Joint written evidence submitted by Rape Crisis England & Wales, End Violence Against Women coalition, Centre for Women's Justice and Rights of Women (VPB09)

Submission to Victims and Prisoners Bill Committee

The need for a bespoke regime to protect confidentiality of therapy records in rape investigations and prosecutions

1. This submission is produced jointly by four women's sector organisations: Rape Crisis England & Wales, End Violence Against Women coalition, Centre for Women's Justice and Rights of Women (see appendix for more details on our work). We are leading organisations working on addressing sexual violence in England and Wales and between us have a wealth of expertise on the investigation and prosecution of rape and other sexual offences ('rape' for short). The first two are umbrella organisations representing a broad range of frontline sexual violence services, and the final two are legal charities providing independent legal advice to rape survivors across the country. Between us we have many years of direct experience of the issues summarised below. Our proposal is supported by the four main professional bodies for therapists in England and Wales: BACP, UKCP, BPS and NCPS.[1]

Summary:

2. Sexual violence and abuse is deeply traumatic for victims and survivors[2]. For many, the impact can be wide-ranging and life-changing. Sexual violence and abuse can be the root cause of mental health problems, eating disorders, self-harm, and suicidal thoughts and ideation. It is common for the impact of sexual violence and abuse to affect personal and family relationships, mental, sexual, and physical health and wellbeing, employment access and outcomes, and long-term educational attainment. For many victims and survivors, therapy is a vital means of working through trauma, supporting them to find routes to regaining control of their lives and improving their mental health and overall wellbeing.

3. We believe that the confidentiality of therapy records requires the highest level of non-disclosure possible, that is compatible with the defendant's right to a fair trial. This balance can be achieved by adopting the threshold applied to therapy record disclosure in New South Wales (NSW), Australia. This is a legal system very similar to our own, where the relevant law is well embedded, having been in place since 1997[3]. In NSW, there is no absolute bar on disclosure of therapy records, but a higher threshold of "substantial probative value", which also takes into account the public interest in

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[1] BACP: The British Association for Counselling and Psychotherapy; UKCP: UK Council for Psychotherapy; BPS: The British Psychological Society and NCPS: National Counselling and Psychotherapy Society

[2] We use these terms interchangeably, "victim" is the term commonly used in the criminal justice system whilst "survivor" is the term favoured by the women's sector

[3] The NSW provisions are in Part 5, Division 2 of the Criminal Procedure Act 1986: https://legislation.nsw.gov.au/view/html/inforce/current/act-1986-209#ch.6-pt.5-div.2

preserving confidentiality. There has been no record of miscarriages of justice in NSW.[4] Please see our Second Reading briefing for a full overview of why this model should be delivered through the Victims and Prisoners Bill.[5]

4. We call for the adoption of the NSW approach, but with a procedure which specifically recognises that excessive applications are made at the police investigation stage in England and Wales, whereas the NSW law was triggered by excessive defence applications. Restrictions and judicial scrutiny are therefore required during the investigation stage, in order to address the severe negative impacts that we currently see.

5. As in the NSW model, our proposal also includes permission by a judge, at the same threshold of "substantial probative value", before disclosure of therapy records can be made to the defence. Therefore, as in NSW, there would be two steps involving judicial scrutiny, but they would be at the stages of access to the police and disclosure to the defence, rather than disclosure to the defence and admissibility for trial, as in NSW.

The current situation

6. Victims and survivors who have reported into the criminal justice system and are also receiving therapy, or have received it in the past, face a serious problem. The private and personal material contained in therapy records are being routinely requested by the police and Crown Prosecution Service (CPS), undermining confidentiality and jeopardising a safe therapeutic space.

7. Concerns about disproportionate and excessive requests for third-party materials (including therapy records), relating to rape victims and survivors during the investigation process have been identified repeatedly over recent years, and therefore we do not set out detailed evidence on that here.

