Police Requests for Third Party Material[1] In Criminal Proceedings

– Government Consultation –

A Response by the Criminal Bar Association RASSO[2] Group

August 2022

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association, and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our

[1] TPM

[2] A specialist CBA Group of expert Barristers who Defend and Prosecute the most serious RASSO cases from across England and Wales;.

practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

4. It is essential to understand that **the CBA does not concur with the findings and recommendations of the Rape Review in many respects, in particular in relation to third party disclosure**. They are based upon methodology which does not yield reliable results, merely impressionistic and unverifiable generalisations by groups of consultees which varied enormously in their size. For example, there were no focus groups conducted with CPS RASSO prosecutors, who were not given the opportunity **to respond to allegations by police respondents on this and other topics. Accordingly, the CBA does not accept the premise of this consultation that third party disclosure requires review beyond the intensive one it has already received, since the Rape Review Gap report was issued and doubtless taking it into account, by the Attorney General. This resulted in the Attorney General's Guidelines being issued in December 2020, replacing those issued in 2013. The required review under the CPIA Code of Practice Order 2020 has already taken place.**

5. The Government have issued a consultation document on the subject of Third-Party Material (TPM) sought by Police in Criminal investigations.

   The consultation period began on the 16th June 2022 and ends on the 11th August 2022.

   In the Ministerial Forward the Minister for Safeguarding, Rachel Maclean MP, suggests that requests by Police for Third Party material held by those other than the Prosecution are not always dealt with appropriately stating that:

   > "…sometimes requests are made for too much or unnecessary information, and this can make the victim feel like they are the one under investigation. This can be especially challenging for victims of rape and sexual assault where the material requested is often very sensitive…. requests for third party material can contribute to slowing them (investigations) down…".

6. The Minister goes on to state that a *'victim'* reporting a crime needs to feel confident that their privacy will not be <u>unnecessarily</u> invaded and that delay will not be occasioned by such requests adding to the length of the investigation and prosecution.

   The consultation seeks to gather data and information for a clearer understanding of the issues. The consultation is to be used for the Government to "…evaluate potential new duties on Police which would be designed to ensure that Police requests for third party material are made appropriately…"

Comment and discussion

Introduction

7. The starting point for our response must be the legal framework into which the duty to seek TPM operates. By way of introductory comment, however, we wish to raise several matters you have not considered, to dispel the myths about third party disclosure:

   (a) TPM sought by the Police or Crown Prosecution Service often discloses information which assists the Prosecution's case; it is not sought solely to assist the defence.

   (b) TPM which is sought and obtained by the Police or Crown Prosecution Service will not inevitably be disclosed to the defence; rather it must be carefully assessed, and if the prosecution decide not to use it as part of its case, it will be disclosed to the defence (as unused Material) only if it meets one of the binary tests in the CPIA for disclosure: that it is (a) capable of undermining the prosecution case or (b) capable of assisting the defence case.[3]

   (c) The assertion in the Ministerial Forward that requests are made for "too much or unnecessary information" is incapable of being empirically verified. It suggests that the Police, Crown Prosecution Service and the Courts are not complying with the law governing TPM on a wide scale by making requests for too often, or for unnecessary information, is not the experience of barristers who frequently prosecute and defend RASSO cases.

   (d) The proposal in the Consultation to introduce a requirement that a request to a third party for disclosure be "necessary and proportionate" is already the law; it appears in the Attorney-General's Guidelines 2020 paragraph 13.a, expressed in stronger terms ("***strictly necessary and proportionate***"), which reflects caselaw under ECHR Articles 6 and 8 and the Human Rights Act 1998. Therefore, the proposed reform is itself not necessary, and could have unintended consequences in actually *lowering* the bar for seeking TPM.

   (e) There is no obligation under the CPIA for third parties to reveal or hand over material that they hold at the request of the police without a Court order. It will be for the court then to evaluate whether the request meets the legal requirements set out below.

[3] CPIA 1996 s3 – Requires the Prosecutor to disclose previously undisclosed material to the accused if it might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused.

The Legal Framework

8. The principal duty of the police and the Crown Prosecution Service is encapsulated in the Criminal Procedure Rules Rule 1.1, which states that the Overriding Objective of the CJS is to ensure that criminal cases are conducted "justly". The Rule goes on to define dealing with the criminal case "justly" includes (a) acquitting the innocent and convicting the guilty; (b) treating all participants with politeness and respect; (c) dealing with the prosecution and the defence fairly (d) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights.

