



## **Victims' Commissioner Briefing on Intrusive demands for Third Party Material in rape cases and The Police, Crime, Sentencing and Courts Bill<sup>1\*</sup>**

*“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?”<sup>2</sup>*

I am pleased that the National Police Chief’s Council (NPCC) portfolio lead for Disclosure supports the case for this change. He agrees that setting out in legislation the framework carefully drawn by Fulford LJ in the case of Bater-James (see below), to ensure that it is applied both to digital material and to access to private material in the hands of third-party, would substantially reduce unnecessary infringements on the victim’s right to privacy while preserving the absolute right of the accused to a fair trial. The police are fully committed to this for the additional reason that it would reduce delay in rape investigations by properly limiting the excessive and time intensive pursuit of victims’ material to the position that it is required only by a reasonable line of enquiry. This, it is felt by the police, would reduce the likelihood of victim disengagement, which is one of the main challenges to overcome in order to improve performance in rape investigation

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<sup>1</sup> \*See also my briefing on the digital data extraction clauses in Part 2 Chapter 3 of The Police, Crime, Sentencing and Courts Bill, where I make very similar points about unnecessary intrusion on the privacy of complainants of sexual assault and which the Government has agreed it will correct, by amending the above clauses.

I seek almost identical protection here against the equally frequent intrusion into the privacy of complainants of rape and sexual assault by requests for material in the hands of third parties. This is currently governed mainly by case law which is not followed. I hope that the Government can be persuaded to put clauses I have drafted into the Police, Crime, Sentencing and Courts Bill which would bring exactly the same protection as they now agree is needed in the case of digital download material.

<sup>2</sup> 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>

## **Background to 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 accepted amendments to clauses on this topic in the Police, Crime, Sentencing and Courts Bill (Police Bill). This will give better protection to victims everywhere whilst protecting fair trial rights and I am especially grateful to Minister Victoria Atkins for her support.

What has had less attention 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. 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 taken. The resultant invasion of privacy is immense in contravention of victim's Article 8 right to privacy<sup>3</sup>. Complainants need to be protected against these excessive demands in the same way that the Government has now agreed to protect them against excessive demands for digital download. We have drafted clauses for the Bill which will extend that protection to third party material. They are attached and we ask the Government to take them on themselves, consistent with the welcome changes they have already made.

There is an annex of case studies (Appendix A) attached to this briefing note, but I hear frequently of this 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 in the police station and who are well-regarded by the Government which has invested in increasing numbers of ISVAs in recent years.

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 to be 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 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 Practice<sup>4</sup> that material is sought only where it is a reasonable line of enquiry<sup>5</sup>.

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<sup>3</sup> Human Rights Act 1998 (legislation.gov.uk)

<sup>4</sup> <https://www.legislation.gov.uk/ukpga/1996/25/section/3>

<sup>5</sup> Para 3.5 of

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447967/code-of-practice-approved.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf)

This was confirmed in the case of Bater-James<sup>6</sup> 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*<sup>7</sup>, 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*”<sup>8</sup>. Blanket requests, where there is no specific reason arising from the facts of the individual case, do not meet this test.

However, the above experience of ISVAs and others together with the annexed case histories and abundant other evidence makes clear that the case law 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. Statute<sup>9</sup> and case law<sup>10</sup> 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 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. This appears to be driven by the Crown Prosecution Service<sup>11</sup>. If the tests in the CPIA Code of Practice<sup>12</sup> and in the cases of Bater-James and Alibhai<sup>13</sup> 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 these police participants was that the CPS were often unwilling to consider cases without this information despite concerns of the police and the victim that the information was not relevant to the investigation.<sup>14</sup>

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<sup>6</sup> Ibid. 3

<sup>7</sup> *R v Alibhai and others* [2004] EWCA Crim 681

<sup>8</sup> 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

<sup>9</sup> Data Protection Act 2018: <https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>

<sup>10</sup> Bank Mellat v Her Majesty's Treasury (No 2): <https://www.bailii.org/uk/cases/UKSC/2013/39.html>

<sup>11</sup> *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

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/994817/rape-review-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994817/rape-review-research-report.pdf)

<sup>12</sup> Ibid. 2

<sup>13</sup> Ibid. 3 & 7

<sup>14</sup> *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 pages 56 & 67

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/994817/rape-review-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994817/rape-review-research-report.pdf)

The intrusion is a major reason why many complainants withdraw from pursuing their case<sup>15</sup>, 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.

