986) 23 A Crim R 224; *R* v *McGarvey* (1987) 10 NSWLR 632.
41. See *R* v *Rahame* [2004] NSWCCA 233; *Allan* v *R* [2017] NSWCCA 6; *R* v *Edwards* [2015] NSWCCA 24; *GEH* v *R* [2012] NSWCCA 150; *JWM* v *R* [2014] NSWCCA 248; *Adams* v *R* [2018] NSWCCA 303.
42. See *Bull* v *R* (2000) 201 CLR 443; *R* v *OL* [2004] QCA 439; *R* v *Wannan* (2006) 94 SASR 521; *Bolton* v *Western Australia* [2007] WASCA 277.

be inferred from acts alone. This may give rise to an application for evidence of past acts or words, particularly those materially relevant or connected to the intercourse so alleged on the indictment, which proceeds before the jury. However, recent cases including *R* v *Burton* [2013] NSWCCA 335 indicate that the improper inclusion of sexual history evidence may well distract the jury from its proper task.[43] This indicates that while history evidence may be admitted at trial, the applications for the admission of such evidence will ordinarily be contested and subject to judicial scrutiny in accordance with legislative reform taking an increasingly restrictive approach to such evidence.

Despite reforms to exclude such evidence—to assert that consent to each sexual act of intercourse must be established afresh and not based on prior consent or a willingness to consent—problems as to fairness to the accused remain. Consent is highly personal and substantially contextual. While the policy context of consent being sought and given anew on each sexual encounter is sound, problems necessarily arise in the criminal trial context because the accused is owed a fundamental common law right to challenge the prosecution case, which will invariably involve a different view to consent as that given by the complainant.

Beloof et al. (2018: 503–514) have considered modified court procedure where counsel presents to secure the interests of the complainant before the jury. Although courts do presently consider applications with three parties appearing—the Crown, the defence and the protected confider pursuant to s. 299A of the Criminal Procedure Act 1986 (NSW)—this is a pre-trial process before judge alone.[44] Trial process must necessarily be modified to accommodate a third party—one securing the interests of the victim complainant—appearing before the jury. It would be inappropriate, for instance, to allow the complainant's counsel to sit with the Crown. In such circumstances, the court environment itself may require redesign and the jury may require a direction or explanation as to the presence and role of the third-party—what they may be expected to object to or say while the jury is present, and any limitations as to their role, including their independence from the Crown and defence. Alternatively, reforms may proceed on the basis that third-party counsel only appear during the leave hearing where the judge considers the application to lift the 'rape shield' absent the jury.

Limiting the role of counsel, alternative mechanisms and non-legal victim advocates

The common law right to a fair trial largely responds to the rigours of the adversarial criminal process. Exchange between prosecution and defence, the independence of the judicial officer, the accused's right to counsel and their ability to put the Crown case to proof are all fundamental characteristics of the fair trial process.[45] As Doak (2005) explains:

43. Additionally, a recent question as to the constitutional validity of s. 293 has arisen, before the NSWCCA See *R* v *RB; Attorney-General (NSW) as Intervenor* [2019] NSWDC 368; *Jackmain (a pseudonym)* v *R* [2020] NSWCCA 150. The constitutional question was whether s. 293, which precludes questioning a complainant in sexual offence prosecution, substantially impairs the court's institutional integrity. The NSWCCA dismissed the appeal and leave to appeal to the High Court of Australia was not granted, see *Jackmain (a pseudonym)* v *The Queen & Anor* [2020] HCATrans 149. This is not to say that the constitutionality of s. 293 is beyond question, albeit an appeal on interlocutory judgement is not the preferred path, see Nettle J: 'The appellant's argument may not be without merit but it cannot be said to be so compelling as to warrant exceptional intervention and further, until and unless the trial has concluded and it has thus been finally determined which relevant and otherwise admissible evidence is excluded pursuant to section 293(3) of the Criminal Procedure Act 1986 (NSW), any attempt to express a definitive view as to the scope and application of that provision would necessarily be hypothetical, at least to some extent. For that reason alone, this matter does not present as an especially appropriate vehicle for the grant of special leave.'
44. Cf. Evidence (Miscellaneous Provisions) Act 1958 (Vic), s. 32C. Another situation may include applications under Evidence Act 1995 (NSW), s. 18, the compellability of spouses and others in criminal proceedings generally, where the witness may have a legal interest separate from the prosecution or the defence. This situation may arise where a family member might be compelled to testify at trial for the prosecution. This concerns raised would be distinct from those of the prosecution or indeed those of the defence. A witness's privilege against self-incrimination would similarly indicate discrete interests not to be conflated with those of the prosecution or accused.
45. *Barton* v *R* (1980) 147 CLR 75.