9. Disclosure by the Crown to the Defence of relevant material which meets either of the twin tests set out in the Criminal Procedure and Investigations Act 1996 is paramount to the fair conduct of criminal proceedings.

10. Paragraph 3.5 of the Criminal Procedure and Investigations Act (CPIA) 1996 Code of Practice and paragraphs 17 and 27 of the AG's Guidelines 2020: Disclosure for Investigators, Prosecutors and Defence Practitioners require investigators to pursue, "**all reasonable lines of enquiry**", "**whether these point towards or away from the suspect"**. The CPIA and the AG Guidelines "make clear the obligation on the investigator to pursue all reasonable lines of inquiry in relation to material held by third parties within the UK" (AG Guidelines paragraph 27). In exercising their disclosure function, investigators must approach the investigation with a view to establishing what actually happened, being "fair and objective" (AG Guidelines paragraph 15).

11. A fair investigation is not endless nor indeterminate, it is by definition exploratory, and must be legally compliant with the CPIA Code of Practice, AG's Guidelines, and Articles 6 and 8 of the European Convention on Human Rights/Human Rights Act 1998 – caselaw under the ECHR protecting the rights of complainants as well as defendants in this respect.

12. It is essential to understand that this is the *investigation of crime by the state*. There may be a tension in a particular case between Article 6, the right to a fair trial, and Article 8, the right to privacy. The AG Guidelines go into great detail in explaining how such interests are to be balanced. Of paramount importance is Guideline 13(h):

> *Where there is a conflict between both of these rights {Articles 6 and 8], investigators and prosecutors should bear in mind that the right to a fair trial is an absolute right. Where prosecutors and investigators work within the framework provided by the CPIA, any unavoidable intrusion into privacy rights is likely to be justified, so long as any intrusion is no more than necessary*.

13. There are also many sources of law that assist Police and Prosecutors with the obtaining of TPM pursuant to the CPIA and the AG's Guidelines:

    Criminal Procedure Rules

Criminal Practice Directions

CPS Legal Guidance on Disclosure of Material to Third Parties (updated February 2021)

Case Law

The issue of witness summons against third parties for production of material.

Police and Criminal Evidence Act 1984 (s8 Sch 1)

14. Relevance, strict proportionality and the scope of TPM are the principles by which such matters are undertaken. In the first instance the Police in their investigation are charged with the duty to gather evidence and other qualifying material which will form part of the Prosecution case in one form or another. The CPIA 1996, AG's Guidelines, other legislation, Regulations and the Criminal Procedure Rules all impose duties on the Police to act fairly in their information gathering. The CPS are under a duty to provide advice about disclosure, and where necessary probe actions being taken by the investigator to ensure that disclosure obligations are being met, including advice on potential further reasonable lines of inquiry; "there should be no aspects of an investigation about which prosecutors are unable to ask probing questions" (AG Guidelines paragraph 24).

15. The AG's Guidelines, paragraph 38, provide that, if an investigator, disclosure officer or prosecutor believes that third party possesses material or information which may be relevant to the case, reasonable steps should be taken to secure and consider the material where it appears that such material exists and it may be relevant to an issue in the case. "*Relevance*" is defined in the Guidelines as "material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that has *some bearing* on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case" (CPIA Code 2). Where privacy considerations are concerned, the investigator must consider what is the least intrusive method which could nonetheless secure relevant material, including potentially from alternative sources (AG Guidelines paragraph 13).

16. Relevance is the clear guiding principle in seeking material. Detailed information from a party seeking disclosure will assist the reviewer in making informed decisions as to whether the material is relevant and meets the twin tests for disclosure under the CPIA 1996.

17. The rationale for pursuing the reasonable line of inquiry and the scope of the review necessitates should be "*open and transparent*", and "*capable of articulation* by the investigator making the decision", to provide the basis for consultation with the prosecutor, engagement with the defence, and provision of information to the witness about how their material has to be handled (AG Guidelines paragraph 13(e)). So, the

legal framework has been carefully constructed to ensure that the proverbial fishing expedition is unlawful, and in our experience it does not happen.