8. The problem was documented most recently in the Home Office consultation response on police requests for third-party materials published February 2023,[6] before that by the Information Commissioner's Office (ICO) in May 2022,[7] and in the Government's Rape Review in June 2021.[8] These disproportionate requests form part and parcel of the excessive focus on 'victim credibility' within rape investigations, which has been widely criticised,

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[4] The New South Wales Sexual Assault Communications Privilege Service is a government funded service which provides advice to victims of sexual offences https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service. They have monitored the law on this issue in NSW from 2000 to 2022. They are not aware of any successful appeals against conviction based upon this legal principle. There have been three unsuccessful appeals, and nine interlocutory appeals initiated by both victims and defendants.
[5] Keeping Counselling Confidential: The problems and solutions with the disclosure of counselling notes: https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/2023/05/Keep-Counselling-Confidential-FINAL-10th-May-23.pdf
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128754/govt_response_to_police_requests_for_TPM_consultation.pdf
[7] https://ico.org.uk/media/4020539/commissioners-opinion-whos-under-investigation-20220531.pdf
[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001417/end-to-end-rape-review-report-with-correction-slip.pdf

including by the Joint Inspectorates report on rape investigations in July 2021[9] and Operation Soteria.[10]

The impact of direct police access to therapy records

9. Some survivors feel forced to choose between seeking justice and seeking therapeutic support. They either decide to disengage from the criminal justice process, or to forgo therapy until that process is over. Rape investigations frequently take a year, sometimes two or three years, in our experience[11] and if a case is referred to CPS this will extend the time considerably, whilst cases that go to trial take several years. These are very lengthy time periods to suspend psychological recovery.

10. When survivors do have therapy, the knowledge that their notes may be disclosed to the police, the lawyers, and ultimately their abuser, can have a chilling effect on the ability to open up and speak freely, which fundamentally undermines the therapy process;

11. Many survivors feel they have no choice but to consent to the police accessing their therapy records because otherwise it will look like they have 'something to hide' and they will be viewed as uncooperative. It is not uncommon for police to inform victims and survivors that if they refuse to consent to their records being accessed then their case will not proceed. In our experience, even when advised by independent lawyers that a request does not constitute a 'reasonable line of enquiry' (and is therefore not a lawful request) some survivors prefer to comply, for fear of the repercussions of refusing consent.

12. We also see cases where requests for therapy records lead survivors to drop out of the criminal justice system, as they cannot face having their abuser see such personal material, or the additional stress surrounding the requests. In one recent case, Centre for Women's Justice advised a survivor that a request was not a reasonable line of enquiry, because the therapy was about adverse childhood experiences which were not sexual and had no connection to the sexual assault she suffered as an adult. Legal submissions were drafted but the survivor felt that the stress of having to confront officers was too much to deal with, and she preferred to withdraw from the process entirely.[12]

13. It is very important to highlight that this is not merely an issue for those few thousand survivors whose cases proceed to trial, but for the vast number who report rape whose cases are never charged. There were approximately 67,000 reports of rape to the police in 2022.[13] Only around three percent of

[9] https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/joint-thematic-inspection-of-police-and-cps-response-to-rape-phase-one.pdf
[10] A Home Office funded academic-led programme to transform the rape investigation process 2021-2023
[11] Statistics giving average lengths of time for investigations are misleading as they include many cases that are dropped almost immediately and so don't reflect the usual timescales for those who support a prosecution
[12] In this case the request for therapy records was withdrawn following a CPS complaint and the police investigation was re-opened with a new investigator
[13] 12 months to December 2022 – Office for National Statistics

reported rapes result in a charge,[14] but the mental health of a great many others is hindered by disclosure of their therapy records, usually for the sake of a process that will not deliver a route to justice. There is a wider public interest that should be considered beyond the interests of the parties in the individual case. This is recognised in the public interest element of the NSW threshold.

Therapy records are fundamentally different from other third party materials

14. Therapy records require higher levels of protection than other third-party materials for a number of reasons:

    a. Only with therapy does the potential disclosure of records create such a deterrent to survivors accessing a service;

    b. Therapy is a uniquely private setting and without confidentiality the very process itself is undermined; trust between therapist and client is a fundamental requirement for therapy to be effective;

    c. Therapy explores feelings and not facts, it is not an evidence-gathering exercise and records are very unlikely to reflect a meaningful factual account of events;

    d. It is well-established that feelings of shame and self-blame are common amongst rape survivors. Therapy is the appropriate setting for exploring these feelings. Such records of trauma should not be unfairly weaponised by defendants through the legal process.