> Although many victims may feel as though they are 'owed' a right to exercise a voice in decision-making processes, such as prosecution, reparation and sentencing, the criminal justice system places such rights or interests in a firmly subservient position to the collective interests of society in prosecuting the crime and imposing a denunciatory punishment (Doak, 2005: 299–300).

The preliminary report of the Gillen Review (2018) provides a convenient summary of the problem presented by the adversarial process:

> The main principled argument against according complainants the rights to independent legal representation during the criminal trial is that it is difficult to see how such a scheme can fit easily into the adversarial system in which, in a criminal trial, there are only two parties: the prosecution representing the public interest in the name of the Crown on whose behalf the proceedings are brought, and the accused (Gillen, 2018: 126).

There is ready acknowledgment of the need for non-legal victim advocates in the criminal justice system.[46] Non-legal advocates ordinarily support victims by maintaining their 'physical safety, emotional and health needs, and rights' (Gillen, 2018: 116). Non-legal victim advocates already work across the criminal and associated courts, as seen through the Witness Assistance Service of the ODPP, the broader work of LegalAid NSW, NGOs and social service providers. There is some argument that bringing these support mechanisms together, either within the one office or profession, will better assist victims by maintaining consistency and access with a professional capacity. Rather than having to navigate a complex field of service providers, a non-legal victim advocate could provide enhanced access by providing high level service support. Advocates could provide key information to victims, keep them updated and facilitate consultation with other stakeholders, including the police, prosecutors and court staff. How such non-legal agents work alongside victim legal representation is yet to be fully explored, although such systems have existed at the state level in the United States for some time.[47]

Cognate civil, family and administrative processes

Complainants may be supported by counsel in alternative, cognate jurisdictions where third-party counsel are already distinguished as complementing the work of the court to protect a vulnerable person. The Gillen Review recognised the value of such comparative approaches as legal representation may already be meaningfully extended to children or vulnerable adults in prescribed legal proceedings. Such third-party involvement is distinguished on the basis that it assists the objects of justice at each specific application or inquiry. Despite potential relevance, this cannot be so simply extended to the criminal trial, traditionally a bipartite process between Crown and defence (VLRC, 2016: 132–133). However, the notional jurisdictions include civil, family and administrative law, where victim complainants may be afforded independent representation during the hearing. Despite marked differences, specifically the absence of a jury, lessons may be taken from such jurisdictions where procedural fairness requires the victim or vulnerable party be independently represented by counsel out of fairness to that person, but to also allow a full ventilation of the facts and issues in dispute to enable the court to make the most relevant orders.

In such proceedings, independent counsel is warranted out of procedural fairness because the orders sought involve the personal interests of the complainant or vulnerable party, and where in the case of family court proceedings involving a child, because the child is unable to represent themselves. Of this, in the context of a return order where one parent was seeking the repatriation of a child removed from Australia, French CJ, Hayne, Crennan, Kiefel and Bell JJ ruled that s. 68 L of the Family Law Act 1975

46. National Center for Victims of Crime, http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/what-is-a-victim-advocate- (accessed 1 February 2020).
47. Above n. 9.

