

Solace submission to Home Office consultation on third party material

About Solace

Solace Women's Aid (Solace) is the leading provider of violence against women and girls (VAWG) services in London and one of the largest single providers in the UK supporting around 30,000 survivors a year.

One of the services we provide is North London Rape Crisis (NLRC), one of the four rape crisis centres in London. NLRC encompasses:

1. A helpline

A free, anonymous service available to women and girls aged 13+ who have experienced any form of sexual violence at any time: recent or non-recent. Through the helpline we provide specialist emotional support and confidential information about options and services available. We also provide support and advice for the friends and family of survivors, as well as professionals working alongside them.

2. Counselling

One to one counselling with specialist, trauma-informed counsellors usually between six and sixteen sessions. We also provide pre-trial counseling for survivors pursuing a criminal justice outcome, and specialist friends and family counselling.

3. Group work and body therapies

We run various groups and body therapies throughout the year including therapeutic group sessions, creative therapy groups and yoga and trauma release exercise groups.

4. Advocacy

Our Independent Sexual Violence Advocates (IDVAs) are specialist advocates with specific knowledge around the Criminal Justice system (CJS) as it relates to rape and other sexual offences. ISVAs provide initial information and ongoing support to women who have experienced sexual violence at any point in their lives who are considering reporting the experience to police and going through the CJS.

We welcome the opportunity to respond to this important consultation on addressing the issues with third party material requests particularly as they relate to sexual offence investigations. However, we echo the concerns raised by the Victims Commissioner and others about the scope of the consultation which aims to understand more about the "highly intrusive, disproportionate or even unnecessary" requests for information and evidence that is routinely requested by investigating officers in sexual violence and rape cases.

As set out by the Victims Commissioner, there have been several independent reports on these issues including the joint report on rape from the inspectorates for the police and crown prosecution service HMICFRS and HMCPSI, the Information Commissioner's Office report which called on the criminal justice system to stop collecting excessive amounts of information and the Government's own End to End Rape Review which described CPS prosecutors requesting "as much digital and third-party evidence as possible".

The consultation sets out that section 1 should be answered by law enforcement, prosecutors and defence lawyers however some of the questions are relevant to our service users so we have answered all relevant questions in each section.

Section 1

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

At the moment, all of these materials are treated as third party material and requested by the police. However, ISVA notes and pre-trial therapy notes should not be included and we will always challenge such requests as counselling is a therapeutic not investigative process

ISVAs are trained to maintain boundaries and do not discuss details of the alleged offence or anything that could be considered evidence. Likewise, pre-trial therapy is specifically designed to support victim/ witnesses by providing skills and support to manage the impact of trauma including symptoms such as anxiety and panic attacks. The therapy intentionally avoids beginning the process of addressing the incident. Very occasionally specific records may be relevant but never the full records.

However, our experience is that it is often requested to find any evidence that may undermine the credibility of the witness rather than to establish the facts and build a case against the alleged perpetrator. For example, we have had a case where education records were requested and then a single incident of the witness cheating on a school exam was said to undermine the reliability of her testimony years later.

We also find that police will routinely request notes from our ISVAs to, as one ISVA said, "chance their arm" that the recipient is not as experienced as to know that they should not do this. Due to the volume of requests, we have had to develop template responses to these requests as well as to requests for counselling notes that are unspecific and again feel like a "fishing" exercise rather than looking for specific time period or incident.

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

As we work with victims and families our experience is that third party evidence is requested from victims.

3. In what types of investigations do you request third party material? Check all that apply.
- Rape and Sexual Offences (RASO)
 - Domestic Abuse
 - Child Sexual Exploitation
 - Assault or Violent Crimes
 - Homicide
 - Economic Crime
 - Drug trafficking
 - Acquisitive crime
 - Modern slavery
 - Other (please specify)

As we do not support victims and survivors of all these crime types we have not responded to this question.

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? Select one response.
- <25%
 - 26 – 50%
 - 51 – 75%
 - 76 – 100%
5. Why is third party material requested? Select one response and include additional information if needed.

- To support or refute a reasonable line of enquiry
- It is a routine request/internal policy to do so in certain types of investigation
- Asked to do so by a supervisor or colleague
- Asked to do by the CPS or other external party
- Other/additional information

Our experience is that the police routinely request third party material assuming that the CPS will require them to have done so in order for them to reach the CPS threshold to press charges, and if victims/survivors refuse it can delay cases further.

6. How do you decide what and how much material to request from third parties? Select one response and include additional information if needed.
- All potentially useful material is requested in case it is needed
 - Lines of enquiry are considered, and specific material is requested to support or refute them
 - Other/additional information

As set out above, our experience is that all third party material is requested and victims are often told that their case will be dropped unless they agree to these sweeping requests.

