Centre for Women's Justice's submission to the Home Office's Consultation on Police Requests for Third Party Material

11 August 2022

Introduction

Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We carry out strategic litigation and work with frontline women's sector organisations on using legal tools to challenge police and prosecution failings around violence against women and girls. As such we have gathered significant evidence, since CWJ was founded in 2016, demonstrating the issues encountered by VAWG victims who report offences to the police, and the approach of police forces and the CPS to such offences.

CWJ has been gathering evidence since 2018 about the large number of disproportionate requests for third party disclosure that are made in rape and serious sexual offence ('RASSO') investigations, concerns which it knows are shared by numerous organisations across the VAWG sector, including Independent Sexual Violence Advocate (ISVA) services across England and Wales.

In the majority of RASSO cases, the central issue in dispute between the victim and the suspect in the case will be whether or not the victim was consenting, or could have led the suspect by her behaviour to believe she was consenting. This being the case, police and prosecutors will commonly consider – from the very outset of the investigation, in our experience – whether there are factors which undermine the victim's credibility. Moreover, investigators and prosecutors in RASSO cases are – in our recent experience – acutely mindful of their legal duty to identify, from an early stage, any material at all that is deemed capable of undermining the prosecution case and could meet the test for disclosure to the defence. We believe that this 'proactive' approach has been particularly reinforced by the Attorney General's 2018 Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System, which emphasised the need for early disclosure, and which was specifically prompted by the high-profile collapse of several cases involving alleged rape and sexual assault.

The consequence of the above combined factors, it seems, is that third party disclosure requests, seeking information about victims or about information they have exchanged with third parties, are currently very common in this area of crime.

It is fully accepted that there are situations where it is justified for material contained within third party records to be sought on the particular facts of the case. However, requests that are made to access information about the victim from a third party, without any specific basis other than the fact that the victim has reported a serious sexual offence and has had contact with third parties, are a cause of significant concern. In the experience of CWJ and its ISVA service partners, police are frequently making 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.

As an appendix to this consultation response, we have provided a sample of case examples of unreasonable third party material requests that have been made in RASSO cases that CWJ have reviewed. This dossier of cases by no means represents all cases where the issue of disproportionate material requests has been raised with CWJ, but is a representative sample. It will be noted that, to protect victims' anonymity, few details have been provided as to the facts of the case itself.

It can be seen from these case studies that often, requests are made which:

(a) seek blanket/wholesale disclosure of all records held about a victim by the third party in question, which by definition will rarely be necessary or proportionate on the facts; and
(b) are entirely speculative: in other words, officers indicate that they have no particular reason on the facts to believe that the records do hold relevant material, but they believe it is their duty to obtain all such records where they are available, so as to trawl them for any material which could unexpectedly undermine the prosecution case or assist the defence case.

Such speculative, unfounded and disproportionate requests for personal information about victims are not just problematic and counter-productive: they are unlawful. Under the GDPR/the Data Protection Act 2018, victims are entitled to expect that processing of their sensitive personal data – even when carried out for a legitimate 'law enforcement' purpose – will only take place where it is 'strictly necessary and proportionate' to do so on the facts of the case. An unreasonable or disproportionate intrusion into their personal records is likely to amount not only to a breach of their data protection rights, but also to a breach of their privacy rights under Article 8 of the European Convention on Human Rights, which must – as the courts and the Attorney General have now explicitly recognised – always be weighed in the balance before their personal information is sought.

In addition to the evidence that CWJ has gathered directly, there is now overwhelming independent evidence – from a series of independent reports that have emerged over the past 3 years – that police and CPS 'trawls' for third party material are regularly going far beyond what is necessary. To cite just a few examples:

- 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 UK Information Commissioner, too, has issued an opinion on this subject, as recently as May 2022, which amply demonstrates the relative routineness and disproportionality of these requests. His report 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 recent evaluation of the 'Sexual Violence Complainant's Advocates Scheme' Pilot which was carried out in Northumbria[1], which provided free legal advice to rape complainants around their privacy rights under Article 8 of the European Convention on Human Rights, found that around 50% of requests were not strictly necessary and proportionate and therefore did not fit the legal requirements for such requests.

