Victims' Commissioner's Briefing on Intrusive demands for Third Party Material, Pre-trial Therapy Privilege and Legal Representation for Victims in Rape Cases
September 2022

"They asked for my entire medical history, even though I only dated my rapist for 5 weeks – and said that they were asking for my complete records because the CPS will demand to see them, which sounds like nonsense given that the CPS are overwhelmed and irrelevant information will only add to their workload. They 'let slip' that any sign of drug abuse or depression in my medical history could influence the CPS's decision. Can addicts and the mentally ill not be raped?"

Quote from a survivor[1]

"Before it [the investigation] was closed, I had avoided seeking help earlier on (i.e. therapy) because I was scared about this being used against me in a trial."

Quote from a survivor[2]

"Victims are being treated as suspects. Change is required."

Information Commissioner for the UK [3]

[1] Victim quotation from Smith, O and Daly, E. (2020). '*Evaluation of the Sexual Violence Complainants' Advocate Scheme*'. See: https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf

[2] '*Rape Survivors and the Criminal Justice System'*, Victims Commissioner 2020 accessed at https://victimscommissioner.org.uk/document/rape-survivors-and-the-criminal-justice-system/

[3] Information Commissioner upon publication of his opinion '*Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations*' 31 May 2022 accessed at https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/05/information-commissioner-calls-for-an-end-to-the-excessive-collection/

Summary

That victims of rape are facing gross invasions of privacy when they report to the police is now so well established it hardly needs stating. Demands for private material are ubiquitous and wide-ranging for anyone reporting sexual violence.

This is in respect of both digital material, such as social media posts, emails, texts and so-called 'third-party material' (TPM) which is material about the victim in the hands of other people (third parties), this includes medical, social services, school and therapy records.

The government sought to address the digital element of this issue through several measures including, following campaigning by me and others, laying down a clear framework in the Police, Crime, Sentencing and Courts Act 2022[4] (PCSC Act). This briefing addresses the other aspect of this issue; 'third-party material' (TPM) and a specific type of TPM: records of therapy.

The extent of this issue is clear, in the last two years alone we have seen the Government's End to End Rape Review research report[5] 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[6] 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 Information Commissioner (IC) has recently (May 2022) issued an opinion[7] on this very subject which amply demonstrates the relative routineness and

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[4] Accessed at https://www.legislation.gov.uk/ukpga/2022/32/contents/enacted

[5] '*Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales Research Report'* Rachel George (Home Office) and Sophie Ferguson (Ministry of Justice) June 2021 accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994817/rape-review-research-report.pdf

[6] '*A joint thematic inspection of the police and Crown Prosecution Service's response to rape: Phase one: From report to police or CPS decision to take no further action*' 2021 accessed at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/joint-thematic-inspection-of-police-and-cps-response-to-rape-phase-one.pdf

[7] '*Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations*' Information Commissioner 31 May 2022 accessed at https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/05/information-commissioner-calls-for-an-end-to-the-excessive-collection/

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.*'

From September 2018 until December 2019 a pilot 'Sexual Violence Complainants' Advocacy Scheme' (SVCAS) engaged local solicitors to provide legal advice and support to rape complainants in Northumbria relating to complainants' Article 8 rights to privacy against inappropriate demands both for digital and third-party material. The evaluation of the pilot[8] demonstrated what was happening in practice in that force, about 50% of requests were not strictly necessary and proportionate and therefore did not fit the legal requirements for such requests. These requests were challenged by the advocates through the scheme.

A CPS internal report[9] (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 own survey of rape complainants[10] showed that, for some, scrutiny of their personal 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.

I have been clear that 3 complementary measures could help bring about the much-needed cultural change in this area and therefore improve victim experience of the criminal justice system, a system which victims tell me they currently find intrusive and retraumatising:

1. Government needs to create a clear statutory obligation on police to limit requests for such material to that which are proportionate and strictly necessary in pursuit of a reasonable line of enquiry, as it did for digital material in the PCSC Act 2022.[11] In addition in the case of material about the victim in the hands of third parties, as per the case of R v Alibhai and others (Alibhai)[12] a request should only be made where the officer suspects that the third party holds material capable of passing the disclosure test i.e. that it will undermine the prosecution or assist the defence.
    - The legislation must insist upon informed non-coerced agreement) from victims/ witnesses (see also point 2).
    - There must be an accompanying code of practice which insists that police give victims clear understandable information about their rights