7. In your view, what are unnecessary and disproportionate requests for third party material driven by? Check all that apply.
- a. Police lack the necessary training and expertise
 - b. Police predict that the CPS will require a lot of third party material and therefore request an unnecessary/disproportionate amount
 - c. The CPS ask for an unnecessary/disproportionate amount of third party material via the police
 - d. Defence lawyers ask for an unnecessary/disproportionate of third party material via the police
 - e. Requests take a long time to be fulfilled and so all possible material is requested in case it is needed
 - f. Requests are always necessary and proportionate
 - g. Other/additional information

We do not have direct contact with the CPS prior to a charging decision, but our ISVAs are often informed by investigating officers that unless they can show the CPS that they have requested and assessed extensive third party material related to the victim, the CPS will not press charges.

So few cases make it as far as going to trial particularly with the current backlogs (which are leading to victims dropping out) so it is hard to assess how much comes from defence lawyers, however we have had cases where counselling notes and other materials were requested on the day of the trial and the advocate working with the victim has had just hours to obtain the materials or face the prospect of the trial being delayed again at the point when the victim has psychologically prepared herself to testify.

We know that it can sometimes take a long time for requests for third party material to be returned. In this section, we would like to understand more about this, including why material can take a long time to be returned and what kinds of solutions could be appropriate to mitigate this.

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

It can often take up to six months and sometimes longer, depending on the type of records being requested. For example, the family courts tend to take longer than GPs. When victims have the support of an ISVA that can be in part because of the time it can take to agree the parameters.

9. Does this differ by type of investigation? Select one.
- a. Yes
 - b. No

As we do not support victims and survivors of all these crime types we have not responded to 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

As we do not support victims and survivors of all these crime types we have not responded to 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

We are often told by the police that there are delays to cases because of delays in third party material being shared. As set out above, we often push back on requests and ask for greater specification and we are aware that this happens with other third parties as well, particularly GPs, for example, who tend to be very sensitive to data requests in general.

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

It can take longer because third parties including for example our ISVAs, will challenge the requests when they are not specific enough or do not explain the purpose of the request. Where we receive requests that have been demonstrated to be relevant to a reasonable line of enquiry, we aim to respond within two weeks.

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.

- a. Yes
- b. No
- c. Other/additional information

N/A

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

15. How far do you agree with the following statements (Strongly agree to Strongly disagree):

- a. Delays in returns for third party material is a significant single factor in slowing down an investigation. Neither agree nor disagree
- b. When third party material is requested early in an investigation, it is less likely to cause a delay. Neither agree nor disagree

These are down to the police to respond to, but it is our experience that delays often occur when requests are excessive, non-specific and unreasonable.

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?

The approach to digital data requests has improved in London and we would welcome a similar approach to third party material. The Digital Processing Authorisation Form now used breaks down very clearly how the police will use the data, the timeframes they are requesting and how long they will keep it for.

Every victim going through the criminal justice process should have access to specialist support, and in the case of RASSO cases this will usually be an ISVA. The Government should enshrine that right in the forthcoming Victims Bill.

We support the recommendation made by the Centre for Women’s Justice, EVAW, Imkaan and Rape Crisis England and Wales in their November 2020 report on the decriminalisation of rape, calling for counselling and therapy notes to be non-disclosable giving them the same status as professional legal advice. Any risks around coaching can be mitigated by the accreditation and regulation of counsellors providing this support to victims/survivors. This model is also supported by the Victims Commissioner, who has highlighted the practice in Australia where they also have an adversarial justice system.

We also support the recommendation from the Victims Commissioner and the Centre for Women’s Justice that Victims must be provided with free legal advice and representation by a qualified lawyer when their Article 8 rights (respect for your family and private life) are engaged. The pilot scheme in Northumbria proved to be overwhelmingly positive, with advocates challenging data requests in 47% of cases and victim/survivors’ confidence and understanding of the criminal justice system improving alongside their ability to cope with the mental health impact of dealing with the system. The Centre for Women’s Justice has been providing free legal advice to ISVAs and their clients, including ours, for over three years and has seen a steady increase in requests, indicating a widespread need for this service.

Section two

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? Select one response and include additional information if needed.
- a. None
 - b. Requests seem to be specifically tailored to reasonable lines of enquiry for the investigation
 - c. A lot of material is requested that doesn't seem to relate specifically to the alleged offence
 - d. Other/additional information

The police routinely request third party material assuming that the CPS will require them to have done so in order to press charges, and if victims/survivors refuse it can delay cases further. Even when the CPS provide early advice on cases, it is often very general advice and doesn't often reduce the amount of material requested by the police.