Members of CWJ's team, too, have on several occasions heard directly or indirectly from police officers working on RASSO cases that they feel under pressure to complete a routine 'checklist' of generic third party enquiries in all RASSO cases before they can refer the case to the CPS. At one stakeholder event to which CWJ staff were invited, a police officer present who had worked on RASSO cases stated candidly that he sometimes felt as if sexual offences units had now become 'victim credibility units', given how much more time and attention was now devoted to 'investigating' victims' credibility when compared with investigating suspects themselves. Consistent with this, the Home Office will note that one of the key findings of, Project Bluestone, a pilot launched by Avon & Somerset Police which has now been rolled out to other forces, was that transformative work was needed to ensure RASSO investigations were properly 'suspect-focused' in their approach to gathering evidence.

Often, in our experience, police officers will justify such requests to victims by stating that the material has been required by the CPS. This may be because a request has already been made by a reviewing prosecutor for the material in that particular case (as part of a checklist of outstanding 'actions' that officers have been required to complete); or because the officers have simply learned from experience that RASSO files will be rejected by the CPS at an early stage unless a generic third party material request of this kind has been made.

This is also borne out by officers interviewed for the evaluation of the pilot scheme in Northumbria, to which we have referred above. One officer anonymously interviewed for that evaluation stated:

> *"…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)".

Another, more senior officer who was interviewed stated:

> *"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, 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 claim made by officers, that prosecutors from the CPS are encouraging or requiring them to make disproportionately wide information requests, finds clear support, too, in recent policing and CPS inspection reports. For example:

[1] Published in December 2020: see https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf

- The Thematic Rape Inspection carried out by Her Majesty's Inspectorate of the Crown Prosecution Service ("HMCPSI") in 2019 found that as many as **71.4%** of requests by prosecutors for information or evidence were made or not made appropriately, 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".* The HMCPSI's Inspection Report adds that it saw examples of "*[CPS] action plans that consisted of a generic list of actions without any tailoring to the facts of the case",* and *"very few"* examples of police officers challenging unreasonable CPS requests in such circumstances;

- An internal review carried out by the CPS itself (the findings of which are as yet unpublished by the CPS, but were leaked to the *Guardian newspaper* in 2020[2]) showed that almost two thirds (65%) of rape cases referred by police to the CPS for early investigative advice (EIA) had been met with prosecutors making *'disproportionate'* and *'unnecessary'* requests for information;

- Likewise, the Government's End-to-End Rape Review research report reveals that 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* [emphasis added].'

In this current culture of routine third party material 'trawls', CWJ routinely hears from RASSO victims, and their support workers, that they feel as if they are the ones who are under investigation after they report a sexual attack, rather than the suspect. It is easy to understand why they feel this, given the very broad requests for third party disclosure that are made in some cases, material going well beyond the facts of the case and sometimes extending over decades. Disclosure requests for materials which entirely pre-date the offence – as we have seen in some cases – are a particularly clear illustration of the widespread assumption that a RASSO investigation must trawl all available information about the complainant's background in order to assess whether they have made a credible complaint. There will rarely be a justifiable basis on the facts for close examination of a victim's life prior to the alleged offence even taking place.

In circumstances where the victim's consent is required to obtain the records, and victims express concerns about providing their consent – even if only on the basis that the volume of material suggested seems unreasonably broad – they are often advised by the police that refusal will result in their case being 'No Further Actioned' ('NFA'd) or refused charge by the CPS.

Usually therefore, in trying to avoid NFA decisions, ISVAs and their clients will feel that they have no option but to consent to disclosure, and there is no obvious mechanism by which the appropriateness of the disclosure request can be reviewed. In addition, victims often feel that objecting to a request to access third party disclosure will give the impression that they have 'something to hide'; therefore, even when advised that the request is not a reasonable line of enquiry, they often decide to provide their consent.