18. Paragraph 38 suggests consideration of the following sources:

    Local Authorities,

    Social Service Departments,

    Hospitals,

    Doctors,

    Schools

    Provider of Forensic Services

    CCTV operator etc,

19. On occasion, and here it needs to be emphasised that it is **relatively rare**, it will be necessarily for Police to approach third Parties, often those related to Education, Health, life background (e.g. Social Services, Children's Homes etc) in order to comply with investigation and disclosure duties.

20. In some cases, third parties request that the police first obtain, as a condition of production, a Witness Summons issued by a court. More often, organisations, which are used to receiving such requests have protocols in place agreed between the Police, CPS and Court to govern requests and responses to produce TPM.

21. It needs to be understood that just because Police do seek TPM and obtain it, it does not follow that it will fall to be disclosed to the defence. There are at least two "bodies" intervening in reviewing and determining whether material will be disclosed.

22. The CPS and prosecution Counsel have a *continuing duty to review* all material gathered by the Police in an investigation to fulfil their duty to ensure a fair trial, fair to all. As the "*Minister of Justice*"[4] in a case, prosecution Counsel has the overriding duty to act fairly with regard to the provision of material to be disclosed to the Defence. Experience suggests that the Crown, encompassing all parts of the prosecution 'Team', are more likely to be cautious with regard to the material being disclosed, and are frequently required by the Judiciary on legal applications[5] to disclose material to the defence for relevance and assistance.

[4] A term frequently used by Judges, meaning that Prosecution Counsel have the ultimate responsibility to assist the Court in delivering a fair trial and who must be even handed in their dealing with the Crown and defence. This is in accordance with the Farquharson Principles under which prosecution counsel operate (see https://www.cps.gov.uk/legal-guidance/farquharson-guidelines-role-prosecuting-advocates).

[5] See Section 8 of the CPIA 1996 where the defence make legal challenges to the material to be disclosed, more often seeking wider disclosure than the Crown has been willing to make.

Basis for the Concern about Third Party Material Requests:

Issues raised in this consultation.

23. To reiterate our initial headline point: the reported research as part of the Rape Review[6] wherein participants reported a *perceived* increase in requests for TPM, is completely uninformative and unreliable, given the lack of any statistical baseline about the rate and nature of requests in the past compared to the rate and nature of requests made currently, from which to draw conclusions across a range of bodies to whom TPM requests may have been made. It is even more perplexing how one complainant might understand the range of requests made by Police in their case compared to other complainants, and in other cases. This is anecdotal reportage which has not been evaluated, much less stress-tested, against basic techniques of empirical research by one or more independent referees as is standard for empirical research prior to publication. For this reason, the Criminal Bar Association's representatives on the Rape Review declined to endorse the methodology and conclusions of the research prior to its publication. The Opinion of the Information Commissioner is also based entirely on unverifiable hearsay reports and assumptions that third party disclosure requests are excessive.[7]

24. Expressions condemning the police for such requests, implying they are acting illegally, as, "*sometimes*" or "*might*" do not assist with what is actually happening.

25. Perceptions of behavior based on small numbered focus groups extrapolated into "public concern" does not give an accurate picture nor can it serve as a sound evidence base for policy making, or new legislation limiting police investigative action and obscuring fairness in the trial.

26. Time and again, whether in recent or historic sexual crime cases, the failure of the Crown to disclose relevant and statute applicable material has caused the high-profile collapse or review of such cases (including, but not limited to, RASSO cases). The seeking of such material must be treated as assisting case-building cases and hence the 'cause" of the complainant' rather than being a hinderance.

27. On this point we would emphasise that good systems of communication to a complainant are essential, explaining why disclosure is essential and advising them of their rights to appear in court to make an objection (Criminal Procedure Rule 17.5 governs summons to produce confidential material, with the application required to be served on the person concerned; see also *R(B) v Stafford Combined Court* [2006]

[6] Government's End to End Rape Review 18th June 2021

[7] https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/05/information-commissioner-calls-for-an-end-to-the-excessive-collection/

EWHC 1645 (Admin), [2007] 1 All ER 102 explaining a complainant's Article 6 rights in witness summons proceedings).

28. Complainants do not need to feel that their privacy is being invaded or that they are undergoing the proverbial, but deeply misleading, '*digital strip search*'. Such expressions feed into a failed understanding of the importance to both the Crown and the Defence of fair trial rights and the role of disclosure. In short, the system needs to take far greater care to educate complainants accurately as to their Criminal Justice Journey from an early stage all the way through, with all necessary support to explain how and why disclosure is required to build a case which can go to trial, and to explain their rights under ECHR Article 6.