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

We aim to respond within two weeks, but where the request is specific and reasonable it can be shorter.

19. Does this differ by type of investigation? Select one.
- a. Yes
 - b. No

As we do not support victims and survivors of all these crime types we have not responded to this question.

20. 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

As we do not support victims and survivors of all these crime types we have not responded to this question.

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

Where the requests are very specific it can take under a week, though this is rare.

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

Up to around a year.

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

- a. There is no-one trained to handle such requests
- b. The requests are unclear and need to be clarified before they can be completed
- c. The requests are for a large quantity of documents and therefore take a long time to fulfil
- d. Other/additional information

Our ISVAs often challenge the amount of third party material being requested - which the victims they work with need to give consent for - because requests are so sweeping.

We challenge on the basis of the case not being made that the requests are part of a reasonable line of enquiry but this can prolong what is already a lengthy process. If a woman refuses to disclose third party notes the case can be delayed by another year. Frustratingly, the requests have often been made before survivors have been referred to us, so we also spend time challenging requests made at the point of reporting.

We also find that some third parties take longer to respond, the Family Court can be one of the longest.

Section three

Questions for all respondents

Police should only be requesting third party material when necessary and proportionate, in line with a reasonable line of enquiry. This is clearly laid out in the Criminal Procedure and Investigations Act (1996) and the Attorney General's Disclosure Guidelines. However, we are aware that this approach is not consistently followed. We want to avoid disproportionate requests for information about victims that constitute 'fishing expeditions' where the purpose is to explore whether or not the victim is credible.

24. Please consider whether you think the proposals below would help to address these issues. If there are any other solutions you would like considered, you can outline these in the final question of this section. (From strongly agree to strongly disagree)

- 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.

Neither agree nor disagree

- 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

- 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

- 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

- 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

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

Early advice from the CPS is not helpful where it is the CPS driving the requests for third party material – we find that the process can be opaque and that police will make speculative requests after seeking early advice. They rarely pushback on this from the CPS so it is down to us to do that.

Our experience is also that the early advice given is very general and often months into the investigation and so not as helpful on individual cases. The advice should be obtained when the police have accounts from both the victim and the suspect and it would be helpful to have some consistency with the prosecutor so that the same person who gives the early advice makes the decision over whether to prosecute.

The statutory duty should be underpinned by a code of guidance that also makes clear what should happen to data and material that is not directly relevant. Victims we work with are concerned about where their data is stored and who has access to it and we can find that officers are fairly dismissive about those concerns. There should be more consistency between forces, some use different forms for example, or don't follow forms and just request material by email. The code should also ensure that victims are signposted to support when the police make third party requests.

The approach to digital data requests has improved in London and we would welcome a similar approach to third party material. The Digital Processing Authorisation Form now used breaks down very clearly how the police will use the data, the timeframes they are requesting and how long they will keep it for.

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 guidance 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 and be available in the language spoken by the victim or witness. It should detail support available to victims at the police station.

The CPS need to be involved in the development of the code to ensure consistency in its application.

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 set out above, the approach to digital data requests has improved in London and we would welcome a similar approach to third party material. The Digital Processing Authorisation Form now used breaks down very clearly how the police will use the data, the timeframes they are requesting and how long they will keep it for.

Every victim going through the criminal justice process should have access to specialist support, and in the case of RASSO cases this will usually be an ISVA. The Government should enshrine that right in the forthcoming Victims Bill.

We support the recommendation made by the Centre for Women's Justice, EVAW, Imkaan and Rape Crisis England and Wales in their November 2020 report on the decriminalisation of rape, calling for counselling and therapy notes to be non-disclosable giving them the same status as professional legal advice. Any risks around coaching can be mitigated by the accreditation and regulation of counsellors providing this support to victims/survivors. This model is also supported by the Victims Commissioner, who has highlighted the practice in Australia where they also have an adversarial justice system.

We also support the recommendation from the Victims Commissioner and the Centre for Women's Justice that Victims must be provided with free legal advice and representation by a qualified lawyer when their Article 8 rights (respect for your family and private life) are engaged. The pilot scheme in Northumbria proved to be overwhelmingly positive, with advocates challenging data requests in 47% of cases and victim/survivors' confidence and understanding of the criminal justice system improving alongside their ability to cope with the mental health impact of dealing with the system. The Centre for Women's Justice has been providing free legal advice to ISVAs and their clients, including ours, for over three years and has seen a steady increase in requests, indicating a widespread need for this service.