Briefing on Intrusive demands for Third Party Material in rape cases and The Police, Crime, Sentencing and Courts Bill

Victims Commissioner

Summary
• Victims of rape are being forced to choose between justice and their right to a private life. Rape victims are facing unjustified demands for personal information held by third-parties (medical, education, social services, therapeutic records etc.) and cases are frequently dropped if victims do not sign over their information. • Faced with handing over their personal information, many victims drop their complaints, leaving them with no resolution and the public with the risk of a criminal free to offend again. This is a particular risk in sexual offending, as research suggests that most offenders do so serially. • On the rare occasion that an allegation ends up at trial, victims are sometimes ambushed by this information in cross-examination. This can include items such as a social worker's 'impression' of them as a child, which hold no relevance to the criminal charge. • The PCSC Bill currently contains clauses (Part 2 Chapter 3) which afford police and the Crown Prosecution Service (CPS), through the police, wide-ranging powers to wholesale access of victim data (from mobile phones etc). Please see the Victims' Commissioner's briefing on this issue on the website. • Government has indicated it will be amending those clauses to ensure that privacy protections for victims are on the face of the legislation. The same issues of privacy exist around third-party material and victims should be given the same legislative protections in respect of this material too.
Tabled Amendments
"It is my assertion that the only way to bring about a much-needed change in practice is to ensure that the framework in place to protect victims' Article 8 rights is embedded in the legislation itself." – Dame Vera Baird QC • The Victims' Commissioner asks you to consider supporting the tabled amendments on this issue. • These amendments have the full support of the policing lead for disclosure and the Information Commissioner. With the police being pleased that these would also have the added benefit of speeding up the investigation process, as only strictly relevant material will be sought. • As a further safeguard, victims should be afforded free and independent legal advice to help them assess if information requests are necessary and proportionate to the investigation. • A detailed briefing is available on my website.
Background
• It has become routine for rape complainants to be asked to hand over excessive personal information. Requests can be in the form of both digital data (from personal devices) and 'third party material' (official records kept by others, including medical records). • Data requests are frequently disproportionate to the investigation and have had a chilling effect on victim confidence. Refusal of these demands frequently leads to cases being dropped ('no further actioned').

- Guidance and case law prohibit the police obtaining an individual's entire personal history; it is not relevant to a reasonable line of enquiry and is not strictly necessary or proportionate (the 'tests' laid down in 'law').
- The Government's 'End to End Rape Review' references CPS lawyers who *"described the importance of obtaining as much digital and third-party evidence as possible in all cases to ensure prosecutors could make robust charging decisions."* This will include stranger rapes where this information cannot possibly be said to be relevant to a reasonable line of enquiry.

The current legal framework

- Existing case law, legislation and guidance makes clear that an officer is only entitled to ask for personal information if s/he believes that it is material relevant to a **reasonable line of enquiry**. In the case of Bater-James, Fulford LJ outlined a framework for dealing with such requests and insisted there can be '*no speculative searches'.* In the case of Alibhai, judges had already made clear that for a reasonable line of enquiry "*it must be shown that there was not only a suspicion that the third party had relevant material but also a suspicion that the material held by the third party was likely to satisfy the disclosure test*". That is material which undermines the prosecution case or assists the defence. Data protection legislation only allows for extraction of specific information insofar as it **is strictly necessary** and **proportionate**.
- Whilst data protection legislation allows police to access material under the strictly necessary for law enforcement 'gateway', it is vital that victims are asked to agree to the police accessing material free of pressure or coercion and that they fully understand what is being sought from them and the implications of providing information.

Why should Government's include new clauses in the Bill?

- The digital extraction clauses in the PCSC bill were initially sought by police for an entirely separate purpose outlined fully in the Commissioner's longer briefing.
- The Bill is currently silent on the matter of third-party material but as Government are minded to now include protections for victims around digital disclosure it is obvious that they must do the same in respect of third-party material too. As current practice means that demands are often 'unlawful' and the violation of victims' privacy rights is massive, both issues (digital and third-party material) are also having an effect on attrition rates.
- The Victims' Commissioner (VC) has consulted the National Police Chiefs Council (NPCC) lead for disclosure on her proposed clauses he agrees that they would clarify the currently disjointed nature of the law, making the job of police easier.
- Victims groups are also in favour of these measures.

What are the protections needed in these clauses?

1	**The framework provided by case law, legislation and guidance must be enshrined in legislation**. • Current practice is to get all material (digital, third-party etc) as soon as possible in most investigations of rape. This happens in no other offence type. This is apparently driven by the Crown Prosecution Service (CPS) and appears to be done as a 'credibility check', which is unlawful.

	• This has been enabled in part because the legal framework around the seeking and obtaining of this material is contained across many different types of law (case law, legislation, guidance etc.) Police agree having a framework in primary legislation will help to clarify the position and bring about much needed change in practice. • The framework insists on the data-subject (in this case the victim) agreeing, free of coercion or pressure, to specified material being sought in pursuance of a reasonable line of enquiry.
2	**Reasonable line of enquiry** • That material must be relevant to a 'Reasonable line of enquiry' should be clearly stated in legislation. 'Reasonable line of enquiry' needs to be clearly defined and an audit trail for the decision-making process should also be mandated, so that decisions can be scrutinised at a later date. • Case study: A historical letter from a rape complainant's childhood was considered by police to be 'relevant' to the investigation and disclosed to the defence and used in cross-examination. The letter pre-dated the incidence of rape by over a decade: as a child, the rape complainant had forged their mother's signature to get out of a school class. If reasonable line of enquiry was clearly defined, there would have been no place for such material.
3	**Strict Necessity** • A complainant's personal information can be expected to contain 'sensitive data' within the meaning of the data protection legislation (e.g. health and sexuality data, and/or such information pertaining to others). Statute and case law insist on 'strict necessity' as the only appropriate test in circumstances where sensitive data will be processed as such this is included in the Commissioner's clauses.
4	**Consideration of other means of obtaining the information** • The Data Protection Act places a high threshold for processing data in this context: 'strictly necessary for the law enforcement'. In order to comply with the legislation, the police need to demonstrate that they have considered other, less-privacy intrusive means and have found that they do not meet the objective of the processing.
5	**Other issues** • The current digital extraction clauses in the Bill place no obligation on the authorised person to obtain views of children and those without capacity when seeking to obtain information from their phones. A duty to explore their views should be included to safeguard their human rights. The same should apply to the clauses addressing third-party materials. • Victims should be granted the option of free and independent legal advice in circumstances where they are required to give consent to police to access their digital data or third-party materials.