15. Therapy records are recognised in a number of jurisdictions as requiring a distinct protection regime of their own, ranging from an absolute 'therapy privilege' in Tasmania, to various other models in other Australian states, in Florida, Pennsylvania and in Ireland.[15]

Why restrictions should apply at the police investigation stage

16. As described above, rape survivors are not free to decline consent to access their therapy records without suffering a detriment in the criminal investigation, including having their case closed. The ICO has advised (in a detailed legal opinion on the processing of victims' personal data in rape investigations in May 2022),[16] that this detriment means that consent cannot be a valid legal basis for disclosure of rape survivors' personal records under data protection legislation. Instead, police can rely on 'law enforcement', as an alternative basis.

[14] Government Rape Review gives a charging rate of 3% for 2019/20. The latest annual figure for number of cases charged is 921 cases higher (using figures for 12 months to Dec 22), but the number of rapes reported to police has risen by approximately 9,000 per year over that time (also using figures for 12 months to Dec 22).
[15] See Law Commission consultation on Irish model at page 91 paragraph 3.100
[16] See footnote 6

17. The law enforcement principle allows police to seek access to records directly from data holders (i.e. therapists) without first obtaining their client's consent, which brings with it its own set of problems and in effect makes any system unworkable.

18. If a therapist receives a request for disclosure of records in this situation they encounter an impossible set of challenges:

    a. Therapists have a professional duty towards their client to promote their client's welfare, and requiring them to act in the interests of a police investigation conflicts with this;

    b. Therapists have their own duties under data protection legislation towards their clients, and can only lawfully provide material to the police against their client's wishes under specific circumstances;

    c. If a therapist provides records to the police against their client's wishes they will damage the very relationship of trust on which therapy is built, and so deny the client a continuing effective therapeutic relationship. They have to weigh this negative impact on their client's welfare in the balance;

    d. The broader circumstances in which therapists can disclose records without their client's consent do not apply where there is no ongoing safeguarding concern;[17]

    e. The ICO opinion sets out the considerations for a data holder when receiving a police request for access to records[18] which includes considering *"if the reasons provided by the police and the needs of the investigation outweigh the interests, rights and freedoms of the person or victim."* Quite frankly this is an impossible expectation of a therapist. Not only does it conflict with their professional duties to their client, but they will have only very limited knowledge of the police investigation and can't possibly balance its needs against the interests, rights and freedoms of their client;

    f. Therapists are often self-employed or work for small organisations, they do not have access to an in-house legal department to help them resolve complex legal issues.

19. If the ICO is correct, that consent cannot be a lawful basis for accessing therapy records, the only feasible option is to remove the decision-making from the shoulders of therapists, and require a court order, so that if a judge determines that the threshold is met the therapist can explain to their client that it is not their choice, and they have no option but to provide the records. This is a very common process for obtaining third party disclosure in civil

[17] BACP guidance for its members states that "circumstances that might justify breaching confidentiality" are "real risk of serious harm, and the threat appears imminent, and disclosure is likely to be effective in limiting the harm or preventing the harm occurring".
[18] Pages 43 to 44 set of bullet points

cases, and a similar process often take place when journalists are asked by police to provide disclosure of confidential sources. It is the only workable approach when access to material is required from a professional where the request creates a conflict of interest for them.

How would a pre-charge system operate?

20. We believe that the requirement for a court order whenever therapy records are accessed by the police would operate well, without any substantial impact on the criminal justice system, for the following reasons:

    a. The volume of applications is likely to be significantly lower than the number of requests for therapy records that are currently made, for two reasons. Firstly, in our experience a considerable proportion of requests for therapy records are not in fact a 'reasonable line of enquiry', both coming from police and from prosecutors.[19] In many cases where survivors push back, after receiving legal advice, the requests are dropped. However, the vast majority of survivors do not have access to independent legal advice.[20] Having to make an application before a judge would focus the minds of officers and prosecutors on whether the request really is a valid one;

    b. Secondly, and importantly, applying the higher NSW threshold would mean far fewer cases would meet the test and the number of requests would shrink enormously. In particular the higher threshold would exclude requests based on a search for 'inconsistencies' (we address this further below);

    c. Judicial scrutiny does not mean that judges have to peruse vast volumes of material. The party making the application simply sets out the key reasons why it is thought that the records meet the threshold for access, or disclosure, any other parties make their submissions, and the judge rules, as in any adversarial process. The judge does not need to take an inquisitorial role;

    d. Having tighter restrictions on access would save the police and CPS considerable time in not having to read through large amounts of materials in many cases, so overall the changes would reduce rather than increase demand on resources;

    e. Having judicial oversight of access to therapy records would create consistency across the country, by creating caselaw that allows police and prosecutors to know which requests are valid, and so reduce the number of requests. It would also inject some rigour into the process. Currently there is enormous variation not just in different geographical areas but between individual officers and prosecutors, and a sense that some individuals simply don't know what the guidance is and act on their gut instincts and assumptions.

