KEEP COUNSELLING CONFIDENTIAL

THE PROBLEMS AND SOLUTIONS AROUND THE DISCLOSURE OF COUNSELLING NOTES

Full Briefing

Committee Stage of the Victims and Prisoners Bill in the House of Lords

Prepared by Rape Crisis England & Wales, the Centre for Women's Justice, the End Violence Against Women coalition and Rights of Women

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Endorsed by:

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Summary

1. **Victims and survivors who have reported sexual violence to into the criminal justice system (CJS) are often put in an impossible position, forced to choose between seeking justice and accessing therapeutic support.**

2. **Neither existing legislation nor iterations of guidance in this area have effectively addressed the problem of widespread and inappropriate requests for this material.**

3. **In order to address this issue, VAWG experts are calling for legislative change to introduce a new, higher threshold for disclosure which is unique to counselling and therapy records, along with judicial scrutiny.**

4. **We are inviting support from peers for an amendment to the Victims and Prisoners Bill, which is scheduled for Committee Stage in the House of Lords on 24 January 2024, to keep counselling confidential. This was recognised as a key issue during Second Reading in the House of Lords, as well as during debate in the House of Commons.**

5. **We are guided by the successful work done in other jurisdictions, drawing on existing legislation in New South Wales, Australia.**

6. **This proposal is linked to our call for independent legal advice for victims and survivors of sexual violence and abuse.**

7. **In the House of Commons, New Clause 19 (see appendix) outlined the new system that we propose, and received cross party-support. Sir Robert Buckland KC, former Lord High Chancellor and criminal law barrister, referred to the proposal as an *"excellent safeguard, which would protect the wellbeing of victims of crime who are having to relive the circumstances every time those issues are brought up".*[1]**

[1] House of Commons, Victims and Prisoners Bill Debate [4 December 2023]. Available from: https://hansard.parliament.uk/commons/2023-12-04/debates/5DA8E455-339D-497A-9F0D-8B566B3E8EA9/VictimsAndPrisonersBill

Introduction

Sexual violence and abuse are deeply traumatic for victims and survivors. For many, the impact can be wide-ranging and life-changing. Sexual violence and abuse are a root cause of mental health problems, eating disorders, self-harm, and suicidality. It is common for the impact of sexual violence and abuse to affect family and personal relationships, ability to work, and long-term educational attainment. For many victims and survivors, counselling and therapy provides 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.

Victims and survivors who have reported into the CJS and are also receiving counselling (or have received counselling in the past) face a very serious and difficult decision. The private material contained in counselling records is routinely requested by the police and Crown Prosecution Service, undermining confidentiality and jeopardising their safe, therapeutic space. As a result of this, many survivors feel forced to choose between seeking justice and accessing therapeutic support. Some feel coerced into allowing their notes to be handed over, and into proving they have 'nothing to hide'. Often, they have been threatened, with police telling them that their case will be dropped if the material is not disclosed.

We believe that no one should have to make this choice. Counselling notes should be kept confidential, and the privacy and dignity of survivors upheld by mechanisms that are fit for purpose and secure their rights.

"How did it feel to have your therapy notes mentioned in a courtroom?"

"A blow. A violation. An assault. Very painful and lasting. Embarrassed. Ashamed. Intimidated. Unsettled. Humiliated."

A survivor speaking about the experience of her therapy notes being disclosed in court.

In its latest Pre-Trial Therapy guidance, the CPS recognises that survivors have faced significant barriers in seeking therapy and justice at the same time.[2] Whilst the guidance acknowledges these barriers, an inherent tension remains: the guidance simultaneously recognises that survivors' access to therapy is vital, yet, in practice, counselling notes remain subject to disclosure. This dissuades many survivors from accessing therapy, and can lead to self-censoring in therapy.

Yet many victims and survivors who have received or are receiving counselling and therapy waive their right to privacy in order to avoid appearing uncooperative, or as though they have something to hide.

