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CC: Minister Victoria Atkins

Dear Rachel,

Thank you for sending me the link to the consultation on third-party material (TPM) requests and for inviting me to be part of a roundtable on the same subject on 29th June which I am happily attending.

I am writing to seek clarification from you about the rationale for launching the consultation which looks to understand the extent, proportionality or otherwise and the necessity of requests in a range of case types but in particular in RASSO cases.

I note that you have said:

'Through this consultation we want to gather more insight, evidence and data to gain a thorough understanding of the issues. We are also using the consultation to evaluate potential new duties on policing, which would be designed to ensure that police requests for third party material are made appropriately.'

In respect of the first half of that paragraph I think there is a wealth of information which would suggest that routine wholesale requests are an extensive and pernicious issue.

Indeed, in the last two years alone we have seen the Government's End to End Rape Review research report discuss how CPS prosecutors described to researchers:

'.. the importance of obtaining as much digital and third-party evidence as possible in all cases to ensure prosecutors could make robust charging decisions.'

The HMICFRS and HMCPSI joint inspection on rape found that:

'In no other crime type is the focus on the victim to such an extent; usually it is on the suspect. In our case files, we saw examples of victims who experienced detailed and personal questioning and searches, who gave up their phones (sometimes for 10 months or more), and whose medical records, therapy records and sexual histories were reviewed in minute detail. The approach towards the suspect tends to be somewhat different, with far less intrusion. The effect of this approach on all rape victims is unjust.'

The ICO has just (May 2022) issued an opinion on this very subject which amply demonstrates the relative routineness and disproportionality of these requests, in fact he '*called on the criminal justice sector to immediately stop collecting excessive amounts of personal information from victims of rape and serious sexual assault cases*.'

The evaluation of the pilot in Northumbria which provided free legal advice to rape complainants around their article 8 rights found in that area around 50% of requests were not strictly necessary and proportionate and therefore did not fit the legal requirements for such requests.

A CPS internal report (as yet unpublished by them but reported on in the Guardian) showed that almost two-thirds (65%) of rape cases referred by police to the CPS for early investigative advice (EIA) involved 'disproportionate' and 'unnecessary' requests for information.

My survey of rape complainants showed that, for some, scrutiny of their personal lives including their digital lives was a consideration in their decision not to report.

And for those who did report, the experience was felt to be invasive and traumatic with many feeling the process was not adequately explained.

That is, as stated above, in the last two years alone, before that there were other inspections and reports which only demonstrate that this has been an issue for some time. It therefore seems to me that there is significant evidence already available, and I would welcome clarity on what additional material you need, which does not already exist.

Regarding the second part of the paragraph which outlines that the consultation will also be used to consider new duties on the police around TPM, I am, as you know, in favour of legislating in this area in similar although not identical terms to the digital extraction clauses in the Police Crime Sentencing and Courts Act. This would provide a clear framework in one place with statutory duties on the police.

However, the three duties you describe in the consultation fall a bit short of this.

The first is a *statutory duty on policing to only request third-party material that is necessary and proportionate, in pursuit of a reasonable line of enquiry for an investigation.* Whilst this covers the general framework contained across various legislation and case law. Importantly, although the Criminal Procedure and Investigations Act 1996 and its' Code of Practice doesn't specifically address the issue of TPM but there is a precedent in case law. This is the case of Alibhai (R v Alibhai and others [2004] EWCA Crim 681). The police should only make requests for third party disclosure where there is a reasonable line of enquiry. However, the Court of Appeal established in Alibhai, 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.' The disclosure test is something which could undermine the prosecution case or assist the defence case. Thus, blanket requests, where there is no specific reason arising from the facts of the individual case, do not meet this test.

The second proposed duty would be a *statutory duty on policing to provide full information to the person about whom the third-party material is being requested. This could include details about the information being sought, the reason why and how the material will be used, and the legal basis for the request.* The documents currently being used to extract agreement to pursue TPM, so-called Stafford statements which require consent to a very wide range of material on the basis of little explanation, have been deemed illegal by the Information Commissioner.