[2] https://www.theguardian.com/law/2020/mar/15/cps-failed-to-tell-inspectors-of-internal-review-revealing-case-failings

ISVAs are sometimes told by officers that certain requests are made because the defence has asked or will ask for them. The defence is of course free to make an application for a witness summons to the court, after a charging decision has been made, if they see fit, and 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, for example by disclosing any material that comes into their possession which does meet the disclosure test. Likewise, it is also open to the Crown to apply to court, post-charge, for records that it deems necessary to obtain at the post-charge stage (and if this procedure is followed, victims and records-holders are entitled to make their own representations to the court opposing the application, if needs be (see *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin); [2006] 2 Cr App R 34)).

ISVAs report that this pressure on victims to accede to disproportionate third party disclosure requests is not only unnecessarily distressing and violating of victims' privacy, but can also – in some cases – deter the victim from pursuing their report altogether. A survey of rape complainants conducted by the Victims' Commissioner in 2020[3] found that some victims decided not to report to the police at all based on their fear that their personal lives would be subjected to intrusive scrutiny, or this was at least a consideration in their decision not to report. Meanwhile many of the victims surveyed who *had* decided to report felt that the experience had been invasive and traumatic, and that the process had not been adequately explained.

We are concerned too, against this backdrop of excessive disclosure requests, that the Attorney General and the CPS have both recently disavowed the legal test set out of *R v Alibhai* [2004] EWCA Crim 681 – which until very recently was still referred to in CPS' guidance (and widely accepted) as the correct legal test for investigators and prosecutors to apply when considering whether to make a third party material request. The Court of Appeal in that case applied the approach that was already set out in the Attorney General's then Guidelines on Disclosure (which have since been revised), namely that for a 'reasonable line of enquiry' the investigator requesting the material must suspect that it contains information which is not only 'relevant' in general terms to the case but also capable of meeting the disclosure test: in other words, that it could assist the defence case or undermine the prosecution case.

The view now taken by the Attorney General however – and explained in her latest Review of the Disclosure Guidelines – is that investigators and prosecutors need only consider whether the third party material contemplated is 'relevant' in general terms: namely, whether it would appear to have 'some bearing' on the circumstances of the case, and is not deemed to be wholly incapable of having a bearing on the case outcome. We have noted the rationale provided by the Attorney General for the revisions to her Guidelines over the years: the concern she raises that the historic *Alibhai* test risks disclosure failings, and her position that since she has now changed her Guidelines in this regard, the decision of the Court of Appeal in 2004 is no longer applicable. It remains a concern, however, that – at a time when it has been widely recognised that police and prosecutors are seeking excessive third party disclosure in the majority of RASSO cases – the Attorney General supports a lowering of the legal threshold that investigators and prosecutors must meet before they can make a third party material request.

[3] https://victimscommissioner.org.uk/document/rape-survivors-and-the-criminal-justice-system/

Her latest Guidelines do now explicitly acknowledge – and this is of course broadly welcome – the other legal safeguards that should apply in these circumstances, in accordance with the GDPR/the Data Protection Act 2018 and Article 8 of the European Convention on Human Rights 1998, in particular the Court of Appeal's approach in *R v Bater-James* [2020] that "there must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation".

It seems to us, in conclusion, that there is significant evidence already available to demonstrate that what is called for a significant transformation in policy and practice, across police forces and the CPS. In addition to our brief responses to the consultation requests, which are set out below, we support the calls that have been made by the UK Victims' Commissioner and others, for the following wider legislative and non-legislative proposals to meaningfully address this problem:

i. A clear statutory obligation on police to limit requests to that which are proportionate and strictly necessary in pursuit of a reasonable line of enquiry and where the officer suspects that the third party holds material capable of passing the disclosure test.

ii. The legislation must insist upon informed, non-coerced agreement from victims/ witnesses.

iii. There must be an accompanying Code of Practice which requires police to give victims clear understandable information about their rights. It should outline that police must give victims 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.