Given the importance of counselling and therapy for sexual violence and abuse survivors, including the overwhelming majority who never have their cases charged or heard in court (just two in 100 rapes recorded by police between July 2022 and June 2023 resulted in someone being charged that same year[3]), there is a clear public interest in securing access to this means of recovery. This means that we need a new higher threshold for disclosure which is specific to counselling and therapy records – reflecting the unique and personal nature of these types of records. As Richard Fuller MP argued during Report Stage in the House of Commons, our proposed amendment will

[2] Crown Prosecution Service, 'Pre-Trial Therapy: Legal Guidance' [26 May 2022, effective from 25 July 2022]. Available from: https://www.cps.gov.uk/legal-guidance/pre-trial-therapy

[3] See: https://assets.publishing.service.gov.uk/media/652eac31d86b1b000d3a513f/outcomes-jun23-tables-191023.ods

make clear that *"counselling is there to explore feelings, not as a source for revealing or investigating facts"*[4], and records are therefore very rarely relevant to a case.

This briefing presents a solution to the issues with the current guidance and practice regarding counselling records. We recommend a way forward that deals with the specificity of the criminal justice system in England and Wales, but draws on the law in New South Wales, Australia, where a presumption of non-disclosure regarding the use of counselling notes within sexual offences cases works effectively. Requests for counselling notes can be made and are decided upon by a judge, at a higher legal threshold than we currently have in England and Wales. This achieves the optimum balance of protecting survivors' rights to privacy whilst also safeguarding defendants' rights to a fair trial.

Baroness Newlove, the current Victims' Commissioner, stated in Second Reading in the House of Lords that *"victims of sexual violence face huge hurdles in getting justice. Too often, they face unwarranted invasions of their privacy. If we are to help them receive true justice, the Bill needs to do so much more to give them the protections they deserve"*, adding *that "I see this Bill as a vehicle to deliver these protections"*.[5]

Context

Rape and sexual abuse are treated with a disturbing exceptionalism when it comes to the criminal investigation process. In no other crime type does the victim have such vast and personal amounts of data trawled through and scrutinised with a view to finding any content that may discredit their character. We know that counselling notes and multiple other materials, such as medical, school, and social care records, continue to be overwhelmingly requested in rape and sexual violence cases as compared to every other type of criminal case. This has been demonstrated by a Home Office consultation which sought views from criminal justice professional on the types of investigations third party material is requested, 82% of respondents named rape and sexual offences as the most likely instances in which third party material would be requested. In addition, 79% of respondents agreed that third party material is requested in roughly 76-100% of RAOSO investigations. Whereas investigations involving theft and economic crimes were the least likely to request evidence from third parties.[6]

The Home Office's own research also found that in a sample of rape cases, almost one third (29%) contained a police request for counselling and therapy notes. Where a reason was given, 32% were related to establishing perceived victim reliability or credibility rather than the facts of the incident.[7]

We believe that this is due, in part, to systemic misogyny within the justice system, deeply rooted in the persistent rape myth that women and girls lie about being raped or sexually abused. Eighty three percent of rape survivors never report to the police,[8] because they think it will be humiliating, embarrassing, and that the police will not support them.

Women and girls who face intersecting forms of oppression may feel additionally concerned about their private therapeutic information being handed over to the police. A culture of prejudice and

[4] House of Commons, Victims and Prisoners Bill Debate [4 December 2023] at column 119-120. Available from: https://hansard.parliament.uk/commons/2023-12-04/debates/5DA8E455-339D-497A-9F0D-8B566B3E8EA9/VictimsAndPrisonersBill
[5] HL Deb, 18 December 2023, c2072
[6] Home Office, 'Police requests for Third Party Material Consultation response' [January 2023] Available From: https://assets.publishing.service.gov.uk/media/63c041148fa8f516a8e0bae2/govt_response_to_police_requests_for_TPM_consultation.pdf
[7] HM Government (2023) Rape Review progress update: https://assets.publishing.service.gov.uk/media/64a7d02e7a4c230013bba335/rape-review-progress-report-year-2.pdf
[8] Rape Crisis England & Wales, 'Statistics about Sexual Violence and Abuse'. Available from: https://rapecrisis.org.uk/get-informed/statistics-sexual-violence/.

discrimination against minoritised survivors within police forces, as recently outlined in the Baroness Casey report, are likely to influence how the deeply personal feelings contained in counselling records are used and presented within an investigation.[9] Institutional misogyny and racism within police forces are barriers that drive fewer Black and minoritised women to report sexual violence to the police[10] - despite the fact that 'those in the Black or Black British and Mixed ethnic groups were significantly more likely than those in the White, Asian or Other ethnic groups to experience sexual assault within the last year'.[11]

The current situation concerning counselling records is just one part of wider failings, where sexual violence and abuse crimes have dramatically low charge rates (approximately 3% at the time of writing), leading many to argue that these crime types have been effectively decriminalised in England and Wales.[12] We know that the persistence of rape myths within the legal system, as well as the low charging, prosecution, and conviction rates for rape, mean that many survivors never seek criminal justice. We believe the current practices of obtaining counselling records feed into this deeply damaging culture.

