



Horizon Institute’s Background Paper On Independent Legal Representatives For Victims Of Sexual And Gender-Based Violence

Introduction

Effective prosecution of sexual offences is a worldwide concern. Conviction rates for rape and other sexual offences are notoriously low when compared to other crimes, and attrition rates for reported cases of sexual and gender-based violence (SGBV) are correspondingly high.¹

As a response to these difficulties, European civil law countries and English-speaking common law countries have begun to recognize the rights of victims of SGBV, and develop policies that increase the participation of SGBV victims in the criminal justice process. In particular, these jurisdictions have accepted that meaningful victim participation entitles a complainant to some form of independent legal representative (ILR).² In their various forms, ILR programs assist SGBV victims by working to ensure that every report of sexual assault is treated seriously from the reporting stage; every victim is treated with dignity; and every investigation and prosecution considers the needs and concerns of the victim.

This background paper will outline the practice of providing victims of SGBV with an ILR. In particular, it will assess the ILR’s role at the reporting, pretrial, and trial stages. It will also assess the actual and potential strengths and weaknesses of existing ILR programs, as well as potential challenges in their implementation.

ILR in European Civil Law Countries

Many civil law countries in western Europe provide complainants in SGBV cases with an ILR. For example, Belgium, Denmark, France, Germany, Austria, Finland, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain, and Sweden provide SGBV complainants with some form of ILR.³

Civil law jurisdictions provide the SGBV complainant with a strong procedural right to an ILR. As a result, ILRs in civil law jurisdictions tend to be lawyers with considerable legal standing. Moreover, ILRs in civil law jurisdictions are often funded by the state.

¹ Independent Legal Representation for Complainants in Sexual Offence Trials, Research Report for Rape Crisis Scotland, Fiona E. Raitt, School of Law – University of Dundee, 2010, (“Scottish Report”), p. 7, at 1.01.

² Scottish Report, p. 19, at 3.01.

³ Scottish Report, p. 19, at 3.03.

Studies of civil law jurisdictions have found compelling evidence that ILRs provide substantial benefits to victims of SGBV. For example, women who receive an ILR in SGBV cases report greater confidence in giving evidence and less hostility towards defence counsel. Overall, victims of SGBV who received an ILR felt less isolated and more able to access information about their case. In addition, they were more likely to share their views on decisions that affected the conduct of investigation and prosecution in their cases.⁴

This section will outline ILR programs from Belgium, Denmark, France, and Germany, as these countries provide a good cross section of practices in European common law jurisdictions.

Belgium

ILR at the Reporting Stage

In Belgium, the victim can request the appointment of a *pro bono* lawyer to serve as her ILR at the reporting stage, which is partially or completely paid for by the state, depending on the fulfillment of certain requirements. However, the victim can select a *pro bono* lawyer of her choosing to serve as her ILR if the lawyer is a second-level volunteer within the legal aid system, or if the court does not appoint the victim with a lawyer.⁵

ILR Before and During the Trial

In Belgium, an SGBV victim can only benefit from an ILR if she joins the criminal case as a *partie civile*. As a *partie civile* to the criminal action, the victim joins the case as an independent party entitled to a lawyer to serve as her ILR for the pre-trial and trial stages of her case.⁶

Once she joins the criminal case as a *partie civile*, the victim can retain the lawyer of her choice to serve as her ILR for the pretrial and trial stages, or apply for a *pro bono* lawyer to serve as her ILR under the conditions set forth above.⁷ However, all pretrial and trial proceedings costs are borne by the victim unless she can successfully apply for legal aid to cover those costs.⁸

The victim's ILR has the right to access all evidence in the case at the end of the pre-trial investigation. The ILR also has the right to be present in court throughout the trial; speak on the victim's behalf in court; call witnesses on behalf of the victim (subject to the judge's discretion); object to questions put to the victim by the defence or prosecutor; cross-examine the defendant; make submissions to the court on the law; and address the court as to the guilt or innocence of the defendant.

⁴ Scottish Report, p. 20, at 3.04.