(Cth) does not necessarily require a child to be represented by independent counsel, particularly where alternative mechanisms may garner evidence as to the welfare of the child.[48] Against the broadly framed requirements of procedural fairness to all affected parties, most notably the child the subject of the order, their Honours indicate:

> Procedural fairness is an essential characteristic of judicial proceedings. However, its content is dependent upon the nature of the proceedings and the persons claiming its benefit. The present proceedings are not a contest between the father and the mother about the custody of the children. Even litigation between parents about parenting orders, while judicial in nature, is not entirely inter partes because in such cases, as s 60CA of the Family Law Act provides, the paramount consideration is the best interests of the child . . .
>
> Contrary to the plaintiff's central submission, resolution of questions about a child's objection to return does not in every case require that the child or children concerned be separately represented by a lawyer. A universal proposition of that kind may be thought to assume, wrongly, that the child whose maturity is at issue in the proceeding can nonetheless instruct lawyers to advocate a particular position. And to the extent to which the proposition depended upon the lawyer for the child making his or her own independent assessment of the child's views, it was a proposition which assumed, again wrongly, that only a lawyer could sufficiently and fairly determine the child's views and transmit that opinion to the court . . .

In such instances, the interests of a child may be fairly represented by a report tendered by an independent family consultant, for instance, as accepted by the presiding judge in each individual matter. Recourse to a lawyer is not specifically necessary and is certainly not required in each case, as is intended under s. 68 L, and certainly not where the child is old enough to communicate effectively with the court. Lessons, albeit limited, may be taken for criminal procedural reform for sex offences trials.

Evidence, trial fairness and therapeutic justice

Enhanced victim participation is often supported on the basis that it increases therapeutic outcomes. Granting victim a role in decision-making processes, such as the ability to present an impact statement during sentencing, is often supported on the ground that even where the content of the statement is not used by the court, the experience of reading out the statement provides for the venting of trauma, and the healing of the victim. This has been described as a process of 'cooling out' victims. It is possible that victim legal representation could be justified on the basis that such representation is likely to encourage healing by granting victims a voice in proceedings, allowing for their case to be put to the court. The victimology literature has long recognised the importance of voice and representation in justice processes. Christie (1977) identifies this as an ownership of the criminal conflict.

However, Bandes (2016) is critical of processes justified out of perceived therapeutic benefits to victims, based on the vagaries of what constitutes a benefit to victims. Indeed, for Bandes (2016), processes justified through the promise a therapeutic outcome may instead mask unintended consequences. At the very least, processes touted as therapeutic may unjustifiably increase a victim's expectation of a positive experience, only to have that expectation dashed in court. Such hope may indeed risk further, secondary victimisation. Given the dearth of empirical evidence as to what constitutes a therapeutic process, intervention or outcome, victim legal representation should not be principally justified on the basis of perceived merits of therapeutic justice. Instead, the focus should be on securing the evidence of the victim in the context of the fair trial process, as maintaining or enhancing the integrity of the evidence that then proceeds, by due process of law, before the arbiter of fact. Alternative adjunct support may be warranted where needed.

48. *RCB as litigation guardian of EKV, CEV, CIV and LRV* v *The Honourable Justice Colin James Forrest* [2012] HCA 47, [42, 46].

Discussion and conclusions

The RCCA (2017), the RCFVV (2016) and the VLRC (2016) and the Gillen Review indicate that the time to consider the role of legal representation or alternative supports for victim complainants is nigh. Rights movements that afford greater voice to victims of crime, particularly for victims of serious sexual violence, have brought this debate forward. Law and legal process is slow to change yet swift intervention to afford complainant's representation risks fairness to the accused. Such change may also unsatisfactorily modify the character of the criminal trial as based on adversarial exchange between prosecution and defence. Non-legal victim advocates may play a role here, relieving the courts of the need for discrete victim legal representation. Nevertheless, the role of legal representation for complainants of serious sexual violence requires critical legal analysis before any changes are made.