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 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 would argue that the drop in rape charges is inextricably linked to the endless pursuit of requests for personal information about victims. Now even the smallest potential imperfection of the character of a victim unearthed in this way will result in a decision not to charge. Many such pieces of information that emerge would be ruled inadmissible if the defence tried to rely on them, but there is no opportunity to test their relevance as the case is closed.

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 behaviour in some unconnected area. This will be done without any notice that something perhaps very intimate or from their long-ago past history is to 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 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 but in practice this doesn't always happen<sup>16</sup>.

This 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*, where he recommended a government review of these practices.<sup>17</sup> Referring to the spectacle he witnessed of vulnerable victims being cross examined about their social services, school and medical records, he writes:

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<sup>15</sup> 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.

<sup>16</sup> [Seeing is Believing - Archived Northumbria Police & Crime Commisisoner \(northumbria-pcc.gov.uk\)](#)

<sup>17</sup> [Final JSCR Report 160218 PW.PDF \(newcastle.gov.uk\)](#)

*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 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 abandons any victim unless they are faultless in all respects. Very few of us would be in that category. The CPS refusing to charge is the predominant current outcome indicated by the hopelessly low prosecution rate. Similarly, we cannot permit where charges are brought that witnesses who are likely already to be vulnerable be hijacked as described by Mr Spicer, by being cross examined on the basis of records delivered to the defence by the Crown Prosecution Service from years ago.

Wide searching of personal history and cross examination of this intrusive kind whilst routinely undertaken in respect of victims is not normally conducted in respect of the defendant, indeed this unique situation is outlined in the recent (July 2021) HMCPSP and HMICFRS joint inspection report<sup>18</sup> on Rape:

*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. It undermines public confidence and reinforces perceived barriers to accessing the criminal justice system. This mindset must change away from finding areas or elements that may weaken the case, and instead towards problem-solving to build strong cases from the outset.*

These findings echo what I have heard too, the suspect is not subject to anywhere near the same levels of scrutiny, he is not expected to hand over his mobile phone<sup>19</sup>,

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<sup>18</sup> [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 \(justiceinspectorates.gov.uk\)](https://www.justiceinspectorates.gov.uk/cps/cps-report-to-police-or-cps-decision-to-take-no-further-action/)

<sup>19</sup> Although police do technically have the power to seize a suspects phone this happens rarely especially in rape cases.

nor to surrender any third-party materials such as social services, medical and school records. In fact, he is afforded greater protections in this regard.

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. Amongst many others I sent views to their consultation on draft guidance last year. Nothing has been published.

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 she says 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, 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.

Despite case law, legislation and guidance<sup>20</sup> 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.

CPS lawyers told the Government researchers for the End to End Rape Review about disclosure practices and '**described the importance of obtaining as much digital and third-party evidence as possible in all cases to ensure prosecutors could make robust charging decisions.**'<sup>21</sup> 'In all cases' of rape will include stranger rapes, where it is hard to see how any of the complainants' personal data is likely to be relevant to a reasonable line of inquiry. In fact, police officers also told researchers their '**perception that the CPS had changed the expectations of what should form part of a rape investigation which was driving the increase in the amount of digital and third-party material required. They felt that requests for third-party and digital evidence had become a standard CPS request for all rape cases rather than specifically for cases where there was a direct link to the incident, with CPS lines of enquiry described as being too broad and a 'fishing expedition'**'<sup>22</sup>

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<sup>20</sup> *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

<sup>21</sup> *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 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/994817/rape-review-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994817/rape-review-research-report.pdf)

<sup>22</sup> *Ibid.*



The CPS inspectorate's (HMCSI) 2019 rape inspection found around 40% of CPS requests for data and third-party material were not proportionate<sup>23</sup>. A CPS internal report (as yet unpublished and not disclosed to HMCSI during its inspection) showed that almost two-thirds (65%) of rape cases referred by police to the CPS for early investigative advice (EIA) involved prosecutors demanding 'disproportionate' and 'unnecessary' requests for information.<sup>24</sup>

In Northumbria there was a pilot of Sexual Violence Complainants' Advocacy (SVCAS) from September 2018 until December 2019. The scheme 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<sup>25</sup>. The pilot demonstrated what was happening in practice in that force. The lawyers involved together with many police officers told the scheme pilot evaluation (SVCAS) about excessive requests. The report found 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.