[8] *Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme*, Dec 2020, Olivia Smith & Ellen Daly Accessed at https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf
[9] https://www.theguardian.com/law/2020/mar/15/cps-failed-to-tell-inspectors-of-internal-review-revealing-case-failings
[10] Ibid. 2
[11] https://victimscommissioner.org.uk/news/pcsc-amendments/
[12] R v Alibhai and others [2004] EWCA Crim 681

and, in order for there to be informed agreement, they must also give details of what specifically is being sought, how it meets a reasonable line of enquiry, and details of how they have considered strict necessity and proportionality.

2. Government must ensure victims are provided with free independent legal advice and representation by a qualified lawyer when their Article 8 rights are engaged.

3. Government must pass legislation which makes notes/ records of therapy for victims of sexual violence privileged as per the 'Australian model'. The model scheme has been in force in New South Wales since 1997 and is now law in all the Australian states bar Queensland. The Australian adversarial system is near-identical to the system in England and Wales. It is the law there that only a judge can order the release of such records upon application by prosecution or defence. A victim of sexual assault can consent to the release of protected confidences (can 'waive privilege') but only once the matter is before the court, in writing and with independent legal advice, and I would recommend this same additional protection in England and Wales to avoid any risk of the process being sidestepped.

These measures would, in combination, make clear the stated intention of government to reduce the intrusion on victims of sexual violence and would bring about the greatly needed change in practice on the ground. This, in turn, would help assure victims that it is safe to come forward without fear of intrusion into their private lives and help reduce attrition.

1. The need for legislation to help change the entrenched culture of excessive prosecution demands for access to rape complainants' private material held by third-parties.

The issue of demands for excessive digital material from victims of sexual crimes has been well rehearsed in the media. The term 'digital strip search' has been used to describe the extremely intrusive nature of current practice. The government has agreed to the need for change and has legislated via the Police, Crime, Sentencing and Courts Act 2022. This will give better protection to victims everywhere whilst protecting fair trial rights.

What has had less attention until recently but is equally pervasive and entrenched is the way that victims are required by the Crown Prosecution Service (CPS), via the police, to provide access to personal material about them in the hands of third parties 'third-party material' (TPM). This is often a wholesale demand for lifelong medical records, including any mental health notes, social services material, school reports and educational material and records of any therapy undertaken. The resultant invasion of privacy is immense and, I remain resolute, in contravention of victim's Article 8 right to privacy.[13]Complainants need to be protected against these

[13] Human Rights Act 1998 (legislation.gov.uk)

excessive demands in the same way that the Government has now protected them against excessive demands for digital download.

In an earlier briefing about third-party material[14] I included an annex of case studies which detail what I hear frequently from the multiple victims' organisations with which I have strong relationships. In particular, this includes what I am told by Independent Sexual Violence Advisers (ISVAs) the highly skilled advocates who, day to day, support rape complainants and who are well-regarded by the government which has invested in increasing numbers of ISVAs in recent years.

In my regular meetings with frontline workers and through correspondence that comes into my office I am told of people reporting historic sexual offences from the '70s and '80s being asked to hand over their current mobile phones; victims raped in their thirties being required to consent to childhood social services records being trawled. In cases where the rape is a stranger rape, with no previous contact at all between the victim and perpetrator similar demands are frequently made. ISVAs tell me that these searches are demanded as standard. They can have no relevance to the facts of the case and do not meet the test in the Criminal Procedure and Investigation Act 1996 (CPIA) Code of Practice [15] that material is sought only where it is a reasonable line of enquiry[16].

This test was confirmed in the case of Bater-James[17] and judges were clear that this means no speculative searches - there must be specificity based in a reasonable line of enquiry.

Further, the Court of Appeal had already established in R v Alibhai[18], 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*[19].' Blanket requests, where there is no specific reason arising from the facts of the individual case, do not meet these tests in law.

However, the above experience of ISVAs, other frontline support workers and abundant other evidence makes clear that the legal framework is not being followed and the law urgently needs to be set out clearly and transparently in statute.

It is equally clear that these demands do not meet with Data Protection law. This sets out that requests are only legitimate if they are strictly necessary and proportionate.