⁵ The Legal Process and Victims of Rape, Ivana Bacik, Catherine Maunsell, Susan Logan, Dublin Rape Crisis Center, School of Law - Trinity College Dublin, September 1998, ("Irish Study"), p. 182, at 2.12, 2.13; Barreau de Charleroi - <http://www.barreaudecharleroi.be/EN/AideDeuxLigne.aspx>

⁶ Irish Study, p. 175, at 2.12, 2.13.

⁷ *Id.*, p. 182, at 4.1, 4.3.

⁸ Barreau de Charleroi - <http://www.barreaudecharleroi.be/EN/AideDeuxLigne.aspx>

The victim's ILR may not address the court regarding the sentence, but may address the court concerning compensation for the victim.⁹

Strengths and Weaknesses

The Belgian ILR system provides victims of SGBV with a very strong platform for participating in their cases from the reporting stage forwards. It is particularly beneficial for victims to have an ILR during the reporting stage to help counteract institutional or personal prejudices that can lead to high attrition rates for SGBV cases. In addition, the Belgian system affords the ILR legal standing and latitude to address the court comparable to that of the prosecuting and defending lawyers. Accordingly, the Belgian ILR scheme is very robust.

Nevertheless, the Belgian ILR system may present some difficulties for SGBV victims who have meager financial resources. Although the victim may receive a *pro bono* ILR, she must complete a lengthy application process for this service. In addition, the victim bears all proceedings costs unless she successfully petitions the state for legal aid. While the state may ultimately cover all costs for an indigent victim, she may be unaware of this benefit, or shy away from pursuing her case upon finding the legal aid application process overwhelming.

In addition, the victim's right to an ILR is not absolute – she is only entitled to an ILR if she joins her case as a *partie civile*.

Denmark

ILR at the Reporting Stage

In Denmark, an SGBV victim is entitled to state-funded legal advice at the reporting stage. Moreover, the police must inform the victim of her right to a lawyer who can serve as her ILR before she is first questioned, after making a report of rape. The victim is then entitled to have the ILR present before questioning.¹⁰

ILR Before and During the Trial

In Denmark, the victim is entitled to a state-funded lawyer who can serve as her ILR for the pre-trial and trial stages of her case. Furthermore, the state may impose an ILR on the victim during the investigation, even if she does not ask for it.

However, the courtroom role of ILRs in Denmark is somewhat restricted. The ILR may not cross-examine the defendant; make submissions to the court on the law; or address the court as to the guilt, innocence or sentence of the defendant. Nevertheless, the ILR may speak on the victim's behalf in court, and object to questions put to the victim by the defence and the prosecution. The ILR can call witnesses on behalf of the victim, but only regarding compensation or the effect of the crime upon the victim.

⁹ Irish Study, p. 182, at 4.4.

¹⁰ *Id.*, p. 188, at 2.12, 2.13.

Although the ILR's courtroom role in Denmark is relatively limited, its role as a supporting figure for the victim is quite comprehensive. For example, the ILR sits as a spectator in the courtroom, and stands by the victim when she is giving her evidence. Moreover, the ILR has the right to take other measures to protect the victim, such as asking that the victim's evidence be given behind closed doors, or that she be cross-examined without the defendant being present. Further, the ILR helps the victim become more comfortable in the courtroom by explaining procedures and the progress of the case.¹¹

Strengths and Weaknesses

One of the main strengths of the Danish ILR system is its accessibility, as all SGBV victims are entitled to a state-funded ILR. In addition, the system provides state-funded legal advice during the reporting stage, which helps counteract institutional or personal prejudices that can lead to high attrition rates for SGBV cases. In a further positive step, the state obligates law enforcement officials to inform the victim of her right to an ILR before she is questioned, and the ILR can be present during questioning.

Moreover, the Danish ILR plays a larger supporting role for the victim than in other jurisdictions such as Belgium. By keeping the victim informed, comfortable, and emotionally supported, the Danish system decreases attrition and increases the chances that the victim will remain assertive and confident during testimony, courtroom procedures, and strategy sessions with the prosecution.