Police participants in the advocacy scheme 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, 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 has recently 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 21<sup>st</sup> June 2021<sup>26</sup>:

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<sup>23</sup> Paragraphs 5.22 and 5.52

<https://www.justiceinspectorates.gov.uk/hmcsi/wpcontent/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf>

<sup>24</sup> Leaked to and reported in the Guardian, March 2020 <https://www.theguardian.com/law/2020/mar/15/cps-failed-to-tell-inspectors-of-internal-review-revealing-case-failings>

<sup>25</sup> *Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme*, Dec 2020, Olivia Smith & Ellen Daly:

<https://needisclear.files.wordpress.com/2020/11/svca-evaluation-final-report-1.pdf>

<sup>26</sup> [End-to-end Rape Review - Monday 21 June 2021 - Hansard - UK Parliament](#)

*'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'*

In Appendix A there are some quite startling examples of the level of intrusion victims are being asked to bear.

It seems from the evidence above that these practices have become cultural. It is imperative to put clearly on the face of the Bill 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 general criminal justice 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. 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, as stated above the police lead for disclosure agrees with me.

Indeed these clauses 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.

### **What am I proposing?**

In my briefing on the digital extraction clauses, I proposed amendments to the Government's bill clauses (Chapter 3 clauses 36-42) which put protections for the victims (and witnesses) Article 8 right to privacy on the face of the legislation. The Government has seriously considered what I have proposed and now intends to incorporate these amendments into the current bill.



In respect of material in the hands of third parties, there are no Government clauses proposed but the argument for regulation and protection is identical. I am proposing a set of mirror clauses to go into the Bill (Appendix B) which essentially give that same protection when that is the material being sought. I would expect that if the Government acknowledges this need for equivalent protection, they would find clauses similar or in identical terms to these to be acceptable.

Additionally, as I have requested in respect of digital disclosure, although as yet not adopted by Government I assert that those being asked for such third-party material be given the opportunity of free and independent legal advice.

For Further information please contact my office  
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## **Appendix A – Case Studies**

**Case 1** As a Police and Crime Commissioner in the area at the time David Spicer (cited above) elaborated to me on an aspect of a cross examination witnessed by him as part of his review process.

It was a case where a letter to school in which a rape complainant had forged her mother's signature to get out of a lesson she did not like was considered by police to be 'relevant' disclosed to the defence and used in cross examination. There would be no place for such material in a test of what was a reasonable line of inquiry into the rape of which she complained approximately ten years later.

The victim in question also provided Mr. Spicer with a powerful quote about this experience for his review<sup>27</sup>:

*"You should not be questioned about stuff outside the time zone for the case.*

*For me, some of it was years ago. For some it's new and fresh. You can put it at the back of your mind.*

*I was questioned about a note for school asking for absence when I forged my mother's signature years before. Afterwards I cried. I was in a catatonic state for a day.*

*I felt that I was on trial. He hated me. Said I preyed on older men (I was 15/16). Said I had done something like this before – i.e. made complaints that were lies.*

*There were not guilty verdicts.*

*It put me off ever giving evidence again. I would not do it."*

The following case studies from the Centre for Women's Justice illustrate the depth of the problem.

