Blanket requests for third party disclosure in rape investigations

Centre for Women's Justice (CWJ) and a group of Independent Sexual Violence Advocate (ISVA) services are concerned about the large number of disproportionate requests for third party disclosure we see in rape investigations.

In many cases police make routine blanket requests for a range of highly sensitive personal third party materials including ISVA notes and ISVA counselling records, GP and other health records, therapy records, social services records, school and other education records. Often officers state that materials are requested by, or required by, the Crown Prosecution Service (CPS).

The law on third party disclosure requests

Police should only make requests for third party disclosure where there is a reasonable line of enquiry. The Court of Appeal established in *R v Alibhai*[1], 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."* Blanket requests, where there is no specific reason arising from the facts of the individual case, do not meet this test.

Where disclosure requests are based on the simple fact that the victim[2] has made a report of rape, and that there is or may be some material that refers to the offence within the records, this amounts to a speculative request, or 'fishing expedition'. There is no basis to suspect that the material is likely to assist the defence case or undermine the prosecution. Material is being sought merely in order to 'check' whether there is anything that might assist the defence. When the third party materials pre-date the offence - absent some specific reason arising from the particular facts of the case - a request for disclosure is again a purely speculative request, directed at the victim's credibility. The mere assertion by a suspect, without more, that the victim's account is untrue and therefore that she is lying, is not a sufficient basis to access her personal records for a credibility vetting. If this were so then the same would apply in a vast range of other crime types, and also to the suspect's own personal records in such a case.

The Court of Appeal addressed a similar situation recently in *R v Bater-James*[3] when it considered access to digital data on rape victims' mobile phones. The Court confirmed that for a reasonable line of enquiry "*there must be a properly identifiable foundation for the enquiry, not mere conjecture or speculation*".[4] The Court noted the importance of having a material justification for an invasion of a witnesses' privacy and referred to the Judicial Protocol[5] which states that "*victims do not waive…… their rights to privacy under Article 8 ECHR by making a complaint against the accuse*d". The judgment balanced victims' Article 8 rights with defendants' rights to a fair trial.

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[1] *R v Alibhai and others* [2004] EWCA Crim 681
[2] We use the term 'victim' as that is the term used by most criminal justice and other official agencies, however the term 'survivor' is preferred by women's sector organisations
[3] *R v Bater-James and Mohammed* [2020] EWCA Crim 790
[4] Para 77
[5] Para 72 refers to the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (2013) [47]

The impact on rape survivors

Most of the women we support feel that if they refuse to consent to police requests they will be treated as having 'something to hide' or as uncooperative or obstructive, and that they have no choice but to agree to all disclosure requests if they want their case to proceed. Sometimes they are told by the police that if they do not provide access to records their case cannot be forwarded to the CPS or will be rejected by the CPS.[6] In other cases the women merely (and justifiably) fear that this will be the outcome of any refusal.

For some women extensive requests for third party disclosure present such a deterrent that they disengage from the criminal justice process altogether.[7] Others stop using counselling and other services they need for their ongoing health and wellbeing as they have no sense or guarantee of privacy around accessing this support. The primary concern for many victims is not that police officers and prosecutors will look at their private information, but that their private records may be put in the hands of the defendant, the very person who has harmed them, often a person they know well. Being told that material will not be disclosed to the defence unless a prosecutor deems this appropriate is no comfort, as they do not know what information might meet the disclosure test or whether prosecutors will carry out their role correctly.

Women who report rape are put in an invidious position. As organisations supporting rape survivors, we do not feel that the decision of whether to accede to an inappropriate disclosure request should rest on the shoulders of individual women, many of whom are vulnerable and traumatised. Rather it is incumbent on the criminal justice system to apply the law correctly and not to make inappropriate disclosure requests in the first place. We therefore call on the police and CPS to address this issue at a national level. Some ISVA services have had meaningful conversations with their local police and CPS on this issue. However, we believe that this is not a local problem, but occurs all over the country and requires a national solution. Many ISVA services do not question disproportionate police requests and many rape victims do not have the support of an ISVA service. The responsibility for ensuring that rape victims' Article 8 rights are respected lies with the criminal justice system.