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[14] '*Briefing on Intrusive demands for Third Party Material in rape cases and The Police, Crime, Sentencing and Courts Bill*' Victims Commissioner, Oct 2021 Accessed at https://victimscommissioner.org.uk/document/briefing-on-intrusive-demands-for-third-party-material-in-rape-cases-and-the-police-crime-sentencing-and-courts-bill/

[15] https://www.legislation.gov.uk/ukpga/1996/25/section/3

[16] Para 3.5 of 'Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice Revised in accordance with section 25(4) of the Criminal Procedure and Investigations Act 1996' accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf

[17] *R v Bater-James and another* [2020] EWCA Crim 790

[18] *R v Alibhai and others* [2004] EWCA Crim 681

[19] The disclosure test in broad terms -Is the material capable of assisting the defence or undermining the prosecution? If yes, then it must be disclosed

Statute[20] and case law[21] insist on strict necessity as the only appropriate test in circumstances where sensitive data will be processed (that is for example health data, sexuality data etc. and/ or that type of information about others). Indeed, the Information Commissioner's recent opinion[22] made clear that there must be an urgent change in practice.

Speculative requests like this appear to be conducted as a credibility check on the complainant. This happens (to this extent) only in rape and sexual assault and in no other kind of case. This appears to be driven by the Crown Prosecution Service[23]. If the tests in the CPIA Code of Practice [24] and in the cases of Bater-James and Alibhai [25] are met, the Crown has a duty to make inquiries of the parties only where they are likely to hold disclosable material, that is, material which is likely to assist the defence case or undermine the prosecution.

However, wide-ranging and irrelevant material is being sought often, and police report victims feeling pressured into agreeing to share this information due to the possibility that their case could not proceed without it. The perception amongst police participants in the research which underpinned the Government's End to End Rape Review was that the CPS were often unwilling to consider cases without this information despite concerns held by the police and the victim that the information was not relevant to the investigation.[26]

The intrusion is a major reason why many complainants withdraw from pursuing their case[27], though they are clear that there was an offence, and it is equally clear that the offender will remain free, potentially to offend again. This material is frequently demanded at the outset of a case before any regard is given to the position of the alleged perpetrator who may, for instance, have admitted the offence in email and apologised, may admit it on arrest, may have previous convictions, or have faced previous allegations or whether there is an eyewitness or other evidence of the offence. As this is the case, it also means that requests are made routinely when it would be very unlikely the officer in the case could have even formulated what may constitute a reasonable line of enquiry in that particular case, as he/ she will not have the suspects version of events.

If the suspect asserts, without more, that the victim's account is untrue and therefore that she is lying, this is not a sufficient basis to access her personal records for a

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[20] Data Protection Act 2018: https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted
[21] Bank Mellat v Her Majesty's Treasury (No 2): https://www.bailii.org/uk/cases/UKSC/2013/39.html
[22] Ibid. 3
[23] *Ibid. 5*
[24] Ibid. 2
[25] Ibid. 17 & 18
[26] *Ibid. 5*
[27] Analysis conducted by my office of a Rape Crisis administrative dataset showed that one in five victims withdrew complaints, at least in part, due to disclosure and privacy concerns. Victims in 21% of complaints had concerns about digital downloads and disclosing GP, hospital, school, employment records, and a combination of negative press coverage.
Home Office data also shows an increase in withdrawal of rape complaints pre-charge, from 20% in 2014/15 to 42% in year to September 2020. I echo the concerns of many senior police chiefs that there has been a fall in public and victim confidence in the police, in particular in relation to rape cases. This is in part due to the level of intrusion they are asked to bear.

credibility vetting. If this were so then the same would apply in a vast range of other crime types, and to the suspect's own personal records in such a case.

I argue that the drop in rape charges is inextricably linked to the endless pursuit of requests for personal information about victims. Where cases do, albeit rarely, get to court and material is admitted, this process can lead to a victim being cross-examined by the defence on the basis of material that is not to do with the offence but indicative of less than perfect victim behaviour in some unconnected area. Without any notice something perhaps very intimate or from their long-ago past history will be brought up to seek to discredit them. In many cases, since they are not the authors of the records, they do not know that the material exists, and it could be something like a social worker's comment about them as a child with which they may profoundly disagree. The utter irrelevance and the shock to the witness of being assailed by such material can fundamentally undermine their ability to continue to testify. If, as occasionally happens, previous sexual history material is any part of what is disclosed, there should theoretically be an application to the court in advance of the trial and the victim should be notified about this. In practice this doesn't always happen[28].