29. The provision of good, frequent, timely information and updating to complainants on all aspects of the case in which they are involved is essential and would, and does, allay many reported fears that appear to have led to the concerns expressed in this consultation. Our experience is that that complainants who are kept informed as to the progress of the case are less likely to withdraw from the process.

30. The defence lawyers in a case, especially a RASSO case, are entitled to test, probe, challenge, investigate and discover as much as they can to respond to the Crown's case, RASSO cases are no exception. That is their duty to their client and to the Court. Part of the defence may be the defendant bringing forward issues based on his knowledge or understanding that require the credibility of the complainant to be tested, and tested robustly. Credibility is almost always an issue in RASSO cases, so the prosecution must always consider the credibility of the complainant. Our experience shows that an equally robust response by the Crown will often present the matter in an explicable light. As we said earlier, it is not uncommon that TPM requested by the defence actually serves to strengthen the prosecution case.

31. Discovering that useful TPM exists after a defendant has been convicted and sentenced, may render the conviction unsafe.

32. The first general issue raised by the Consultation, in the bullet points on page 4 of the consultation, is a proposal that a new statutory duty be imposed on the police dealing with TPM. There are already at least seven statutory and regulatory regimes, set out above, to which the Police must have regard.

33. **We do not consider further regimes to be necessary. The Police are already under obligations to act applying tests of necessity and strict proportionality when it comes to material subject to Article 8 claims to privacy, with a clear and direct focus on what the case they are investigating demands in terms of relevance. More legal scaffolding will merely dilute knowledge even further as training provision is at best patchy at present due to police force areas being starved of resources for this purpose for many years.**

34. We do suggest later in this response that an updated, modern, and revised CPIA is long overdue, fit for the time, purpose and public behavior with regard to personal

information exchange and behavior on social media of complainants and defendants alike, who now tend to live their lives online, generating material relevant to the investigation. The CPIA has not received a comprehensive review since 1996. The regulatory geography of TPM is complex, far-reaching, and expanding. Few Police departments or personnel grasp or understand the web of requirements and so mistakes can be made.

35. The withdrawal of a rape or serious sexual offence trial from a jury due to failure of disclosure and/or failure to investigate adequately is not unusual. Some police officers and Crown prosecutors take far too narrow approach to disclosure, which can cause a significantly adverse outcome for the complainant when the defendant is acquitted by the trial judge as a result. When material meets the twin test for disclosure it must be sought by the Crown and provided.

Investigation Length and TPM agency responses.

36. The second area on which general information is sought by this Consultation is the length of time third parties take to respond to police requests. Overall, we are not sure that this is a significant factor in investigation delay. Reports from many practitioners show that usually the response from a third party is relatively swift given the longevity of RASSO investigations overall.

37. In addition, the back-log of cases coming before the Court before the pandemic, when so many courts and court rooms were literally *dark*, sitting days of the judiciary were restricted by the Ministry of Justice with the explicit policy of allowing the backlog to accumulate, investment in specialist police training was denuded, and specialists in the CPS and police were lost due to job cuts, with a consequent loss of expertise, has meant that RASSO and other very serious criminal cases take much longer to process through the system. *The RASSO cases in the queue increased 25% in the 15 months before the pandemic.*

38. The Criminal Bar is shrinking at an alarming rate. According to the CPS, as of November 2021 the number of RASSO prosecutors available for them to instruct has been reduced by between 22% and 25%. This affects prosecuting barristers on the RASSO list as well as those who defend (and most of us do both). Between January and March 2022, more than 200 serious offences in the Crown Court were aborted because there was no one available to prosecute and defend on the day, a twelvefold rise on the same period a year before; half of those cases involve sexual offences or violence.[8] Many RASSO barristers are leaving the RASSO panel because of the

[8] These statistics are for a period before the criminal bar commenced its current professional action to save the criminal bar and the criminal justice system through selective withdrawal of service.

amount of unpaid work required in the overall low rate of remuneration for such difficult and complex work.

39. If the judiciary, Courts and Criminal Bar are able to rebuild their strength, then there should be more capacity for speed of case building and throughput. Until then the longevity of case life will continue and worsen.

40. RASSO cases still do not receive effective priority status in listing decisions and can be listed for trial three or even four years after the date of the allegation; where the defendant is on bail it is now nearly 5 years on average for an adult rape offence to proceed to completion.