### **Case 2 -Blanket request for social services records of a woman who was previously a looked after child**

*A survivor 'Emma' was asked for her social services records she asked the ISVA to help with this request which seemed unreasonable*

*The ISVA reported:*

*CPS have requested social services records as they say it is a reasonable line of enquiry. The client wanted to understand why these were relevant before she could decide whether to consent. She stated that she has absolutely nothing to hide, however she was a looked after child and the records contain her whole personal life history up until the age of 18. There was nothing relevant to the offence in the records and it seems that the only reason they asked for them was because she had told them she was a looked after child.*

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<sup>27</sup> Ibid. 6 at page 138

*I had emailed the OIC to ask her to explain why it is that they want social services records – what relevant evidence they believe they may contain – because the client needs this information so she can consider if she would consent. This was her response: “That is CPS’ decision but it would be to review records and see if there is any material that would assist or undermine the case”.*

### **Case 3 - Blanket request for all records**

*A young survivor ‘Alisha’ was asked for consent to access all her records, her ISVA reported:*

*I am supporting a young woman who just made a report to the police and she received an extremely vague consent form that asks to access school, medical, social services, counselling, mental health records with no explanation of what they will be looking for or within what dates, only the names of the schools/services. I challenged this, the officer provided an example as to why he would need to access school records and only offered the following about who will access the data and how it will be stored: ‘Any information in this case will be confidential and will only be shared with parties who are concerned in safeguarding vulnerable people.’*

## Appendix B -Proposed clauses

New clauses:

(1) Subject to Conditions A to E below, insofar as applicable, an authorised person may request information in the possession of a third-party if-

(a) the subject of the data has agreed to the request being made.

(2) Condition A for the exercise of the power in subsection (1) is that it may be exercised only for the purposes of—

(a) preventing, detecting, investigating or prosecuting an offence

(3) Condition B for the exercise of the power in subsection (1) is that the power may only be exercised if—

- (a) the authorised person reasonably believes that information stored by a third party about the data subject is relevant to a purpose within subsection (2) for which the authorised person may exercise the power, and
- (b) the authorised person is satisfied that exercise of the power is strictly necessary and proportionate to achieve that purpose.

(4) For the purposes of subsection (4)(a), information is relevant for the purposes within subsection (2)(a) in circumstances where the information is relevant to a reasonable line of enquiry and likely to meet the disclosure test.

(5) Condition C as set out in subsection (7) applies if the authorised person thinks that, in exercising the power, there is a risk of obtaining information other than information necessary for a purpose within subsection (2) for which the authorised person may exercise the power.

(6) Condition C is that the authorised person must, to be satisfied that the exercise of the power in the circumstances set out in subsection (6) is strictly necessary and proportionate, be satisfied that there are no other less intrusive means available of obtaining the information sought by the authorised person which avoid that risk

(7) Condition D is that the data subject who has given agreement under subsection (1)(a) was offered free independent legal advice on issues relating to their human rights before that agreement was given.”

(8) Condition E is that an authorised person must have regard to the code of practice for the time being in force under section [Code of practice] in accordance with section [Effect of code of practice] below.

(9) In this section and section [Application of section [Requests for third party material] to children and adults without capacity]—

“adult” means a person aged 18 or over;

“authorised person” means a person specified in subsection (1) of section [Application of section [Requests for third party material] to children and adults without capacity] (subject to subsection (2) of that section);

“child” means a person aged under 18;

“agreement” means that the data subject has confirmed explicitly and unambiguously in writing that they agree—

(a) to the request for disclosure of specific material by a third party.

Such an explicit written confirmation can only constitute agreement for these purposes if, in accordance with the Code of Practice issued pursuant to section [Effect of code of practice], the data subject—

(i) has been provided with appropriate information and guidance about why the request is considered strictly necessary (including, where relevant, the identification of the reasonable line of enquiring relied upon);

(ii) has been provided with appropriate information as to (a) how the data will or will not be used in accordance with the authorised person’s legal obligations and (b) any potential consequences arising from their decision;

(iii) has confirmed their agreement in the absence of any inappropriate pressure or coercion;

(iv) has been provided with and signed the legal notice issued by the College of Policing for use by authorised persons seeking such material.

“third party” means any organisation, agency, body, individual or authority which holds information about the data subject;

“data subject” means any person who may have information stored about them by a third party and could include victims of crime, witnesses to crime and others coming into contact with authorised persons.

“information” includes moving or still images and sounds such as documentary footage;

“offence” means an offence under the law of any part of the United Kingdom;