How this plays out in court and its' impact on victims is well illustrated and discussed by senior family and criminal law barrister David Spicer in his 2018 *Serious Case Review Concerning Sexual Exploitation of Children and Adults with Needs for Care and Support in Newcastle-upon-Tyne*. He recommended a government review of these practices.[29] Referring to the spectacle he witnessed of vulnerable victims being cross examined about their social services, school and medical records, he writes:

"The disclosure process is costly. Records are not kept expecting they might be disclosed. Victims are unlikely to be aware of much of the content and are not informed in advance of appearing as a witness for fear of allegations that they have been coached and prepared. The consequence of this is that damaged and vulnerable individuals are knowingly exposed to distressing material without notice and to an experience calculated to confuse, intimidate and cause them further damage and distress. There is a strong argument that this is inhuman and degrading treatment prohibited by the European Convention on Human Rights and Fundamental Freedoms and does not lead to fair administration of justice."

He later quotes a victim:

"I had good support for the criminal court. Good preparation. But it made me angry. I was made out to be a liar and it made me feel low. That came as a surprise – it was dreadful. I wasn't expecting it. Afterwards I was very upset and couldn't control

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[28] '*Seeing is believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16*' Northumbria Police and Crime Commissioner, accessed at https://archive.northumbria-pcc.gov.uk/volunteers/court-observers/seeing-is-believing-2/

[29] '*Joint Serious Case Review Concerning Sexual Exploitation of Children and Adults with Needs for Care and Support in Newcastle-upon-Tyne'*, Independent Report Author – David Spicer February 2018 accessed at https://newcastle.gov.uk/sites/default/files/Final%20JSCR%20Report%20160218%20PW.PDF

myself. I started having dreams and flash backs. I was asked about things in my records that I knew nothing about – my past and I didn't know why."

Neither situation I have raised is right or fair. We cannot continue with a system that seemingly abandons any victim unless they are faultless in all respects. Very few of us would be in that category. The current hopelessly low prosecution rate[30] suggests a system that will only attempt a prosecution in instances which it sees as almost absolute certainties and where the victim is as near to the myth of the perfect victim as possible. Where charges are brought, we cannot permit that witnesses, who are likely already to be vulnerable, be cross-examined on the basis of records from years ago and delivered to the defence by the Crown Prosecution Service.

Whilst routinely undertaken in respect of victims, wide-ranging searches of personal history and cross examination of this intrusive kind is not normally conducted in respect of the defendant. Indeed, this unique situation is outlined in the recent (July 2021) HMCPSI and HMICFRS joint inspection report[31] on rape – see above. Their findings echo what I have heard, too: suspects are not subject to anywhere near the same levels of scrutiny, they are not expected to hand over their mobile phones[32], nor to surrender any third-party materials such as social services, medical and school records. In fact, they are afforded greater protections in this regard.

Despite case law, legislation and guidance[33], practice on the ground echoes what we see with digital disclosure. It is practically CPS policy to get as much material as possible, but this only seems to be the case in rape investigations.

The CPS inspectorate's (HMCPSI) 2019 rape inspection found around 40% of CPS requests for data and third-party material were not proportionate[34].

The Northumbria Sexual Violence Complainants' Advocacy (SVCAS) evaluation[35] interviewed police participants who expressed concern about the level of demand being made of victims:

"I could talk all day about third-party material, and it is the real bone of contention. It's one of the things that has given me sleepless nights over the years, you know. It has… And I had a rape team investigator say to me on one occasion, or a former rape team investigator, say to me, 'I had to like leave the rape team because of what I was being asked to do, in relation to victims, I couldn't do it'. And I think, you know, that, for me just spoke volumes. And lots of people were expressing their concerns, including me,

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[30] News article, Victims Commissioner, July 2022 accessed at https://victimscommissioner.org.uk/news/record-number-of-reported-rapes-means-steady-cps-progress-is-not-enough/

[31] Ibid. 6

[32] Although police do technically have the power to seize a suspect's phone this happens rarely especially in rape cases.

