

Victims' Commissioner's briefing on third-party materials, privilege for notes of therapy and legal representation for victims of rape.

The Victims and Prisoners Bill (the Bill) presents a once in a generation opportunity to improve the criminal justice system response for victims. The Victims' Commissioner welcomes the introduction of this Bill into Parliament; however, the Victims and Prisoners Bill misses an opportunity to address the typically very poor experiences of rape complainants within the criminal justice system.

In recognition of some of the issues outlined below, the government have added clauses to the Victims and Prisoners Bill but as drafted these do not go far enough.

Issue

Third-Party Material (TPM)

"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?"¹

Victims are being forced to choose between justice and their right to a private life. It is now well accepted and understood that when someone reports a rape to the police, they are likely to be asked to hand over their mobile phone and to sign a document allowing the police to access records about them in the hands of other parties. These are known as 'third-party materials' (TPM) and can include items such as medical records, education records and social services records.

Often complainants will not even know the record exists let alone its contents. Ultimately, such records can end up in the hands of the defence and victims can be questioned about their contents during a trial; usually, if such records reveal anything which undermines the victim's credibility, then the case goes no further. If a victim refuses the police access to this material the investigation usually ends.

The government partially legislated on this issue in the [Police Crime Sentencing and Courts Act 2022 \(PCSC Act\)](#)², which introduced a new regime for police requests for victim's digital data. This legislation included safeguards for victims to protect them from ubiquitous and intrusive requests. In May 2023 [the government announced](#) it would amend the Victims and Prisoners Bill to include the framework to be applied to requests for TPM³, with a stated aim of 'ending intrusive fishing expeditions.'

Clauses 24-26 of the Bill will amend the PCSC Act to include a regime for accessing TPM, however, these clauses merely restate the current legal position and lack sufficient protections that apply to requests for digital data within the PCSC Act. Without these protections, they will not bring about the necessary culture change needed in this area.

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 Accessed at <https://www.legislation.gov.uk/ukpga/2022/32/contents/enacted>

³ www.gov.uk/government/news/end-to-intrusive-fishing-expeditions-of-rape-victims-therapy-notes

Victims should have a voice in the process.

In Part 2, Chapter 3 of the PCSC Act, the provisions that deal with the disclosure of digital material relating to a victim of crime include two important protections. The first is that the victim's 'agreement' must be sought (37(1)(b)). The second is that agreement must not be coerced by threats that the investigation will otherwise be brought to a halt (39(2)).

The government amendments to the PCSC Act via the Victims and Prisoners Bill should reflect this approach. This would provide consistency in the handling of a victim's digital data and TPM. Given that the police will often be seeking to obtain both at the same time, it is difficult to justify requiring different processes which are simultaneously employed. This consistency of approach benefits both the police and victims.

More importantly, the processes set out in the PCSC Act offer greater protections for victims. The provisions as currently drafted in the Victims and Prisoners Bill suggest personal data can be sought regardless of any challenge raised by the victim. This is a backwards step. Legislation must be clearer that police and prosecutors should always be seeking the agreement of victims when obtaining their personal data.

The government should amend these clauses so that the wording mirrors that of the clauses dealing with digital material in the PCSC Act.

Children and adults without capacity

Children and adults without capacity are a group of victims who are particularly vulnerable. As drafted, the clauses in the Victims and Prisoners Bill state that notice must be served on the parents, guardians or relevant 'care' authority of a child or adult without capacity. If they are not available, then the notice can be given to 'any other adult' who the authorised person (in this context a police officer) deems appropriate. We have significant concerns about how this might work in practice. For example, in theory, the notice could be given to another authorised person who as a co-worker of the authorised person seeking the information, may only be concerned with helping their colleague to do their job and give no consideration to the privacy rights of the victim.