Nevertheless, the reduced legal standing of Danish ILRs minimizes their ability to advocate for the victim's case. By restricting the ILR's advocacy role in the courtroom, the Danish system provides less legal representation for victims than jurisdictions such as Belgium, which afford their ILRs comprehensive legal standing.

France

ILR at the Reporting Stage

In France, the SGBV victim is entitled to a lawyer who can serve as her ILR at the reporting stage; however, the police do not have to inform her of this right. In addition, the ILR does not generally accompany the victim to report the rape because he or she is usually only consulted after the report has been made to the police. Legal aid does not cover the ILR at the reporting stage.¹²

ILR Before and During the Trial

In France, as in Belgium, SGBV victims are entitled to become a *partie civile*, which entitles them to representation by a lawyer who can serve as their ILR for the pretrial and trial stages. The state will fund the victim's ILR if she is able to demonstrate sufficient financial need. However, the victim must select her state-funded ILR from a list drawn up by the French Bar

¹¹ *Id.*, pp. 198-200, at 4.1-4.4.

¹² *Id.*, p. 210, at 2.12, 2.13.

Association, which usually consists of junior lawyers. The victim may seek reimbursement from the defendant to cover her ILR costs, but only if the defendant is convicted.

French ILRs are entitled to be present in court throughout the trial, and have the right to access all of the evidence before the trial. Moreover, the ILR may speak on the victim's behalf in court, and call witnesses on her behalf. The ILR may also cross-examine the defendant, and make submissions to the court on the law. Finally, the ILR may address the court concerning the guilt or innocence of the defendant and compensation payable to the victim. In extreme cases, the ILR can ask the Court to adjourn the case to seek more investigation.¹³

Strengths and Weaknesses

The French system counteracts attrition by affording victims legal advice during the reporting stage. However, this right is considerably diluted by the fact that the ILR does not usually accompany the victim when she makes her report. Additionally, the police are not obligated to inform the victim of her right to legal advice at the reporting stage. In another blow, the state legal aid scheme does not cover legal advice at the reporting stage, which means that victims in France are much less likely to avail themselves of their right to legal advice during the reporting stage. Accordingly, attrition rates for SGBV cases are likely to be higher in France than in other jurisdictions such as Denmark, which provide state-funded ILRs during the reporting stage, and obligate law enforcement officials to inform the victim of her right to an ILR during the reporting stage.

As in Belgium, however, the French ILR scheme affords a very strong platform for the victim to participate in her case from the reporting stage onwards. French ILRs have legal standing and latitude to address the court comparable to that of the prosecuting and defending lawyers. In this regard, the French ILR scheme is very robust.

Nevertheless, the French ILR system may present some difficulties for SGBV victims who have meager financial resources. Although the victim may receive a state-funded ILR, she must complete a lengthy application process to demonstrate sufficient financial need. Additionally, while the victim may recover ILR costs from the defendant, this is not guaranteed, and she can only attempt to recover these costs from the defendant if her case is successful. Therefore, while the state may ultimately cover all costs for an indigent victim, she may be unaware of this benefit or shy away from pursuing her case upon finding the application process overwhelming. Finally, state-funded ILRs are usually junior lawyers, which means that SGBV victims in France with meager financial resources are more likely to receive sub-par legal representation.

Germany

ILR at the Reporting Stage

¹³ *Id.*, p. 218, at 4.1-4.4.

In Germany, victims are not entitled to state-funded legal representation at the initial stage when they report a rape, although they have the right to have their own private lawyer who can serve as their ILR present during police questioning.¹⁴

ILR Before and During the Trial

Under the German ILR scheme, a victim can appoint a state-funded lawyer known as a *Nebenkläger* (literally, a party who is proximate to the prosecutor) to serve as her ILR. The ILR plays an important role in advising the victim pre-trial by providing her with the information she needs on the progress of the case and its likely outcome. During the pretrial stage, the ILR also seeks to ensure that all the relevant evidence is gathered, and that the victim is fully prepared for the trial itself. The victim has access to the prosecution file through the ILR, and this puts her in a stronger position at the trial.