[33] *R v Alibhai and others* [2004] EWCA Crim 681, Bater-James & Mohammed v R [2020] EWCA Crim 790, The data Protection Act 2018, The Attorney General's Guidelines on Disclosure, Criminal Procedure and Investigations Act 1996

[34] Paragraphs 5.22 and 5.52 '*2019 Rape Inspection: A thematic review of rape cases by HM Crown Prosecution Service Inspectorate'* December 2019 accessed at https://www.justiceinspectorates.gov.uk/hmcpsi/hmcpsi-rape-inspection-2019/

[35] Ibid. 8

but when that officer said that to me, I kind of thought, d'you know what, there's something sadly wrong here." (Police Manager 1)

"…The CPS routinely ask us to obtain peoples 3rd party, medical, counselling and phone records regardless of whether a legitimate line of enquiry exists or not. Further to that they insist that we check the voluminous data in its entirety. This is usually PRE-CHARGE." (Police Officer Case 27, Case Files, emphasis in original).

This is the kind of behaviour for which the government apologised. In particular, the then Lord Chancellor, Robert Buckland said, in answer to a question from Harriet Harman MP about the use of a victim's previous sexual history in trials when making a statement on the End-to-End Rape Review in the House of Commons on 21st June 2021[36]:

'I think undue focus on the victim begins right from the initial investigation and I think that that is wrong. I think that the proper emphasis in this report is about looking at the person who is alleged to have done it, rather than constantly focussing as she rightly says, on irrelevant previous sexual matters that have nothing to do with the case and are an unwarranted intrusion into the private life of victims.'

And in answer to David Davies MP …….

'We need to move away from the fixation with the credibility or believing of the victim and be much more about the perpetrator. If someone's house is burgled they do not expect to have a long trawl into their personal history and if they had a window unlocked or whether they had been drinking: it is about trying to find out who did it and who is responsible for the crime. It is that sort of approach that is needed in rape and serious sexual offending'

What am I proposing?

It seems from the evidence above that these practices have become cultural. It is imperative to put clearly into legislation what is permissible and what is not, for everyone's sake. Currently the framework for access and disclosure of this kind of material is scattered across case law, guidance and legislation. The disjointed nature of all of these reference points mean that some police may be unaware of the true position in law; much is open to interpretation and agencies are able to act in a way which legislative provision would make clear is not permissible.

The law needs to be clearly set out in a single piece of legislation.

Government needs to create a clear statutory obligation on police to limit requests for such material to that which are proportionate and strictly necessary in pursuit of a reasonable line of enquiry, as it did for digital material in the PCSC Act 2022.[37] In

[36] Hansard 'End-to-end Rape Review: Volume 697': debated on Monday 21 June 2021 accessed at https://hansard.parliament.uk/commons/2021-06-21/debates/A284C9E5-F4BF-4CA4-B62F-3486C0629E1F/End-To-EndRapeReview#contribution-663BCD16-8465-4CD4-AE36-99F498CF5D54

[37] https://victimscommissioner.org.uk/our-work/briefings/police-crime-sentencing-and-courts-bill/

addition as per the case of Alibhai[38] a request should only be made where the officer suspects that the third party holds material capable of passing the disclosure test i.e. that it will undermine the prosecution or assist the defence.

The work of officers on the ground would be far more straightforward and victims of crime would be protected against current unacceptable levels of intrusion. Indeed, the police lead for disclosure agrees with me, not least because making these requests and then trawling material is highly time consuming for the police and adds time to investigations.

New legislation may also provide a benefit to third-party data controllers, ensuring that they only get lawful, proportionate and well explained requests from police which will minimise the current inevitable back and forth which currently happens and causes delay.

It would give officers like those quoted as part of the Northumbria pilot (above) clarity about what they can and cannot do so that they can respond appropriately to any requests from the CPS.

Additionally, legislation should insist upon informed and non-coerced agreement from victims.

There must also be an accompanying code of practice which insists that police give victims clear understandable information about their rights and that in order for there to be informed agreement they must also give details of what specifically is being sought, how it meets a reasonable line of enquiry and details of how they have considered strict necessity and proportionality.

I recommend that to reverse the current culture of wholesale demands for third-party material, a clear framework be enshrined in legislation.