The clauses should also be amended to mirror the provisions of the PCSC Act, which do offer a useful safeguard. These state that authorised persons must, if possible, obtain the views of the child and they must evidence in writing that they have done this (38(4)). Additionally, another authorised person i.e., another police officer, cannot provide 'agreement' in the context where an 'appropriate adult' is unavailable (38(8)(f)).

These are important safeguards as this group are arguably more vulnerable to coercion and/ or manipulation.

Amendments 87A and 88A tabled by Baroness Morgan, seek to replicate the provisions in the PCSC Act and provide victims with the greater safeguards outlined above.

We understand both from services that support victims going through the criminal justice system and from academics working on Operation Soteria that the PCSC Act has had the desired effect and requests for digital material have reduced.

The Government's Position

The Government have argued that their clauses will bring about the desired change in culture. Despite stating that their clauses merely reiterate the current legal position, in regard to TPM, and do not, as they did in the PCSC Act, created a new power. They point to the accompanying statutory guidance as the panacea to this problem, whilst also citing the statutory guidance on digital material attached to the PCSC Act as the reason the measures they introduced in that legislation have been successful.

Unfortunately, guidance is not and can never be the solution, the police were subject vast amounts of guidance around both digital material and TPM before the PCSC Act was introduced as a Bill. Yet, they were still demanding vast volumes of private information about victims who reported rape. More guidance will not precipitate a change in culture. The success of the PCSC Act provisions can only be attributed to the fact that a new regime was put into legislation.

It is difficult to imagine how, merely restating the existing legal position in the Victims & Prisoners Bill, anything will change.

Additionally, during Committee stage in the House of Lords the Government asserted that the protections amendments 87A and 88A (at that time amendments 101,102 and 173) would introduce for victims would impact the defendant's right to a fair trial. This is not the case. The FAQ's which accompany this briefing rebuts this argument.

Free Independent legal advice and representation

To offer further protection to victims and more of a level playing field, the Victims Commissioner is calling for victims of rape to be afforded access to free legal representation. Victims would benefit from legal advice when presented with requests for information that is often deeply personal nature. The relative power and legal 'knowledge' of the police, compared to the victim, disadvantages the victim who is often lacking the information to make informed decisions about these requests. Amendments 77 and 78 seek to achieve this and the Victims Commissioner is supporting these.

[A pilot scheme undertaken in Northumbria](#) providing victims with free legal representation showed that interventions by lawyers noticeably suppressed requests and had significant positive impact on the complainants' confidence in the justice system⁴.

The Victims Commissioner would like to see free independent legal representation to be made available [wherever a victim's Article 8](#)⁵ 'right to privacy' is compromised. Amendments 77 and 78 would compel the government to develop proposals for a scheme to give victims of rape access to free, independent legal advice.

Changes needed to the Bill

- The 'TPM' clauses drafted by government will not bring the desired end to 'fishing expeditions', these clauses need to include the protections contained within the clauses on digital material in the PCSC Act.

⁴ Ibid. 1

⁵ <https://www.legislation.gov.uk/ukpga/1998/42/contents>

- The Bill should include a statutory right to free independent legal representation for victims of rape wherever their 'Article 8' rights are engaged by a criminal justice agency/ the criminal justice system.

Opportunities

The following amendments to the Bill would make the necessary changes required to radically improve the experience of the criminal justice system for rape victims.

- Amendments 87A and 88A which amend the government's clauses on TPM to include the safeguards from the digital clauses in the PCSC Act.
- Amendments 77 and 78 which conveys a statutory right to free and independent legal representation for victims of rape where their 'Article 8' rights are impacted.

Should you require greater detail on any of the above issues this can be found in our [detailed briefing for the PCSC Act available on our website](#)⁶.

If you have any question on this or any other aspect of the Victims' Commissioners work please contact Rebecca Shortt, Policy Manager at Beccy.Shortt@victimscommissioner.org.uk

⁶ <https://victimscommissioner.org.uk/our-work/briefings/third-party-material/>