iv. Victims must have access to free legal advice and representation by a qualified lawyer when their Article 8 rights are engaged: in other words, in relation to any requests by the police/CPS for records which contain their personal information. In addition, we believe it might assist if there were police and CPS review mechanisms in place which enabled victims to seek a formal review, by a more senior police officer/prosecutor, of a third party material request that they consider to be unnecessary/disproportionate.

v. The Government should consider introducing legislation which makes therapy notes of victims of sexual violence subject to a rebuttable presumption of non-disclosure, as per the Australian model. It is our understanding that this model has been in force in New South Wales since 1997 and is now law in all the Australian states with the exceptional of Queensland. It is the law in those states, as we understand, that a victim of sexual assault can consent to the release of protected therapy records, but only in writing and with independent legal advice. We would urge that this same additional protection is put in place in England and Wales. We 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. Indeed, it seems to us loosely analogous to the careful approach that is already taken in this jurisdiction to 'sexual history evidence', for example: where a defendant is still entitled to such disclosure/to rely on sexual history evidence about a victim if the court agrees that there is a particular factual basis on which to admit that evidence,

so as to ensure the defendant has a fair trial, but where no such exceptional facts arise, it is excluded, and for good reason.

These measures would in combination make clear the 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 unwarranted intrusion into their private lives and help reduce attrition.

Our responses to consultation questions

We note that Part 1 of this consultation is directed at those working in law enforcement, as prosecutors, or defence lawyers. Given, however, CWJ's legal expertise and the fact that it has been monitoring police and prosecutorial practice in relation to third party material for some time, we have decided to respond to some of the questions from this part, where (and insofar as) we feel able to do so. We have also provided answers to some questions in Part 2, as well as all questions in Part 3.

Section 1: Questions for law enforcement, prosecutors and defence lawyers In this section, we'd like to establish some basic information about third party material: what it is and why and how often it is requested.

1. What kind of material do you think constitutes third party material? Check all that apply:
a. Medical records
b. Mental health records
c. Counselling/therapy notes
d. Independent sexual violence/domestic violence advisor notes
e. Employment records
f. Local authority records
g. Education records
h. Prison records
i. Closed Circuit Television recordings ('CCTV')
j. Other, please specify

All of the above categories do constitute third party material. However, it is submitted that it will only be in the very rarest of cases that records held by an Independent Sexual Violence Adviser ('ISVA') Service could ever relate to a reasonable line of enquiry, and so be necessary third party material for the police to obtain. This is because the Home Office's ISVA Guidance outlines the strict boundaries ISVAs must have around their relationships with clients (see page 10), including the rule that they cannot support a client at trial if they have had any discussion with the client about the facts of their case. We are aware that most ISVA services interpret this provision to mean that it is best practice for them not to discuss or take note of the facts of the case with the client at all, if they can avoid it, Unless police specifically suspect, therefore, that in a particular case an ISVA has taken the unusual step of taking an account from a victim as to the circumstances of the offence, there can therefore be no lawful basis to request an ISVA's notes. It is concerning, in light of this, that we regularly hear of such notes being requested, on the vague/general basis that the victim has received support from an ISVA service arising from the alleged offence. Such unnecessary intrusions into the records of a victim's private sessions with her ISVA leaves vulnerable victims feeling that their trust has been betrayed and violated, without any good reason. Guidance for police and prosecutors should therefore make absolutely clear that ISVA notes are not a category of 'third

party records' that should be requested as part of an investigation other than where there is a clear specific factual basis on which to do so. The same applies to therapists who work within ISVA services and provide therapy recognised as so-called 'pre-trial therapy', operating in a framework where the therapist specifically avoids any discussion of the facts of the offence.

2. About whom is third party material typically requested? Check all that apply:
a. Victim
b. Witness
c. Suspect

We have, on occasion, heard anecdotally from police officers (and frontline services that have regular contact with police officers) that considerably more third party material is requested about victims in RASSO cases than is requested about suspects. This anecdotal evidence certainly seems consistent with the other evidence we have highlighted in the 'Introduction' to this consultation response about the disproportionate degree of attention paid to victims' credibility, and the need for more 'suspect-led' investigations.

3. In what types of investigations do you request third party material?

No answer – this question is not relevant to us.