If refusals by victims to disclosure of materials led routinely to applications by the CPS to the court for orders for disclosure, ISVA services would feel comfortable supporting their clients to refuse blanket requests, and handing over their own records in response to court orders. However, in practice we do not see such applications made. Usually, in trying to avoid No Further Action (NFA) decisions ISVAs and their clients feel they have no option but to consent to disclosure and there is no forum in which the appropriateness of the disclosure request can be addressed. If applications for orders were made routinely, those holding the records and the victims themselves would have an opportunity to make representations to the court.[8]

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[6] Also reported by officers interviewed for the evaluation of the Northumbria pilot Sexual Violence Complainant's Advocates Scheme published December 2020, see page 22 final para, pages 47-48, 60-61: https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf

[7] Also confirmed in the Northumbria pilot evaluation report

[8] see *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin); [2006] 2 Cr App R 34

The wider picture

We understand the importance of prompt and appropriate disclosure to the defence. However, we believe that since the high profile case of Liam Allan, the pendulum has swung so far that disclosure requests in rape cases have extended beyond the bounds of what is proportionate or lawful and now trample on the Article 8 rights of victims. ISVAs are told by officers that certain requests are made because the defence has asked or will ask for them. However, the defence is not entitled to pursue fishing expeditions and is free to make an application to the court if they see fit. It is not the role of the police to follow up every request by the defence, or to try to pre-empt defence requests, but rather to apply a lawful approach to their own duties. Post-charge, disclosure will be reviewed following the Defence statement and PTPH forms.

Women often feel that when they report a rape they are under investigation, rather than the suspect. It is easy to understand why they feel this, given the very broad requests for third party disclosure that we see, going well beyond the facts of the case and sometimes extending over decades. Disclosure requests for materials pre-dating the offence are a particularly good illustration of the assumption that a rape investigation must trawl all available information about the complainant. Nowhere else within policing is a victim required to expose every aspect of their life when they report a crime, nor would any court expect to explore every aspect of a witnesses' life in determining a specific issue.

If we consider the implications of such an approach it becomes clear why it is disproportionate and unacceptable, and why the law is right to set the boundary that it sets. When such 'fishing expeditions' take place sometimes incidents are uncovered which are entirely unrelated to the rape but show the victim in a bad light. For example, in one of our cases a request for university records revealed that a student was accused of cheating in an exam when she was caught looking at her phone. No doubt the defence would wish to use that to seek to undermine her credibility. This was given as a reason for NFA, despite the fact that to use this information the defence would have to surmount the hurdle of a non-defendant bad character application. The result of such an approach is that any woman who breaks rules, such as cheating in an exam, is potentially outside the protection of the criminal law and can be raped with impunity (in those common situations where there is no independent evidence to prove the rape). If such cases were prosecuted by the CPS, and the admissibility of the exam incident was considered by a court, the injustice may not be as great, but in practice such disclosures often lead to NFA and there is no opportunity to test the admissibility of the information in the third party records, or the jury's view of her account of the rape.

This issue arises in many different situations. For example, where a victim was a looked after child, social services records often hold information that paints her in an unfavourable light, thus placing such women at a serious disadvantage. In some cases the records contain incorrect information. In another recent example, a woman was given reasons for NFA by the police, including that her credibility was undermined by the fact that she had lied to a social worker about whether a previous partner (not the alleged rapist) had been in her house. However, the victim stated that the social worker had misunderstood the events and there had not been any dishonesty on her part. In

addition, when third parties make inaccurate records, the victim is sometimes accused of inconsistencies that she cannot explain.

In the majority of rape cases that we see, the accused claims that the sexual contact was consensual, and police and prosecutors focus on whether there are factors to undermine the victim's credibility in these 'word on word' scenarios. A third party disclosure exercise that casts a wide net over large swathes of the victim's life in a trawl for material that may potentially have a bearing on credibility goes beyond the ordinary reach of the justice system. The Court in *Bater-James* quoted with approval that:

Lines of enquiry, of whatever kind, should be pursued only if they are reasonable in the context of the individual case. It is not the duty of the prosecution to comb through all the material in its possession [...] on the lookout for anything which might conceivably or speculatively assist the defence. [9]

We accept that there are situations where it is appropriate for records to be sought, where there are evidential issues in the particular case. We also accept that historic cases are different because contemporaneous records may rebut allegations of recent fabrication and the victim often does not recall whether disclosures were made at the time. Also, in some situations there will be a legitimate basis to seek records about the victim. For example, if the accused knew her well and made a credible claim that she had a personality disorder that impacted on her evidence, there may be a reasonable line of enquiry to consider her medical records to explore if this had ever been diagnosed. However, none of these justifications apply to the many requests made that amount to blanket requests without any specific basis other than the fact that the victim has reported a rape and has had contact with third parties.

Finally, a proportionate approach to third party disclosure will save a huge amount of resources for the police and CPS and speed up rape investigations. Many rape investigations currently take a year or two, some even longer, and broad disclosure processes must contribute greatly to that. Not only does it take time to locate and obtain records, but police and prosecutors have to read through voluminous irrelevant material. Defendants also suffer from investigations hanging over them for prolonged periods. A change in approach will benefit not only victims but the system as a whole.

The following are provided with this overview:

1. A dossier of 10 case examples illustrating the issues raised above

2. Advice by Edward Henry QC

3. Cambridge Rape Crisis summary of third party materials discussions.

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[9] Para 71