

## Unjustified demands for victims' personal data

### Key points

- The PCSC Bill presents a valuable opportunity to protect victims from disproportionate and inappropriate requests for data when reporting crimes such as rape.
- The Government has amended Clause 36 et sequens to guarantee victims safeguards against over intrusive and excessive police requests for personal mobile phone data, ensuring that any request must be relevant to a reasonable line of enquiry.
- These safeguards must now be replicated for requests for third-party material such as the victims' medical notes, school reports and therapy notes.
- These safeguards must be legislative and included within the PCSC Bill for a range of reasons:
  - To ensure that investigations focus on investigating the crime in hand, not on investigating the victim.
  - To maintain victim confidence and help to ensure that victims do not withdraw from the process due to excessive and unnecessary demands for data.
  - To overcome the well-recognised problem of excessive and unnecessary requests for information.
  - To commence culture change amongst the police and Crown Prosecution Service (CPS) on the issue of excessive and over-intrusive demands for digital and third-party material.
  - To reduce delays in investigations, caused by unnecessary requests for third party material.
  - To ensure that third party material is also included in the Codes of Practice that the PCSC will create, alongside requirements on digital extraction.
  - Non-legislative action would not be compulsory for police forces and will not solve the problem.
- The Victims' Commissioner has consulted with the National Police Chiefs Council (NPCC) lead for this area of work who is in favour of legislating and is satisfied that the Victims' Commissioner's proposed clauses are workable and allow full investigation and appropriate access to material whilst giving the protections to complainants that are essential if we are to restore public confidence.

### Action required

- Support the proposed amendments protecting victims from disproportionate and unnecessary demands for third-party material at Report Stage.

### Introduction

It is crucial that victims of crimes such as rape do not face disproportionate and unnecessary requests for their personal data when reporting a crime. The impact of these requests can be devastating – undermining victims' confidence and can be a direct factor in victims withdrawing support for the complaint.

The PCSC is an excellent vehicle for addressing this issue. Amendments to Clause 36 et sequens achieved significant protections for victims regarding digital extraction for information from personal devices such as from their mobile phones. This must now be replicated for intrusive demands for third-party material.

## **Why legislative change is required**

The only way to change practice in this area is to legislate.

It is plain that, in respect of victims of crime and in particular victims of rape, many police forces are running what Professor Betsy Stanko described, when talking about the work of Bluestone in Avon and Somerset, as a ‘victim credibility unit.’ So great is the focus on credibility that it has become standard practice for the Crown Prosecution Service (CPS), via the police, to ask for vast amounts of digital and third-party material from a victim of rape. Indeed, CPS lawyers told the Government’s End-to-End Rape Review (EERR) the importance of getting ‘*as much digital and third-party evidence as possible in all cases to ensure prosecutors could make robust charging decisions.*’ Police, too, described this as a standard enquiry on the insistence of the CPS, describing these requests as a ‘fishing expedition’.

Her Majesty’s Inspectorate of the Crown Prosecution Service (“HMCPSI”) in 2019, found that as many as 71.4% of requests by prosecutors for information or evidence were made unnecessarily or not made appropriately, with one of the most common themes being prosecutors “making requests for third-party material (such as education, medical or Social Services records) that were not necessary”. The HMCPSI’s Inspection Report adds that it saw examples of “[CPS] action plans that consisted of a generic list of actions without any tailoring to the facts of the case”, and “very few” examples of police officers challenging unreasonable CPS requests in such circumstances.

The process of obtaining material from third parties is causing delay. This is in contrast to the aims of the E2ERR, which is seeking to speed up the process. The best way of doing this will be to ensure that requests are proportionate and lawful. That will only happen if the framework is clearly laid out in statute.

We have seen that the effects of the piecemeal nature of the framework in digital material creates confusion, which the Government have accepted by including these new clauses in the Bill. Indeed, the National Police Chiefs Council (NPCC) disclosure lead ACC Tim De Meyer accepts the need for culture change and is in favour of legislating because it will, he says, have the added benefit of speeding up the process because only limited amounts of material will be sought, enabling police to investigate more offences.