A fresh document is therefore required and though I agree that this is the absolute minimum information that should be included it is vital that there is also a record of the reason the officer has concluded the third party holds information capable of undermining the prosecution or assisting the defence and sets out that the complainant has the right to withdraw any consent given at any time. Additionally, as the government added to the clauses in the Police Crime Sentencing and Courts Act, there should be a duty to explain that refusal to agree to accessing this material is not fatal to the case i.e. that victims cannot be coerced into agreeing.

There must be an additional statutory duty on the police to ensure that any consent given by a complainant is fully informed which, in the context of the legal complexities of the position and the potential clash between Article 8 Rights to Privacy will be a requirement that s/he is afforded has access to independent legal advice before being asked to consent. There is often much to be considered professionally as to whether the requirements in fact meet with the stepped legal requirements and to what extent the Article 8 rights are engaged and where the balance lies between that right and the rights under Article 6. The protection of Article 8 rights is a function which cannot be carried out, in this context, by anyone other than a professional acting on behalf of the complainant. The Crown Prosecution Service and the police cannot represent both the complainant's interests and those of the prosecution in the balancing exercise which must take place.

Allied to this there should be legislative provision for privilege around therapy notes, following the Australian model which makes these records privileged and only accessible by order of a judge.

The third proposal is that there should be a statutory duty on policing, in their requests for information to third parties, to be clear about the information being sought, the reason why, how the material will be used and the legal basis for the request. I agree with this and would additionally advise that third parties must be referred to the ICO opinion which makes clear that if the demands do not fulfil the lawful requirements or are in excess of them, they too, as data controllers may be liable for breaches, so that they can make an informed decision about whether they are satisfied they can disclose the data.

Finally, you suggest there should be a code of practice to accompany the duties outlined in the points above to add clarity on the expectations on policing and promote consistency in practice. I agree that there should be a comprehensive code of practice.

I have some further concerns about the fact that the consultation is pitched in part at the very agencies who are responsible for this issue in the first place and how their responses may conflict with the other target group of victims and victims' representatives and what weight may be given to different responses. This is of particular concern in respect of the CPS who have been stating publicly that they have a commitment to reduce demands but have recently removed all traces of the precedent in the case of 'Alibhai' from all but one piece of their guidance. This is clearly a public statement to the contrary to their expressed position since this removal is widening the test to one of relevance and away from the requirement for suspicion that material would pass the disclosure test.

Defence lawyers are part of this group of respondents and as the consultation looks at a number of different case types including offences like fraud. I am concerned that a lack of distinction in case types and the likely nature of the TPM may be an issue here. The type of TPM sought in a fraud case as opposed to rape is very different and is usually far less intrusive in nature. It is most likely to be financial records of businesses, it is not possible to compare this to the highly intimate information sought from rape complainants. Hence, there is a high risk you will get lawyers who defend fraud saying they don't get enough material. The way the questions are asked obfuscates this distinction and requires clarification perhaps by the use of a term like 'intimate TPM' or in data processing terms 'sensitive data'. This data will always engage Article 8 rights when little of the other type of material will so different considerations apply.

Obviously, material that is properly collected by police in pursuit of the tests set out above may or may not be properly disclosed to the defence by them and the CPS when it is appropriate to do so. There is a long history of prosecution non-disclosure of disclosable material in cases of all kinds across the criminal justice arena, dating back to the major miscarriage of justice cases in the 70s such as R v Judith Ward. These failures are likely to be commented on by defence lawyers and have nothing to do with over-demand of material from complainants.

I am, as ever, committed to working with government on this issue so that we can reverse this highly damaging culture, hopeful that more victims will seek and receive justice. However, it is perplexing for the victims' sector to see government consulting ostensibly to find information about a topic which its own Review and every state

organisation involved with it has found to be an over-intrusive process in rape and sexual assault. This is not only, as the inspectors say ‘unjust’ but is also a major deterrent to complainants coming forward to report this terrifying and endemic crime

As is my practice I will place a copy of this letter on my website.

Kind regards

Dame Vera Baird QC
Victims’ Commissioner for England and Wales