41. The imminent introduction of the expensive and operationally problematic "Common Platform", in which court staff, judiciary, solicitors and Bar are untrained, is also likely to add to the delay in throughput of RASSO cases. We note that court staff have voted to strike over the introduction of "common platform".

42. The "time it takes for third party response" as a delay factor in case life is of minimal effect set against these other factors. Our collective experience is that TPM requests are not delaying cases to any significant degree. Any changes to the system need to be based on sound evidence, derived from empirical research and analysis using recognised methodology.

8. Response to the Questionnaire, Page 5

Question 1 – list of material that <u>may</u> constitute TPM.

a,b,c,d, e,f,g,h,

Each of these listed can and have qualified as TPM.

CCTV is usually direct evidence of events and so is evidence in the case either to be used as part of the Crown's case or defence case or disclosed to the defence by the Crown in any event. Other times CCTV might constitute TPM

Other…is any material held by an Authority, organisation, group, club etc which may be relevant to the issues in a criminal case.

Question 2 –

TPM is typically requested in regard to witnesses in a case, complainants, other witnesses. Requests may be made of other agencies about the defendant.

Question 3 –

TPM may be sought in any case. There is no case- or offence-specific TPM. All of the listed offences could be the cause of an application, as might others. It all depends on the circumstances of the case.

Question 4 – this is quite impossible for anyone to answer. It should be the subject of proper empirical research, such as that undertaken in 2001 by Plotnikoff and Woolfson for the Home Office.[9] It may be far easier to interrogate Crown Court records in RASSO [not RASO, as the Consultation wrongly defines the current acronym] cases to discover in a given period how may requests or court orders were made. There is a section on the Crown Court Pre-Trial and Preparation Hearings (PTPH) form in the court process that Judges tick for this question:

"*Is there any…(TPM).. in this case".* These forms are easily accessible.

However, that would not capture cases where the third party cooperated with the Police, often because there was a Protocol in place in that area.

Our impression and experience is that these applications are relatively rare.

We do not agree that there are particular issues or problems in requests for TPM in RASSO cases. By their nature these are complex and often sensitive cases. Naturally this may mean that such requests concern sensitive records which may mean that witness summonses are required for production of material.

As noted earlier, many Courts, police, and their Local authorities or NHS Trusts have local protocols for the application and production of material. Someone, be it independent Disclosure Counsel, Prosecution Trial Counsel, the Judge or a lawyer from the Authority will review the "files", identified by the parties by way of topics or issues with reference to a witness.

Question 5 – b,c,d are not viable , lawful, options. The law permits only a., as set out earlier.

The police do not routinely "trawl through" and recover large amounts of personal material. There must be a transparent purpose tied to the scope and relevance of the investigation, identified in writing in advance.[10]

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[9] Joyce Plotnikoff and Richard Woolfson, *'A Fair Balance'?: Evaluation of the Operation of Disclosure Law* (Home Office, Communications and Development Unit, 2001).

[10] However, sometimes a broader disclosure exercise is required by virtue of case-specific events. In one of the larger child sexual abuse cases in the North of England Senior Junior Counsel for the Crown was required to attend on many Social Services departments across the country at the behest of the Trial Judge to review Social Services files held about the complainant. This exercise, arising during the trial, revealed that the complainant was severely disturbed, having made serious and fantastical allegations against others.

Question 6 – Option b is the only lawful option.

As we have observed earlier, there is a careful procedure gone through, specific issues are identified and acted on. In such circumstances the Defence or indeed the Crown will set out a series of issues / questions or enquiries for the police to follow, so that there is direction and purpose in what the Police are looking for or the Authority are being requested to categorise. Often the prosecution and defence will work together to identify search terms for digital downloads to ensure that only relevant information is searched for.

Similarly, the Police in the early stages of certain types of investigation, sometimes sexual offence cases, may develop a case-specific Disclosure Plan which involves consideration of TPM. The police in some areas have disclosure champions who produce such disclosure plans.

Question 7 – in our experience it is unlikely that a, b, c, or e, is the case. If there have been such instances, we suspect that they are rare.

Resource implications, human and time (cost) are far more likely to mean the converse, that in most cases there is no appetite for such broad disclosure actions by police or CPS.

