

Supplementary written evidence submitted by the Victims' Commissioner for England and Wales, Dame Vera Baird QC (INV0032)

About the Victims' Commissioner

The Victims' Commissioner for England and Wales is dedicated to promoting the interests of victims and witnesses.

The role of Victims' Commissioner is to promote the interest of victims and witnesses, encourage good practice in their treatment and keep under review the operation of the Victims Code.

Critical new additional concerns about demands for access to and disclosure of third-party material

Since my original submission setting out concerns about CPS failures to prosecute rape¹, critical issues have emerged about CPS demands for access to rape complainants' private material in the hands of third parties. (Third Party Material/TPM)²

The current situation and the legal framework that governs access to and disclosure of third-party material is outlined fully in my briefing on this issue for the Police Crime Sentencing and Courts Bill.³

In practice, material in the hands of third-parties is sought as frequently as mobile phone data. ISVAs report that the focus on complainant credibility has made it 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.

CPS lawyers told the Government's End to End Rape Review (E2ERR) 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 described this as a standard enquiry on the insistence of the CPS, describing these requests as a 'fishing expedition'⁴.

Her Majesty's Inspectorate of the Crown Prosecution Service ("HMCPSP") in 2019, found that 71.4% of requests by prosecutors for information or evidence were made

¹ Available at <https://committees.parliament.uk/writtenevidence/36818/pdf/> (June 2021) & <https://committees.parliament.uk/writtenevidence/37853/pdf/> (July 2021)

² These are any personal records held about the complainant by any third-party and includes medical records, social services records, school records as well as records of therapy.

³ Available at [Police, Crime, Sentencing & Courts Bill - Victims Commissioner](#)

⁴ *Justice System response to adult rape and serious sexual offences across England and Wales Research Report*, June 2021 Rachel George (Home Office) and Sophie Ferguson (Ministry of Justice) at page 50 onwards https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994817/rape-reviewresearch-report.pdf

unnecessarily or inappropriately, 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” and “without any tailoring to the facts of the case”. A CPS internal report (yet unpublished and not disclosed to HMCPSP during its inspection) showed that 65% of rape cases referred by police to the CPS for early investigative advice (EIA) involved ‘disproportionate’ and ‘unnecessary’ requests for information.⁵

This is exactly the culture and practice that the Government recently apologised for⁶ in its E2ERR and which it is addressing via safeguards for victims in the Police, Crime, Sentencing and Courts Bill in respect of digital material.⁷

Independent Sexual Violence Advisors (ISVAs) and sexual abuse charities tell of people reporting historic sexual offences from the ‘70s and ‘80s being asked to hand over their current mobile phones; and of victims raped in their thirties being required to consent to childhood social services records to be trawled. The same demands happen in cases where the rape is a stranger rape, with no previous contact at all between the victim and perpetrator. ISVAs would say 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 Practice⁸ in which material can be sought only where it is a reasonable line of enquiry⁹. The case of Bater-James¹⁰ in respect of digital material confirmed that this means no speculative searches.

The Court of Appeal in *R v Alibhai*¹¹ said that for a request for TPM to be 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.*” This means that the material is not supportive of the prosecution nor is neutral but would either undermine the prosecution or assist the defence. Blanket requests, where there is no specific reason arising from the facts of the individual case, do not meet this test.

However, all the evidence makes clear that the case law is not being followed.

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.) Statute¹² and case law¹³ insist on strict necessity as the only

⁵ Leaked to and reported in the Guardian, March 2020:

<https://www.theguardian.com/law/2020/mar/15/cpsfailed-to-tell-inspectors-of-internal-review-revealingcase-failings>

⁶ [End-to-end Rape Review - Monday 21 June 2021 - Hansard - UK Parliament](#)

⁷ [New privacy safeguards: rape victims' mobile phone data to be protected from unjustified intrusion - Victims Commissioner](#)

⁸ <https://www.legislation.gov.uk/ukpga/1996/25/section/3>

⁹ Para 3.5 of

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf

¹⁰ Ibid. 3

¹¹ *R v Alibhai and others* [2004] EWCA Crim 681

appropriate test in circumstances where sensitive data will be processed, that is for example health data, sexuality data etc. and/or information about others.

Speculative requests like this appear to be conducted as a credibility check on the complainant. This happens only in rape and sexual assault and in no other kind of case. The intrusion is a major reason why many complainants withdraw from pursuing their case¹⁴, 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 or where there may have been an eyewitness or other evidence of the offence.