In Germany, the ILR generally has the same rights of participation at trial as the prosecutor and defence lawyer. Additionally, the ILR can access the evidence before the trial; be present in Court throughout the trial; speak on the victim's behalf in Court; call witnesses on behalf of the victim; object to questions put to the victim by the defence; and object to questions put to the victim by the prosecutor. The ILR may also ask questions of the defendant; make legal submissions to the court; address the court regarding the guilt or innocence of the defendant; and address the court as to the sentence and suitable level of compensation for the victim.¹⁵

Strengths and Weaknesses

The German ILR system is particularly weak when it comes to representation at the reporting stage. Although it allows victims to have a private lawyer present during questioning who can serve as their ILR, it neither subsidizes this representation nor provides a state-funded alternative. As a result, only victims who can afford to pay a lawyer can benefit from representation during reporting and questioning, which is usually the stage that presents the most obstacles for women. Therefore, the German ILR system is less effective in preventing attrition for SGBV cases than other jurisdictions that partially or completely fund an ILR during the reporting stage.

Nevertheless, the German scheme appears to provide victims with the strongest platform for participating in their cases from the pretrial stage onwards. Similar to the Belgian and French systems, the German system affords its ILRs broad legal standing and latitude to address the court, which is comparable to that of prosecuting and defending lawyers. In addition, the German system adopts an element of the Danish approach by ensuring that ILRs provide the victim with emotional support and assistance as they familiarize themselves with the case. As a final bonus, German ILRs for the pretrial and trial stage are available to all victims and are fully funded by the state. Accordingly, the German scheme appears to incorporate the strongest elements from other European civil law jurisdictions into a very strong ILR program for the pretrial and trial stages.

¹⁴ *Id.*, pp. 228-229, at 2.12, 2.13.

¹⁵ *Id.*, pp. 236-238, at 4.1-4.4.

ILR in English-Speaking Common Law Countries

Unlike European civil law jurisdictions, English-speaking common law jurisdictions are much less amenable to providing victims of SGBV with an ILR. Although Australia, Canada, England and Wales, New Zealand, Ireland, South Africa, and the United States have engaged in public debate over the scope of victims' participatory rights in SGBV cases, only Ireland has emerged from this discussion with a limited form of ILR for victims of SGBV. This is likely because, as adversarial jurisdictions, English-speaking common law countries have the rights of the defendant at the heart of their constitutions. As a result, the rights of the victim are frequently far less visible or easy to enforce.¹⁶

The norm in most English-speaking common law countries is for victims of SGBV to be entitled to information, support, compensation, and the right to make a victim impact statement. However, these entitlements are usually provided through the prosecutor's office and do not include the services of an ILR.¹⁷ Nevertheless, some English-speaking common law countries have developed integrated assistance agencies for SGBV victims that provide healthcare, counseling, and support. In particular, programs exist in the United States and United Kingdom that provide victims with an independent, non-legal representative who provides considerable support to the victim throughout his or her case.

This section will focus on the limited ILR provided in Ireland and the programs providing independent, non-legal representatives in the United States and United Kingdom.

Ireland

Ireland operates a limited ILR scheme that permits a victim to have her own lawyer to oppose applications for the introduction of sexual history evidence either pre-trial or during the trial. This limited ILR service is not funded by the state, and starts and finishes at the application stage.

Ireland is the only English-speaking common law countries that permits victims of SGBV to have an ILR who is a lawyer. Nevertheless, it is clear that this form of limited ILR provides minimal independent legal representation for the victim, particularly when compared to the broad representation afforded in European civil law jurisdictions. Indeed, rape crisis groups argue that Ireland's limited ILR scheme is insufficient, and continue to press for its scope to increase.¹⁸

United States

Although the United States does not permit victims of SGBV to have independent legal representation during their cases, a very effective national program exists that provides abused and neglected children – many of whom are victims of SGBV – with independent representatives who accompany them and provide support throughout the legal process. In some instances, these

¹⁶ Scottish Study, p. 28, at 4.03.