The cases that indicate the reluctance of the courts to lift the 'rape shield' indicate that we are dealing with a limited number of applications to examine history evidence. The reforms of the 1980s to better protect victim complainants against the harsh, arguably unwarranted practices of the common law adversarial trial are working. Such reforms have essentially shifted the defence practice of 'breaking' the victim by confronting them with evidence of their arguably questionably sexual history, thereby introducing to the jury a reasonable doubt as to the complainant's lack of consent to the intercourse so alleged on the indictment. The normative predisposition of lawyers regarding the acceptability of aggressively examining complainants on their sexual history, rather than the immediate facts that go to consent as relevant to the intercourse as indicated in the indictment, has changed significantly over time. Simply, by the beginning of the 21st century, the culture of the common lawyer to the adversarial testing of the victim complainant in open court had arguably shifted from one of 'breaking' the witness on the stand by confronting them with adverse reputational or sexual history evidence, to one of understanding sexual offences complainants as a special class of victim in need of enhanced evidential and procedural protections. Although these protections are varied and remain contentious (Bowden et al. 2014; Garkawe, 1994), most lawyers now accept such reforms as necessarily modernising the adversarial criminal trial consistent with changed social and community standards. Public policy reasons also prevail, including greater trial support for victim complainants that encourages higher reporting to police with less victims withdrawing their complaint mid-trial.[49] However, persistent negative attitudes toward sexual complainants, including gendered assumptions as to the hysteria and reliability of complainant evidence, remain (Gillen, 2019: 79–85).

While the Gillen Review (2019: 19–20) provides some guidance as to how legal representation may be made available during trial, the lack of consideration of the law of evidence and trial process and the case law that reports the complexities around lifting the 'rape shield', including a critical discussion of the immovable complexities of consent to intercourse, is a systemic weakness of the report. Poorly referenced and articulated explanations of the scope, impact and thus usefulness of pilot studies or reform initiatives across international jurisdictions also hamper the veracity of the recommendations (see Gillen, 2018: 11, 125, 224–225, 238, 251, 255, 266, 267, 307, 388, 389, 391, 398). This problem also undermines the academic literature, which tends to sidestep the critical assessment of doctrinal, evidential and procedural aspects of this inexorably complex area of law, matters that necessarily arise when legal representation for complainants of serious sexual violence is being considered (Gillen, 2019: 161–171). Further work on the role of third-party representation regarding how the law of consent is explained to juries is vital. How such representation will impact the jury is largely unknown. The Gillen Review (2019) fails to provide such detail. To date, no workable model of reform has been provided or tested, at least in adversarial jurisdictions. Only limited lessons may be drawn where counsel for the

49. See BOCSAR (2018: 14) Trend result and average annual percentage change over the last 60 months for recorded criminal incidents (sexual assault), up by 4.3%; over 24 months, up by 7.2%.

complainant presently retains independent counsel, specifically where counselling evidence of the protected confider is subpoenaed, because such processes are meted absent the jury.

While practical examples and anecdotal measures may be welcomed to appease victim groups, the true test of stable law reform is the extent to which such reform is doctrinally and procedurally sound, consistent with the institutions of justice that protect the accused's right to justice. The goal is to build upon the strengths of the fair, adversarial trial. While there is a sound basis to argue for counsel for complainants of serious sexual violence, this should be restricted to discrete applications where the evidence and the law establishes that the victim complainant has concerns and interests not specifically addressed by the prosecution, defence or court (acting in a supervisory capacity, where permitted). Rather than representation at all phases of the trial, following the successes of counsel for the protection of sexual assault communication privilege, legal representation should only be considered, at least as an initial piolet, as an adjunct to specific phases of the criminal trial. Request for counsel assisting the complainant should be made by motion at a direction hearing, ideally during the pre-trial phase. As argued here, counsel assisting may beneficially help complainants and the court where prosecution or defence counsel seeks to lift the 'rape shield', and where a complainant may otherwise be exposed to egregious examination in court.

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