It is clear that the drop in rape charges is enabled and fuelled by this pursuit of requests for personal information about victims. The smallest potential imperfection of the character of a victim unearthed in this way will result in a CPS decision not to charge. This is pursuant to their decision not to charge any case which is not a rocksolid certainty resulting in the collapse of charges by almost 2000 prosecutions a year since 2016/17 and the consequently appallingly low number of rape convictions compared to earlier years. The CPS chooses to say that more digital material makes cases harder when it is in fact their own decision to over-demand for trawls of such material.

In the rare cases that do get to court, this search for discreditable material can lead to disclosure to the defence, enabling cross-examination of a victim using something from their long-ago past history. They are not the authors of the TPM and in many cases do not know that the material exists. It could be 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 be an

application to the court in advance of the trial and the victim should be notified about this, but in practice this doesn't always happen¹⁵.

This issue also relates to pre-trial therapy notes from counsellors, increasingly sought by the Crown Prosecution Service (CPS) with other forms of third-party material.

¹² Data Protection Act 2018: <https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>

¹³ Bank Mellat v Her Majesty's Treasury (No 2): <https://www.bailii.org/uk/cases/UKSC/2013/39.html>

¹⁴ 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.

¹⁵ [Seeing is Believing - Archived Northumbria Police & Crime Commissioner \(northumbria-pcc.gov.uk\)](#)

In my previous submission to this committee, I wrote:

Concerns about disclosure of complainants pre-trial counselling notes deter many victims from accessing therapy until after trial. CPS recently consulted on new guidelines¹⁶ on this but the post-pandemic courts backlog has lengthened the time victims may go without therapy, potentially deepening their trauma. The situation is precarious for victims who risk their notes being disclosed to the defendant should they have counselling pre-trial. CPS have not published new any new guidelines to address this unacceptable practice which is a key deterrent to reporting.

Since then, there have been worrying further developments.

The CPS have yet to publish their pre-trial therapy guidance but has recently put out for consultation a number of new documents about its approach to prosecuting Rape and Serious Sexual Assault (RASSO)¹⁷. In these documents the CPS presents the legal test for access to third-party material as if it were weaker and more open than it is in law. The legal framework for requesting, accessing and retaining victim data is contained in a number of places both in statute and case law.

Importantly, in respect of third-party material, there is a precedent in case law. This is the case of *Alibhai (R v Alibhai and others [2004] EWCA Crim 681)*. Police should only make requests for third party disclosure where there is a reasonable line of enquiry. 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 CPS' new documents state that a reasonable line of enquiry in respect of thirdparty material is anything 'relevant'. This is a totally subjective test. Obviously, too, it is a far lower threshold than material which might satisfy the disclosure test, as set out immediately above in the case of *Alibhai* - importantly saying that 'relevance' is not the test but the test is *“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.

The CPS has also recently 'updated' its 'disclosure manual'¹⁸ - the very guidance used day-to-day by prosecutors, which now has been altered from correctly reciting the rule in *R v Alibhai*, so that it now repeats the wrong formula that the test is 'relevance'.

¹⁶ Accessed at Draft guidance on pre-trial therapy | The Crown Prosecution Service (cps.gov.uk)

¹⁷ Help us improve how we explain our work on rape and serious sexual assault | The Crown Prosecution Service (cps.gov.uk)

¹⁸ Disclosure Manual | The Crown Prosecution Service (cps.gov.uk)

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In its' Rape and Serious Sexual Offences (RASSO)¹⁹ guidance, updated in this year, the test remains the Alibhai test, which also sends a very confused message to prosecutors.

It is essential that the CPS ensures all its guidance follows the law and that means putting the 'Alibhai' test back in the disclosure manual and ensuring it is properly outlined in the new documents under consultation. The changes, if they remain, will inevitably make the current over-demand for TPM worse and is clearly an attempt to give it spurious legitimacy. New CPS pre-trial therapy guidance is likely to follow the same wrong test.

All this is despite the CPS repeatedly saying that they wish to end the current culture of obtaining as much information about a victim/ survivor as possible.

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¹⁹ [Rape and Sexual Offences - Overview and index of 2021 updated guidance | The Crown Prosecution Service \(cps.gov.uk\)](#)