¹⁷ *Id.*, p. 27, at 4.02.

¹⁸ *Id.*, pp. 34, 35, at 4.17, 4.18.

independent representatives play a role in the children's cases. While this program is only available for minors, and does not provide legal representation *per se*, it provides a series of support services that developing ILR programs in other jurisdictions may want to consider offering.

Court Appointed Special Advocates (CASA) for Children

CASA is a network of 951 community-based programs in 49 U.S. states that recruit, train and support citizen-volunteers to advocate for the best interests of abused and neglected children in courtrooms and communities. CASA has an official relationship with the courts, and volunteer advocates are appointed by judges to watch over and advocate for abused and neglected children who have been removed from their homes due to abuse or neglect. Because they are empowered directly by the courts, CASA volunteers offer judges the critical information they require to ensure that each child's rights and needs are being attended to while in foster care. Judges typically assign CASA volunteers to their most difficult cases because there are not enough CASA volunteers to represent all of the children in care.¹⁹

CASA volunteers undergo rigorous screening and training before they are accepted into the program and assigned to a child. As part of their training, the volunteers study the legal system through which abused and neglected children must pass, and learn to identify physical and emotional signs of sexual and physical abuse and neglect. Volunteers are only assigned to one child at a time, and stay with each case until it is closed and the child is placed in a safe, permanent home. For many abused children, their CASA volunteer ensures they do not get lost in the overburdened legal and social service system, or languish in inappropriate group or foster homes. Further, CASA volunteers are often the only constant adult presence in the lives of the children they assist.²⁰

Although CASA volunteers are not legal advocates *per se*, they play an important role in the child's case. The volunteer attends all court hearings, takes notes, observes the process, and provides emotional support to the child. In addition, the volunteer works closely with the child's *guardian ad litem* (GAL) to discuss the child's needs and evidence in the case. Because the CASA volunteer is usually the only constant adult presence in the child's life, he or she is often the only person who can provide the GAL with a complete and detailed picture of the child's situation and relationship to others, which is very useful to the child's case. Moreover, the CASA volunteer frequently contributes to the GAL's *amicus curiae* briefs, and in certain occasions is asked to testify as a witness on behalf of the child.

The primary source of CASA's funding is the federal government, through the Office of Juvenile Justice and Delinquency Prevention. Additional support comes from corporations, individuals and other private funders.²¹

Strengths and Weaknesses

¹⁹ CASA – Court Appointed Special Advocates for Children - <http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301295/k.BE9A/Home.htm>.

²⁰ CASA – Court Appointed Special Advocates for Children - http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm.

²¹ *Id.*

The CASA program is a powerful and effective model for supporting a victim throughout the legal process. At the heart of the program's success is the long-term relationship that builds between the child and volunteer throughout the case. This relationship provides the victim with much needed emotional support and confidence as he or she navigates the legal system. If applied to the context of SGBV victims, the CASA model could considerably reduce the rate of attrition for SGBV cases by providing a touchstone figure to support the victim throughout the process.

Another important component of the CASA program is the rigorous screening and training of its volunteers. By ensuring a high quality of volunteer assistance through a detailed and uniform curriculum, CASA does its best to ensure that the close relationship between the volunteer and victim is a healthy one. Moreover, the CASA training program guarantees that the volunteer will be as helpful as possible to the GAL and child's case.

Finally, although not ILRs *per se*, CASA volunteers are taken seriously by the legal system, and play a defined role throughout the length of the case, often providing the GAL with crucial information that is not available from any other source.

Independent research has demonstrated that children with a CASA volunteer are substantially less likely to spend time in long-term foster care and less likely to reenter care. In 2013, nearly 75,000 CASA and GAL volunteers helped 238,000 abused and neglected children find safe, permanent homes.²²

Despite its strengths, the CASA program also has vulnerabilities. In particular, the close relationship between the volunteer and victim frequently leads other actors in the case – especially family members of the victim – to try and influence the volunteer. Further, it can sometimes be hard for the volunteer to remain objective during the case because of the bond he or she develops with the child. In addition, in a system where many individuals play a role in a child's case, the CASA volunteer risks being viewed as a nuisance by other actors such as social workers, who are often reluctant to collaborate with the CASA volunteer. Finally, some children may feel fatigued with the number of actors in a case, and therefore refuse to interact fully with the CASA volunteer.