With respect to "d", the police are unlikely to act on defence requests without recourse to the CPS, Prosecution Counsel or indeed possibly the Court, to evaluate whether the requests are justified under the legal tests.

If the Defendant wants TPM investigated they will normally need to apply for it, informally to the CPS or formally to the Court under the witness summons procedure.

There is a clearly defined process that must be applied by which TPM is sought and obtained. A court will require certainty and relevance. The Police do not just "fish", or should not.[11]

Question 8 – We are intrigued as to the source(s) of the evidence for the concerns raised in this Consultation. What is the <u>evidential</u>, empirical researched evidential basis for these contentions?

There may be *perceptions* in certain cases of difficulty or slowness. In historic sex cases, often, records are on paper stored away from the Authority, or they are long ago records and take time to track down. Sometimes the release of records depends on personnel in Authorities being available to assist the Police, or the

[11] It would be of interest to be directed to the evidence for these assertions and see in terms of numbers of instances where such practices have been identified by knowledgeable experts as having been undertaken.

Authority make counter-requests for greater certainty, or the Authority is in a different form or configuration than it was when the records sought were made.

Often in highly complex cases, where the issues are the extent of a witness or defendant's past involvement and behaviour, eg while in Care or under the supervision of Social Services, there may be large volumes of material to be reviewed in order to follow up on like issues from the case. For example, an adult complainant of sexual abuse in children's home 40 years previously. Social services records and records from the home may well still exist in paper form, but are likely to be in more than one storage unit which must be search for.

In our experience it is impossible to say how long such requests take, and should take, for responses, so assessing an average is equally impossible. The questions throughout this Consultation overlook the fundamental fact that every case is fact-specific, and generalisations and assumptions such as appear in the Home Office document cannot be helpful in producing any reliable answers.

Question 9 - No

Question 10 – Questions 9 and 10 unfortunately display a misunderstanding of the system. Options a – i, save h, all have the capacity to be highly complex and may be cases where TPM is requested. Requests are relatively short in most cases with one side or the other mapping out what they are requesting and serving it on the other side and the Court.

Where before the PTPH, one side indicates that there is TPM in a case, the Court will set a timetable for action by the parties as part of its case management functions. The parties are accountable to the court for adherence to this timetable, or have to come back should they encounter unexpected difficulties in adhering to it. Again, average times for work undertaken are very difficult to assess.

Question 11 – the options in this question are not reflective of practice.

Selecting one would be misleading of the overall picture and behaviour of Agencies and Authorities, those who hold potential material.

Most often our experience is that Authorities are willing to assist a criminal investigation. Some, depending on the nature of the sought material, will invite Counsel or the requesting party to attend and undertake a sift. Rarely is legitimately requested material refused or failed to be provided, since Authorities are familiar with the legal disclosure regime.

Question 12 - obviously quantity (and difficulty in locating the records) may affect the time it takes for a third party to respond.

Question 13 – Our general experience is that third parties do respond in a time frame which does not affect the course of the case.

There are exceptions. Sometimes in responding it leads to further requests arising, due to the response which has not been holistic and to that extent the Authority responds exactly to what they are asked to do.

Question 14 – a, b, c, yes; d, sometimes but we suggest less so as more often the Police will seek guidance from CPS and Counsel before making the TPM request.

Question 15 – we will respond by reference to the question and box answer option.

a – Strongly Disagree.

b – Agree However, often TPM will be triggered by the provision of a Defence Statement which comes after the provision of Prosecution material in the first stage of the disclosure process under the CPIA ("primary disclosure"). Therefore, such seeking of TPM may come late in the sequence of the process of disclosure.

Question 16 - again this question is premised on the false assumption that the law does not currently require requests for TPM to be necessary and proportionate. As set out above, they have to be both necessary and strictly proportionate were the complainant's Article 8 privacy interests are engaged by the material.

Early identification of issues in dispute between the parties identified by the Defence focus the potential for TPM requests. Such early consideration need not wait for the stages in the process. But there are occasions where earlier identification of contested issues can be made if the defendant engages (or indeed it is possible for them to engage).

This issue, concerning TPM, should be a part of a detailed review and updating of the entire system of disclosure under the CPIA 1996. It might be referred to the Law Commission as an individual topic, or alternatively as part of an overall large scale-deep review undertaken by a highly exceptional and experienced panel into the workings of the Criminal Justice System.