[19] As confirmed by the various reports in paragraph 8 above
[20] See our separate submission to the Bill Committee on the need for independent legal advice for rape survivors

21. Therefore, a regime which requires judicial scrutiny not only creates justice for victims and is workable for therapists, it brings other benefits, and also creates some certainty for defendants who know that there has been a rigorous process behind decision-making on this matter.

22. Currently, to the best of our knowledge, applications for court orders are never made pre-charge, though it seems they may be possible under PACE[21] s.9 and Schedule 1[22] (although that process is generally used for production of materials relating to suspects rather than victims). We also never see applications made post-charge, because where consent is refused this will generally lead to the case not being charged. However, if applications are made post-charge, Criminal Procedure Rules (CPR) 17.4-17.6 apply, which enable the person who is the subject of the data (ie the victim or survivor) to make written representations and to be invited by the court to make oral submissions and be legally represented.

23. If a pre-charge court process is introduced as a requirement for therapy records, it would need a change in the law to apply CPR 17.4-17.6 in pre-charge applications (by amending CPR 17.1 which sets out a list of applications where the process applies).This would ensure that the judge reaches a decision with the full implications in mind, and accords with the requirements of Article 8 ECHR which are engaged where personal records relating to sexual matters are disclosed. This was addressed in *R (B) v Stafford Crown Court* [2006] EWHC 1645, where the High Court stated that the victim of a sexual offence should have a right to make oral representations at the hearing of an application for disclosure of her psychiatric records, which would include legal representation. In our view, CPR 17.4-17.6 must also be amended to make the inclusion of the data subject in the process mandatory, because as currently drafted it is at the discretion of the court (giving survivors the opportunity to make representations would be mandatory, as it currently is for data holders, but the survivor's take-up of that option would be voluntary).

What does the NSW threshold mean in practice?

24. The NSW Sexual Assault Communications Privilege Service[23] informs us that cases that meet the threshold for disclosure in NSW ("substantial probative value") are generally those where the very first report of the rape to any person was to the therapist, and those where the survivor has a psychiatric condition characterised by delusions. No doubt there are other situations where a case-specific reason may mean that a fair trial is not possible without disclosure.

25. However, importantly, the mere fact that some account of the offence was given by the survivor to the therapist, which could potentially be mined for inconsistencies, is not sufficient to meet the threshold, unless there is a specific reason for believing that there are inconsistencies present. This is a

[21] Police and Criminal Evidence Act 1984
[22] See CPS guidance on rape and sexual offences Chapter 3 section headed "obtaining third party material"
[23] See footnote 3

critical difference between the NSW threshold and the current UK threshold for a 'reasonable line of enquiry' (which would remain unchanged under fresh provisions that the Government intends to introduce into the Bill in relation to third-party materials).[24] Under the Attorney-General's Guidelines for Disclosure[25] any document containing a previous account by a survivor meets the disclosure test to the defence and therefore also the threshold for access. This search for 'inconsistencies' is at the heart of the process at present.

26. There is currently an inherent contradiction in the approach to inconsistencies in rape prosecutions.[26] On the one hand, it is well recognised that the effects of trauma often makes memory more fragmented, and that in any event it is common for people not to give identical accounts on every occasion. The CPS guidance on rape myths, and Judges' directions to juries, caution that "inconsistent accounts given by the complainant are not necessarily indicators of untruthfulness and that a consistent account by the complainant is not necessarily an indicator of truthfulness".[27] Nevertheless, the criminal justice process views inconsistencies as a key indicator of whether an account is reliable or untrue.