4. We understand that requests for third party material can be a particular issue in Rape and Sexual Offence (RASO) investigations. In your experience, in roughly what proportion of RASO investigations is third party material requested?

No answer – we are unable to answer this question.

5. Why is third party material requested?

No answer – save that we refer you to the Introduction to our consultation response, which discusses the factors we think are driving disproportionate third party material requests; and also our answer to Question 7, below.

6. How do you decide what and how much material to request from third parties? Select one response and include additional information if needed:

a. All potentially useful material is requested in case it is needed

b. Lines of enquiry are considered, and specific material is requested to support or refute them

c. Other/additional information

The approach that should be taken by investigators and prosecutors is the approach that is summarised in option (b). We would add to this however that in circumstances where the material requested contains personal information about the victim (which in most instances is likely to include sensitive personal data), investigators and prosecutors should also be considering whether obtaining the material is strictly necessary and proportionate in all the circumstances, in accordance with their obligations under the GDPR/Data Protection Act 2018 with regard to processing of sensitive data. Obtaining material which is deemed to have some broad bearing on the circumstances of the case, but is unlikely either to assist or undermine,

in any material way, the prosecution case, or to assist the defence case, is unlikely to meet the '(strict) necessity and proportionality' threshold. Conversely, if there is a factual reason to suspect that the information sought might materially assist the defence case, then clearly it will be necessary to obtain it so that the defendant can have a fair trial.

For the avoidance of doubt we are clear that the approach set out in option (a) above is unlawful. It risks casting an overly wide net and obtaining irrelevant personal material (that will also be extremely time-consuming for officers to sift), before it is even clear what the issues in the case are and what lines of enquiry are relevant to pursue.

7. In your view, what are unnecessary and disproportionate requests for third party material driven by?

As set out in the Introduction to this consultation response, we believe they are often driven by the CPS, or by RASSO 'gatekeepers' within police forces. We also believe that they are driven by anxiety – among police officers and prosecutors alike – about being criticised in the event that a RASSO prosecution or trial collapses, or results in acquittal, as a result of disclosure that is said to undermine the victim's credibility. We believe that this anxiety stems from, or was significantly aggravated by, the negative media attention surrounding the series of collapsed rape and sexual assault trials in 2017-18, starting with the case of *R v Allen,* and the response of the CPS and the Attorney General to those cases. Clearly however, RASSO prosecutions will not be best served by unnecessary and disproportionate requests for third party material, which undermine victims' confidence or willingness to engage, and are unlikely to assist in justice being served.

8. On average, how long does it take to issue a request for third party material?

No answer – we are unable to answer this question.

9. Does this differ by type of investigation?

No answer – we are unable to answer this question.

10. If YES, please specify average time spent on issuing a request for third party material for:
a. Rape and Sexual Offenses (RASO)
b. Domestic Abuse
c. Child Sexual Exploitation
d. Assault or Violent Crimes
e. Homicide
f. Economic Crime
g. Drug trafficking
h. Acquisitive crime
i. Modern slavery
j. Other/Additional information

No answer – we are unable to answer this question.

11. **In your experience, do third parties from whom you have requested information generally: [Select one response and include additional information if needed.]**
a. Fail to provide the requested material

b. Provide only what is requested
c. Provide more than what was requested
d. Ask you to attend premises to search for relevant material
e. Other/additional information

No answer – we are unable to answer this question.

12. In your experience, does the quantity of third party material requested affect the amount of time taken for the material to be returned? Select one response and include additional information if needed. a. Yes, if more material is requested it will take longer to receive it b. No, the amount of material requested is not related to the amount of time it might take to receive it c. Other/additional information

No answer – we are unable to answer this question.

13. In your experience, do third parties generally return requests for material within a satisfactory timeframe (i.e., to ensure timely progression of the investigation)? Select one response and include additional information if needed.

No answer – we are unable to answer this question.