2. The need for privilege for a very specific type of third-party material; records of therapy.

There is a specific related problem about how current therapeutic notes are dealt with. Many victims will benefit from therapy to help them to deal with the trauma of what has happened. Historically, police and CPS told victims not to seek therapy prior to trial but to delay until afterwards. Victims' groups had long been saying this was unacceptable and in 2017 the CPS announced they would re-draft their guidance on 'pre-trial' therapy, in this context the CPS refer to any therapy that is during the course of criminal proceedings. Amongst many others I sent views to their consultation on draft guidance last year. The CPS finally published that new guidance in May 2022. Victims' groups tell me it was an unmitigated disappointment. Whilst it advised victims of rape not to delay in obtaining vital therapy to help them deal with their trauma it also preferred the wide and arguably dangerous test of

[38] Ibid. 12

'relevance' in advising prosecutors, therapists, victims, police and others, what may be sought as part of an investigation. This did not go unnoticed and in August 2022, the main professional bodies representing therapists wrote an open letter to the CPS challenging this guidance and asking for a rethink.[39]

It is unacceptable that victims were advised not to seek therapy pre-trial but equally unacceptable that the police and CPS require access to notes of their therapy sessions with the threat that they might be disclosed to the defendant. This clearly, also acts as a bar to therapy. The last person a victim traumatised by rape wants to hear about its impact on them is the man who they say did it. Many victims will not take the risk that something they said about their trauma may be put to them in court in front of the defendant. This means that few people are able to both have the therapy they need and to play a role in bringing a culprit to justice. Many kinds of therapy do not involve a rehearsal of the facts of the case; indeed, therapy deals with feelings and not facts and it is unlikely that most therapy notes will pass the CPIA and Alibhai tests and yet it appears to be standard to treat them as if they do.

As I outlined above, where such notes have been sought and the case gets as far as court there is a risk that these will be used in court.

In a recent piece for BBC Newsnight (5.8.22) a woman who found herself in just this position discussed her experience when notes of her therapy were put to her in court during the trial of her rapist, in an attempt by the defence to paint her as a liar[40]. She had discussed with her therapist the fact that the rape meant she did not want to engage in some intimate activity with her husband but had felt unable to talk to her husband about this:

"*The defence said are you truthful? And when I said yes, she said- well you're not exactly truthful with your husband are you? – would you like me to read your therapy notes out about what you're currently discussing with your therapist? – I said no. It was like a physical punch – because I wasn't expecting it- that someone would bring that up in a courtroom about my current sex life – how, how is that relevant? It was violating – like another trauma*."[41]

Most people would be horrified to hear that private notes of this nature are requested routinely, but this example is especially shocking because it so clearly demonstrates how this intimate information can be used in court to destabilise and undermine a victim in a manner which feels like a physical assault. It is clear that this unbalanced approach cannot continue.

What am I proposing?

There must be a statutory right to protection for sexual assault victims' confidential therapy and counselling notes.

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[39] BACP call for CPS to rethink guidance, 8th August 2022 accessed at https://www.bacp.co.uk/news/news-from-bacp/2022/5-august-call-for-cps-to-reconsider-pre-trial-therapy-guidance/

[40] https://www.bbc.co.uk/iplayer/episode/m0019v8c/newsnight-05082022

[41] Quote from survivor 'Mary' on BBC Newsnight Ibid.

I have set out an argument in this briefing for legislation to curb over-intrusive demands for other personal material, but the intrusion and the risks are so serious with therapy notes that I recommend a shield of privilege around them. That would save sexual assault victims from the further harm they may be caused if their records are revealed. It would safeguard the broader public interest in the integrity of counselling and would promote willingness to report sexual assault.

Importantly, the law would strike middle ground so that a defendant's right to a fair trial is also protected. There would be absolute privilege over notes until a case got within the remit of a court when a party (defence, prosecution or police) would have to seek judicial consent for a summons to access what would then be confidences protected by qualified privilege. The subject of the notes i.e., the victim should be informed that an application has been made and be given the opportunity to make representations via a state funded lawyer. The Judge should override the victim's confidentiality only for compelling reasons, taking into account whether the information has substantial probative value not available elsewhere and only if sure that the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting material into evidence.