United Kingdom

The United Kingdom has introduced an effective program that provides adult victims of SGBV with independent, non-legal representation.

Independent Sexual Violence Adviser (ISVA)

Similar to the United States CASA program, the United Kingdom's ISVA program provides victims with an independent, non-legal representative. However, the ISVA program

²² CASA – Court Appointed Special Advocates for Children - http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm.

distinguishes itself from the CASA program by focusing on adult victims of SGBV, rather than abused and neglected children.

ISVAs are specially trained support workers who provide proactive assistance and advice to SGBV victims. The support provided by an ISVA varies from case to case, depending on the needs of the victim and their particular circumstances. However, the main role of an ISVA includes making sure that victims of sexual abuse have the best advice on: what counseling and other services are available to them; the process involved in reporting a crime to the police; and taking their case through the criminal justice process, should they choose to do so. ISVAs are expected to provide support, information and advice to victims, and to liaise with other relevant agencies on their behalf.

Unlike the CASA program, where volunteers only work through state level CASA agencies, the ISVA scheme embeds its advisors in Sexual Assault Referral Centers (SARCs) or voluntary sector projects. In this regard the ISVA, unlike the CASA, is able to fulfill a multi-agency role where he or she increases the host organization's ability to engage with, and influence, partner agencies. This is largely due to the ISVA's links with other statutory and voluntary agencies providing services to victims of SGBV.

The role of the ISVA is therefore broad, offering a wide range of assistance that includes coordination of services for the victim from a multi-agency standpoint. The expectation is that this will reduce their fear and uncertainty over the criminal justice process and encourage their participation. Since 2006, ISVAs have been viewed by the U.K. Home Office as key workers in providing a range of support to SGBV victims accessing services from SARCs and other sources, including voluntary sector projects.

Like the CASA volunteer, it is the combination of emotional support and practical assistance that is the hallmark of the ISVA's role. The addition of ISVAs to the mix of workers helping sexual violence victims is seen as very necessary, as they help to fill a gap that cannot be filled as well by any other existing worker.²³

The ISVA program is partially funded by the UK government, which currently provides 1.72 million GBP per year.²⁴

Strengths and Weaknesses

The ISVA program is perhaps the most powerful and effective model in common law jurisdictions for supporting a victim of SGBV throughout the legal process. In addition to possessing most of the traits that make the CASA program beneficial, the ISVA program has the added advantage of focusing on all victims of SGBV – including adults. Another area where the ISVA scheme boasts an added benefit over the CASA program is in the ISVA's multi-agency role. While the CASA volunteer works among other actors in the victim's case, the ISVA is

²³ Independent Sexual Violence Advisors: A Process Evaluation, Final Evaluation Report, Dr. Amanda L. Robinson, Cardiff University, 24 November 2009, pp. 6-8; 43-47.

²⁴ <https://www.gov.uk/government/policies/ending-violence-against-women-and-girls-in-the-uk/supporting-pages/sexual-violence>

actually empowered to coordinate relationships between statutory and voluntary agencies in the victim's case. The multi-agency coordinating function of an ISVA's work has been viewed as particularly important, since it enables practitioners from a range of agencies to facilitate a response that is less traumatizing for the victim, with the ability to be tailored to the victim's specific emotional, health, and practical needs.

Despite its strengths, there are a few aspects of the ISVA program that could be improved. For example, although the ISVA has a multi-agency role, studies have shown that not all partners understand the concept and remit of the ISVA role. Furthermore, ISVAs have indicated that they would like to benefit from an accredited training programme specific to ISVAs that can prepare them to deliver all of the different facets of their work, for all types of sexual violence victims. Finally, the ISVA program still needs some work to address the gaps in providing services to children and young people who are victims of SGBV.