14. Why do you think it can take a long time for some third parties to respond to requests for third party material? Check all that apply:
a. It is not a priority for them to do so
b. They are unfamiliar with these types of requests and do not know how to handle them
c. They do not have a dedicated member of staff or team to handle these requests
d. The requests from police are not clear, and do not provide specific information needed to process the request
e. Other/Additional information

No answer – we are unable to answer this question.

15. How far do you agree with the following statements:

a. **Delays in returns for third party material is a significant single factor in slowing down an investigation. Select one:**
Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

We agree. From our experience as an organisation which advises victims (and their ISVAs), we believe that delays arise from too many requests being made, from overly broad requests being made, coupled with third parties struggling to process requests and indeed to determine whether it is reasonable for them to comply.

b. **When third party material is requested early in an investigation, it is less likely to cause a delay. Select one:**
Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

No answer – we are unable to answer this question.

16. Aside from ensuring that requests for third party material are necessary and proportionate, is there any other action – legislative or non-legislative – you would like

to see to improve the timeliness of returns for third party material? Thank you for completing this section. Please progress to Section 3.

Requests should also be in pursuit of a specified, reasonable line of inquiry. It is also vital that the information provided to data controllers is specific and gives some details of how the request meets a reasonable line of inquiry. We believe this could help with timeliness as well as ensuring the requests are appropriate and protect the rights of the data subject.

In our Introduction to this consultation response, and in answer to Question 26 below, we have called for a statutory framework governing police requests for third party material, to be accompanied by a Code of Practice. We believe that this would greatly assist in filtering out disproportionate, unnecessary and (consequently) time-wasting material requests, as well as protecting victims' rights.

Section 2: Questions for providers of third party material, victim groups and victims

17. In your experience, how much third-party material is typically requested about a victim?

As demonstrated by the dossier of case examples that we have provided with this response, and set out in our introduction above, third party material sought by the police/CPS in RASSO cases can be very broad and often includes:

- Medical records;
- Therapy/counselling/mental health records;
- Educational records;
- Local authority/social services records;
- Employers' records;
- Notes kept by support services, including ISVA services;
- Records kept by a victim's legal representative (although these are typically refused because the information is of course subject to legal privilege).

Frequently, the volume of material sought is very substantial, particularly where wholesale requests are made for the entirety of an organisation's records relating to a victim. Requests are made for records pre-dating the offence; sometimes, the records will span decades. We have been particularly alarmed to receive reports of cases where requests are made for records about a victim dating back to childhood, when the offence they have reported happened to them as an adult.

We refer, for example, to Cases 4 and 5 within our enclosed Case Studies Dossier. In Case 4, the victim's full, historic medical and school records were requested (in addition to blanket access to her digital data) in a case involving sexual violence and domestic abuse. The sole basis given for requesting that material was that the suspect had denied the offence, which implied that he was questioning the victim's credibility: therefore, it was said, the police had a general duty to check through third party records about the victim for evidence that might assist the defence case that she was not credible.

In Case 5, similarly, a request was made by the CPS for all of a victim's school records, and medical records dating back to her childhood, despite the fact that she was in her late 20s when the alleged offence (essentially a stranger attack) took place.

A further, very stark example of voluminous requests being made for third party material is afforded by Case 7 within the Dossier, where a victim was given a consent form by the police in which she was asked to provide the police with blanket access to her school, medical, social services, counselling and mental health records, with no explanation of what relevant information the police were looking for or within which time period.

In Case 8, the victim had mentioned to the police that prior to the offence taking place she had been a 'looked after child'. Subsequently, she was informed that the CPS had requested disclosure of the entirety of her childhood social services records up to the age of 18. Ostensibly, the sole reason for this request was our client having mentioned that she was a 'looked after child': there was nothing relevant to the offence within the records. In Case 9 meanwhile, a request was made for a victim's entire GP records, despite the fact that the victim had never discussed the alleged offence with her GP. The sole document of relevance within her GP records was therefore a single document from the SARC, which the police could simply have obtained directly from the SARC. Nonetheless, the police insisted that it would need to obtain the entirety of her GP records. One email sent to the victim's ISVA by the officer in that case explained *'In regards to the medical records (3rd party material) we always request this as part of our investigations...'*.