There is a model scheme which has been in force in New South Wales since 1997 and is now law in all the Australian states but Queensland. The Australian adversarial system is near-identical to the system in England and Wales. It is the law there that, once the matter is before the court, a victim of sexual assault can consent to the release of protected confidences (can 'waive privilege') but only in writing and with state funded independent legal advice and I would recommend this same additional protection in England and Wales to avoid any risk of the process being sidestepped I commend this as a well-tried model which by requiring an appropriate balance of interests has safeguarded both victim privacy and defendant fair trial rights and has had a chilling effect on demands for this confidential material.

I recommend that there should be statutory system of protective privilege for the confidentiality of sexual assault victims' therapy records in any criminal proceedings.

3. The need for free independent legal advice and representation for victims where their Article 8 rights are engaged.

I have long advocated for free independent legal advice and advocacy for victims of rape. In some cases, despite the stance in the adversarial system that that the prosecution is brought on behalf of everyone in society, the individual victim's legal interests may differ from those of the state. This is particularly likely where the victim's rights under the European Convention on Human Rights (ECHR) are at stake and, to date, has occurred most frequently in connection with the victim's right to private and family life under Article 8 and specifically in relation to disclosure

requests as part of a criminal investigation as outlined above. There is a negative obligation on the public authorities to abstain from arbitrary interference with those rights and regard must be had to the fair balance which must be struck between any competing interests of the individual and the state[42]. This 'triangulation of interests' was recognised by the House of Lords[43]. Clearly, the victim's rights cannot be represented by the CPS. A victim will require independent legal advice, to safeguard their entitlements.

Disclosure is not the only area where the state is unable to represent the legal rights of the victim. For instance, Section 41 of the Youth Justice and Criminal Evidence Act 1999 when a defendant applies to call evidence about the victim's previous sexual history will also engage Article 8 rights. Victims are often not told about such applications (even though important facts may be known to the victim). CPS are reported to take stances out of court, on the basis of whether similar applications have been allowed in the past. Whereas the personal interest, reputation and well-being of the individual victim requires them to be fully informed with an independent presence, in respect of Article 8 at the application. Further, the CPS Victims' Right to Review (VRR) has been broadened by the High Court to offer an opportunity for a victim to make representations on why their case should be re-considered. CPS have been dismissive of victims' requests to review a refusal to charge, as my survey of rape survivors shows[44]. A victim who wishes to use the voice that the Court has now given to them will require publicly funded representation to protect their interests and argue their rights.

The Sexual Violence Complainants' Advocate [SVCA] scheme was piloted in Northumbria[45] to engage local solicitors to support rape complainants. The scheme took 83 referrals from September 2018 to December 2019. Casefile analysis showed poor practice around victims' privacy rights. Advocates challenged data requests in 47% of cases. The scheme increased complainants' confidence and understanding in the justice system and improved their ability to cope with the mental health impact of the system (which likely reduced attrition). The project changed organisational cultures, significantly decreasing police and CPS requests for indiscriminate evidence gathering. Police and CPS felt investigations were more efficient and proportionate. A judge commended the pilot scheme. It also encouraged best practice when complainants had complex needs, e.g., special measures / ABE interview. All pilot participants agreed with the principle of legal support being made available for sexual offence complainants.

What am I proposing?

There should be a statutory right for victims to be given free legal advice and representation in respect of any decisions taken by police, prosecutors or courts that

[42] Roche v. the United Kingdom [GC] - 32555/96 Article 6 Article 8
[43] R v A 2001 UKHL 25 per Lord Steyn
[44] Ibid. 2
[45] Ibid. 8

threaten their Article 8 Right to Privacy including as above in any application to obtain records of therapy that are ‘privileged’ or any other right within the European Convention and specifically in order to ensure the victim’s voice in the VRR.

I recommend free independent legal representation for victims of crime when their Article 8 rights are engaged, including previous sexual history hearings, applications to obtain privileged records, in any other instance where another European Convention right is engaged by the actions of a criminal justice agency and if they wish to submit a VRR.

In summary

I urge government to consider adding additional clauses to the Victims’ Bill which:

1. Clearly set out the framework for obtaining and scrutinising TPM.
2. Provide a shield of privilege to notes of victim’s therapy.
3. Give victims the right to free independent legal advice and representation where their Article 8 rights are engaged i.e., when disclosure requests are made during course of an investigation, when an application is made for therapy privilege to be waived, and at previous sexual history applications. As well as during any VRR process.

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