It is imperative this issue of excessive privacy impinging demands made of victims is appropriately dealt with in the legislation. Even as it can appear to be two separate issues, in reality they are two sides of the same issue; the CPS, via the police, are asking victims of rape for their digital material and third-party material. The overarching aim of this appears to be assessing credibility. It would be a disservice to victims if the Government puts protections in place in legislation for one aspect of this and not the other.

## **Further reasons to legislate in the PCSC Bill**

There are additional reasons to legislate in the PCSC Bill:

The police accept the suggested amendments. The NPCC lead for this area of work is in favour of legislating and is satisfied that the amendments are workable and allow full investigation and appropriate access to material whilst giving the protections to complainants that are essential if we are to restore public confidence.

These clauses on third-party material would need to be subject to the Code of Practice and other documents attached to this Bill, which need to be developed on top of the legislative provisions in the Bill itself.

There is an urgent need to commence culture change amongst police and CPS on the issue of excessive and over-intrusive demands for digital and third-party material. The accepted amendments on digital download clauses added the specific requirement that a complainant should

not be told that if s/he refuses to allow download the case will be stopped. This is a clear and helpful acknowledgement that this approach to complainants must stop. The focus must be on investigating the crime - not the victim.

It is futile to draft culture changing provision like this if it does not cover third-party material too. What use protecting a complainant from being told that her case will stop if she does not allow digital download when she can instead be told that it will stop if she doesn't allow full access to third party material? It is clear that removing the means to obtain excessive digital download material will be ineffective unless it is also applied to excessive demands for third party material.

Non-legislative options, such as a data processing notice (DPN) for third-party material will not change culture. These forms, issued as a 'guide' by the NPCC, are just that 'guidance', forces can choose to use them and can (and do) adapt them for their own use. Furthermore, the Victims' Commissioner has heard that they are used inappropriately - presented to victims to sign incomplete, i.e. they have no idea what they are signing as that will be filled in at a later point by the officer. Or that, on the ground, some officers are completely unaware of their existence, presumably because the force in question has decided not to use them. If the DPNs were capable of solving the problem, then presumably the culture described above would have ended.

### **The PCSC Bill**

In the Lords chamber, Baroness Williams made clear that the Government is "very alive" to what she called this "*very important issue around the proportionality of requests for third-party material relevant to a victim. This material can be highly sensitive—for example, medical records. We agree that such material should only ever be sought where there is a reasonable line of enquiry, but we are aware that this is not always the case. There are examples where such requests cannot be justified, and this has a detrimental impact on the confidence of victims. The Government wholeheartedly agree that there needs to be a consistent approach to ensure that requests for third-party material are made with the victim's right to privacy in mind and to ensure that the victim is fully informed.*" She indicated to peers that she would ensure that work was done in this area as the Bill progresses through its Lord's stages.

The proposed legal safeguards would require the same formula essentially as that which Government has already agreed should apply in respect of digital download including that material could only be requested by officers in pursuing a "reasonable line of enquiry" and also that there would have to be an audit trail to show when, how and why consent was given by the victim. They would also incorporate the important legal precedent in the case of Alibhai (R v Alibhai and others [2004] EWCA Crim 681), so that as well as being the subject of a reasonable line of enquiry, information held by third-parties can only be sought where the authorised person suspects that the information might be disclosable if in the possession of the prosecution, in other words that it might meet the disclosure test.

### **The remedy**

The remedy for this problem is for the PCSC Bill to legislate to cover requests for third party material in a comparable manner to that already agreed to cover digital extraction. This can be achieved by peers supporting the proposed amendments protecting victims from disproportionate and unnecessary demands for third-party material at Report Stage.

### **Further information**

For further information, please [visit our website](#) or email [Beccy.Shortt@victimscommissioner.org.uk](mailto:Beccy.Shortt@victimscommissioner.org.uk)