Other cases featured within the Dossier demonstrate that it is not unusual for the ISVAs' own notes to be requested, which – as we have noted in answer to Question 1 – will in most cases be wholly unreasonable given that ISVAs are unlikely to discuss the details of an offence with the victim or record any such account in their notes.

It is our experience – and this may be apparent from some of the case summaries – that when blanket or vague requests for third party records are challenged by a victim's ISVA or legal representative, they are sometimes withdrawn, or substituted with a narrower, more targeted (and fact-specific) request. This rather suggests that many officers and/or prosecutors recognise that the original requests made were unnecessary. We have also seen that in some cases, police officers do not agree at all with a request that has been communicated to them by the CPS, and will 'push back', with or without success. This 'push-back' often only happens, however, when a victim's representative has questioned/challenged the request or sought an explanation. We are concerned that many victims who do not have a legal representative or even an ISVA to turn to for assistance will not know what their rights are and so either feel pressured into granting requests, however uncomfortable they feel with the level of personal information being disclosed, or disengage from the process. It is therefore imperative that (i) more is done to ensure that disproportionate requests are not being made by police and prosecutors in the first place, and (ii) victims have access to free, independent legal advice so that they are aware of their rights and can assess whether a request that has been made is lawful.

In addition to our experience, as summarised above, we refer you to the findings of the numerous reviews, investigations and inspections outlined in the introduction to this consultation response, all of which support the contention that a very large, and indeed excessive, volume of third party material is typically requested concerning victims in RASSO cases.

18. On average, how long does it take to process and answer a request for third party material?

We will leave this to providers on the frontline – and victims – to answer, but we do know that requests cause significant delays in investigations in RASSO cases.

19. Does this differ by type of investigation? We are unaware of other offences where this is a significant issue.

YES – please see answer to question 20, below.

20. If YES, please specify average time spent on processing and answering a request for third party material for:

Child sexual abuse should be included within RASSO for the purposes of this consultation as the same issues arise.

21. Thinking about those cases which are quick to respond to, how long do they take from your experience?

No answer – we are unable to answer this question.

22. Thinking about those cases that take the most time to respond to, how long do they take from your experience?

No answer – w are unable to answer this question – but please see earlier comments regarding delays.

23. In your experience, what prevents the timely return of third party material?

Notably, the records-holders to whom these requests are directed will likely have to consider their own duties to the victim under data protection legislation, and potentially (if the victim is their client or patient) also their professional/safeguarding obligations / their duty of care more generally. This may inevitably give rise to delays, to questions being raised, or to uncertain responses from the third parties in question, particularly if the information they have been provided by the police are overly broad and insufficiently clear.

We believe that judgement calls about whether or not to disclose information can be particularly difficult for professionals such as therapists/counsellors, and that there is currently insufficient guidance to assist therapists/counsellors in making such decisions. Indeed, while we welcome the CPS' recent decision to change its guidance on Pre-Trial Therapy so that victims and therapists are encouraged to prioritise the victim's need for therapeutic support ahead of a trial, we note that the CPS' new Pre-Trial Therapy guidance essentially requires therapists to make their own decisions as to the reasonableness of a request, and to assess in light of their safeguarding obligations to their client whether it is in the client's best interests or not for the information to be disclosed. We suggest that this is an impossible judgement call for therapists to make, given that they are not lawyers, and in any event that they cannot possibly anticipate what the impact will be of disclosure (or non-disclosure) on a charging decision or on the prospects of a conviction. It may also result in professionals struggling to respond to police requests in a timely manner.