27. When it comes to therapy records, there are particularly strong reasons not to rely on notes as indicators of factual accuracy. Therapy explores feelings, not facts, matters are often not discussed in a chronological way and therapists may easily misunderstand or choose not to interrogate factual aspects, which is not the focus of their work. They are not engaged in an evidence-gathering process and their clients are not given the chance to raise corrections. Their records are particularly poor indicators of the facts. Removing trawls for inconsistencies in therapy records would not undermine the fairness of the trial process, such trawls are themselves unfair.

28. Finally, we note that the NSW model, although it is often referred to in shorthand as a regime for therapy records, goes beyond therapy to include any medical records. We propose a tighter definition that includes only records of therapists, counsellors, psychologists and other providers dealing with a person's mental health, not physical health.

What about the Law Commission consultation?[28]

1. The Law Commission is not considering a regime specific to therapy records, only the broader issue of disclosure of third-party materials, therefore the specific protections required to address the problems around confidentiality of therapy records will not be delivered by that route.

2. In any event, the problems we seek to address are long-standing and this Bill is the obvious legislative route to address them, two years on from the Government's End-to-End Rape Review. The CPS consultation on 'pre-trial

[24] Our understanding is that these will be similar to those for digital data introduced in the Police, Crime, Sentencing and Courts Act 2022
[25] Version published May 2022 paragraph 86 e.
[26] As also identified by the Law Commission consultation at page 135
[27] Crown Court Compendium Part I page 20-4
[28] Law Commission Consultation on Evidence in Sexual Offences Prosecutions published 23 May 2023

therapy' records took place even earlier, closing in autumn 2020 and arose from well-known difficulties in this area. Fresh CPS guidance was not introduced until May 2022, and it does not solve the problems we set out above. The Law Commission will not report until 2024, a general election year. It may be several years before another suitable legislative vehicle comes along and in the meantime these problems, which are well-known and have persisted for years, will continue.

3. The Government has acknowledged the urgency by introducing provisions in the Bill on third-party materials, without waiting for the Law Commission to address the very same points (though these provisions will not go far enough on therapy records). A government can introduce legislative reforms before the conclusions of a Law Commission consultation where there is a "case for immediate action". The Government introduced a new offence of threats to share intimate images in the Domestic Abuse Act 2021, whilst the Law Commission was reviewing the law on intimate image abuse.[29] This Bill is the right and timely opportunity to bring in change that will make a meaningful difference to victims and survivors.

Appendix – the four organisations behind this submission

Rape Crisis England & Wales (RCEW) is a charity working to end sexual violence and abuse. We provide specialist information and support to all those affected by rape, sexual assault, sexual harassment and all other forms of sexual violence and abuse in England and Wales. We are also the membership organisation for 39 Rape Crisis centres. Together, we aim to educate, influence and make change.

The End Violence Against Women Coalition (EVAW) is a leading coalition of specialist women's support services, researchers, activists, survivors and NGOs working to end violence against women and girls in all its forms. Established in 2005, we campaign for every level of government to adopt better, more joined up approaches to ending and preventing violence against women and girls, and we challenge the wider cultural attitudes that tolerate and condone this abuse.

Centre for Women's Justice (CWJ) is a legal charity which seeks to hold the state to account for failings in the policing and prosecution of violence against women and girls, and challenge discrimination within the criminal justice system. We carry out strategic litigation, provide independent legal advice, training and referrals to a specialist lawyers panel for frontline women's sector organisations, as well as drawing on case work to provide an evidence base to influence change in laws, policy and practice of criminal justice agencies.

Rights of Women (RoW) is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of violence against women and girls. Rights of Women provide specialist telephone legal advice lines for survivors, to increase their understanding of their legal rights, improve their access to justice and empower them to make informed choices where they come into contact with the criminal justice system.

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[29] Then Home Office Minister for Safeguarding Victoria Atkins said of that amendment: "Although the Law Commission is currently reviewing the law around intimate image abuse, *we recognise the case for immediate action*". She elaborated that the amendment will *"have an immediate impact"*, pending the Law Commission's report and recommendations later this year [emphasis added]. HC Deb Vol 692 Col. 516 (15 April 2021)Domestic Abuse Bill: https://hansard.parliament.uk/commons/2021-04-15/debates/0E322BD7-571C-4DC5-A8C8-7B29806DE067/DomesticAbuseBill

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