Other than the system benefiting from occasionally updated reviews of the AG's Guidance on Disclosure, essentially the system is working on the framework built by the **CPIA 1996** which was before the proliferation of social media, individuals publishing their views on current cases, expressions by participants who use their personal devices on which to store data, including material which could be relevant to a witness's own testimony.

We do say that the current legal system for the control and provision of TPM is entirely satisfactory for present purposes. Were however there to be either of the suggested reviews, above, then TPM would clearly be part of that process. Likely as not the legal system now in place would be retained however a refreshed review of TPM would be of advantage.

There are new Guidance documents on the handling of witnesses' personal data, compliance with GDPR, seeking and obtaining personal devices and downloading them, reasonable lines of enquiry and so on.

We favour a consolidated, new, up-to-date CPIA covering all the last 16 years developments in this area and of Disclosure. It is timely that the Criminal Justice System is at breaking point, indeed if not already broken, so a reset of overarching principal issues would be of significant benefit, to all.

Section 3

The premise for the first two paragraphs in Section 3, is we regret, misguided. As set out earlier, there is a twin statutory test to apply for the instigation and continuation of a prosecution. The CPS is charged with a duty under the Prosecution of Offences Act 1985 to prosecute cases, assess their merits under the Code for Crown Prosecutors, and act accordingly. This means the filtration of cases using judgement.

We agree "fishing" is undesirable, but we have not seen this is a common practice. If some 'fishing' is done by the defence, this will be intercepted by Prosecution Counsel. Assessment of credibility of the Crown's witnesses is an essential part of the role of a Prosecutor and their duty to make sure that the case passes the Evidential and Public Interest Tests in the Code for Crown Prosecutors, more so perhaps in RASSO cases where the crucial evidence often comes from a single source, the complainant. It is unavoidable that the credibility of the complainant will be an issue.

Question 24

a - Strongly Agree, to which we would add taking Early Advice from Prosecution Counsel.

b – **Strongly Disagree,** because the legal standard is even more exacting, as explained earlier, and this change would merely downgrade practice. What would

make a difference is properly funding police forces to have dedicated disclosure officers, and regularly refreshed training**.**

c – **Agree** To an extent. This is already the law under the HRA and English case law, and a complainant who is the subject of a third-party witness summons to produce material about them must be given notice of the application to the court, and to have the opportunity to make representations, under the Criminal Practice Directions 18E.[12]

d – **Disagree**. There already is this requirement, and again this could come under a properly constituted review of TPM provision in a updated CPIA.

e – **Agree**. But again, see above for a better solution. Revision and consolidation in such an important area is far better than piecemeal bolt-on duties.

Question 26 - "…reduce the number of disproportionate and unnecessary requests for third party material….?".

We reiterate our concern about the basis on which this Consultation is predicated.

What is the evidence for the constant assertion that Police investigations are including whole-sale dredging of TPM of such sensitivity so as to affect complainants in RASSO cases? Do so many RASSO complainants generate such material? **It is not our experience as practitioners that they do.**

There are certain types of cases where TPM is sought and required, but this is not the norm.

We would welcome a better understanding of where the concern is coming from and on what is it based. Is there solid research underpinning this claim? It was not generated by the Rape Review's commissioned research conducted by the Ministry of Justice. There is already in place a great deal of legislation, regulation, Guidance and oversight for and of Police on this topic of TPM including HMICFS.

We have already alluded to our suggestion for a significant Deep Review of not just this aspect of the process but the work of the Criminal Justice System at this time.

Failing that, then a detailed revision of the CPIA to deal with all aspects of modern investigations, witness behaviours, modern communication techniques etc of

[12] For analysis of the complainant's Article 6 and Article 8 rights in relation to a witness summons for third party disclosure, see *R(B) v Stafford Combined Court* [2006] EWHC 1645 (Admin), [2007] 1 All ER 102.

RASSO and other cases with Codes of Practice based on all the learning since 1996 would be far better. There is no need to have a RASSO-specific Code of Practice, because all areas of police investigations may engage sensitive material.

The Criminal Bar Association of England and Wales would be delighted to cooperate and assist with a thoroughgoing review and updating of the criminal justice system, and specifically CPIA 1996 to make it fit for purpose for the 2020s.

The RASSO Group of the Criminal Bar Association

August 2022

R(B) v Stafford Combined Court [2006] EWHC 1645 (Admin), [2007] 1 All ER 102