Section 3: Questions for all respondents

24. Please state how much you agree or disagree with the following:

a. **Engaging in Early Advice with the Crown Prosecution Service in rape cases helps to ensure requests for third party material are necessary and proportionate, in pursuit of a reasonable line of enquiry. Select one:**
Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

We hold the view that the problem of disproportionate third party material requests is being driven in large part by the approach taken by prosecutors at the CPS, and so are not convinced that Early Advice will necessarily resolve the problem.

b. **There should be 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. Select one:**
Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

We agree that it would be a step in the right direction if a statutory framework were introduced with an accompanying Code of Practice. Equally, any such statutory duty and Code of Practice must be supplemented by regular training and guidance for investigators and prosecutors on how to approach decisions in the kinds of scenarios that typically recur in RASSO cases.

c. **There should 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. Select one:**
Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

We strongly agree that there should be this duty and that victims should be given the opportunity to give their informed agreement.

d. **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: Select one.**
Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

As outlined elsewhere this will enable the third party data controller in question to make a better decision about whether they can disclosure the information, and might also help to speed up the process.

e. **There should be a code of practice to accompany the duties outlined in points b - d to add clarity on the expectations on policing and promote consistency in practice. Select one:**
Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

We strongly agree. A comprehensive Code of Practice is needed to make clear to officers the expectation of government in this area and to reassure victims.

25. Please provide further details for your answers and responses to the policy proposals outlined in questions 15 b-e.

We have been clear that there needs to be significant change in the culture on the ground in respect of RASSO cases. This seems unlikely to be achieved through training and guidance

alone, however important that may be. Indeed, it does not seem that any of the reports that we have cited in the introduction to this consultation response – which, over a period of several years, have repeatedly raised concerns regarding excessive third party material requests – has resulted in a significant shift in the policies or practices of police forces and the CPS, which suggests that an external, and enforceable, legal framework is needed.

We believe therefore that new legislation which outlines a clear framework for requests from police for information about victims in the hands of third parties (TPM) may assist by demonstrating the Government's firm intention to bring routine, speculative 'credibility checks' to an end. The framework could look similar to the recently passed clauses in the Police Crime Sentencing and Courts Act 2022 (PCSC Act) with this important addition. The legislation should as in the PCSC Act clauses provide extra safeguards for children, vulnerable people and people without capacity. We would also urge that the Secretary of State consult victims' representatives in creating the Code of Practice. The Code of Practice should give further detail and cover how the officer will demonstrate necessity, proportionality and their reasoning in deciding to pursue this line of inquiry. It should be specific about the consequences of not following the legislation both for the individual officer and the wider legal context. It should contain detailed safeguards for vulnerable adults, children and people without capacity. The Code should also contain specific detail on what should be contained in any processing notice/ consent form and mandate that information be provided in 'easy read' and easier to read formats. It should detail support available to victims at the police station. It should also set out a review mechanism which a victim or their support worker or representative can trigger to seek a review by a more senior officer or prosecutor of whether the request is indeed a reasonable line of enquiry.

26. Are there any other actions – legislative or non-legislative – you would like to see to reduce the number of disproportionate and unnecessary requests for third party material?

As outlined in the preamble we would also like to see free legal advice and representation by a qualified lawyer for victims when their Article 8 rights are in play. We would like to see police forces and the CPS instituting review mechanisms so that problematic requests for third party material can be subject to scrutiny, at the victim's request.

In addition to any statutory framework and accompanying Code of Practice, we would like to see police forces all adopting clear and accessible consent forms/data processing notices for victims, including easy-read versions which outline to victims exactly what their rights are in this situation. These processing notices should require officers to notify the victim of specific information that they are seeking, the reasonable line of enquiry that this information relates to and why (with reference to the specific facts of the case, not just the fact that it is a RASSO case where the defence will seek to undermine the victim's credibility), the date parameters within which the information is sought, and any other parameters that they will apply in order to ensure the material disclosed to them is limited and proportionate.

Even introducing the above measures is unlikely to be truly effective unless it is reinforced by internal policies, guidance and training within police forces and, crucially, the CPS. A significant cultural change is needed so that, instead of approaching all RASSO cases with the mindset that as much private third party material should be obtained as possible in every case, prosecutors and police officers on the ground recognise the harm caused by wholesale requests and focus instead on a targeted, fact-specific approach.

Finally, we would also recommend that at a legislative level, therapeutic notes are made subject to a presumption of non-disclosure, so that victims are able to seek therapy to help with the trauma of the offence, without fear that notes of that therapy may be routinely sought by the police.