During Second Reading of the Bill in the Lords, multiple peers recognised this as an issue that needs to be addressed. Kennedy of The Shaws acknowledged that *"misuse is often made of [therapy] records"* and *"this has got to stop".*[13] Lord Ponsonby also noted that *"victim information requests and victim support surely go to the heart of how the criminal justice system treats victims"*.[14]

The Main Issues

1. **Fundamental misunderstanding of the purpose of counselling and therapy**
2. **Undermining of the counselling and therapeutic profession**
3. **Unworkability of current guidance**

Fundamental misunderstanding of the purpose of counselling and therapy

The disclosure of records about deeply sensitive and personal feelings related to sexual trauma are very rarely relevant to criminal investigations and proceedings. There is an inherent contradiction between encouraging survivors to access safe and confidential therapy for trauma and the routine practice of police requesting these records, which can be harmful and distressing for survivors. This puts survivors in the untenable position of having to censor what they share in their personal healing journey. We know that restricting survivors' support in this way can significantly prolong their trauma.[15]

[9] Baroness Casey Review, 'An independent review into the standards of behaviour and internal culture of the Metropolitan Police Service' [March 2023]. Available from: https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf

[10] Centre for Women's Justice, End Violence Against Women Coalition, Imkaan, & Rape Crisis England & Wales, *The Decriminalisation of Rape: Why the Justice System is Failing Rape Survivors and What Needs to Change* [November 2020]. Available from: https://rcew.fra1.cdn.digitaloceanspaces.com/media/documents/c- decriminalisation-of-rape-report-cwj-evaw-imkaan-rcew-nov-2020.pdf. See further: Thiara, R. & Roy, S. 2020. *Reclaiming Voice: Minoritised Women and Sexual Violence Key Findings* [Imkaan, March 2020]. Available from: https://829ef90d-0745-49b2-b404- cbea85f15fda.filesusr.com/ugd/f98049_a0f11db6395a48fbbac0e40da899dcb8.pdf.

[11] Office for National Statistics, 'Sexual Offences Victim Characteristics, England and Wales: Year Ending March 2020', Section 5 [March 2021]. Available from: https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesvictimcharacteristicsenglandandwales/march2020#ethnicity

[12] Centre for Women's Justice, End Violence Against Women Coalition, Imkaan, & Rape Crisis England & Wales (n 8).

[13] HL Deb, 18 December 2023, c2114

[14] HL Deb, 18 December 2023, c2128

[15] See: https://www.vice.com/en/article/pajqkv/rape-victims-denied-therapy-uk-courts

Undermining the counsellor and therapeutic profession

Whilst the CPS does provide some guidance for therapists delivering Pre-Trial Therapy, in practice therapists are being left to make decisions that jeopardise the confidential, trusting, and private relationship with survivors that is essential to their work.[16] This undermines the fundamental ethical code and professional contract on which therapeutic support is based. The fact that therapeutic notes are regularly considered disclosable also places a considerable burden on counsellors and therapists, who must keep notes that will not be misconstrued by the CPS and damage a trial. This conflict of interest results in therapists being forced to work in a way that is ethically and professionally compromising, where they must limit survivors' choices and prioritise criminal justice outcomes over the wellbeing, healing, and recovery of survivors.

"It seems to go against the foundation of therapy - that it's an open and non-judgemental space - when your notes from therapy could be taken literally to judge you."

Lucy, Counsellor at Nottinghamshire Sexual Violence Support Services

During Second Reading in the House of Lords, Baroness Hamwee referred to the situation as *"shocking"*, noting that *"victims are deterred from counselling because of defendants' access to counselling records and how they may be used"* and that *"confidentiality is essential for counselling to be effective"*.[17]

Unworkability of current guidance

We know that there is a wide variation and inconsistent implementation of the guidance across police forces and CPS areas; the current guidance leaves police officers with wide discretion and little support in terms of implementation. We are concerned that, in practice, large amounts of survivors' sensitive, personal, and private material will continue to be requested by police.

In terms of application of the law, whilst a defendant's right to a fair trial (Art. 6, ECHR) is recognised and enforced, the right of a survivor to privacy (Art. 8, ECHR)[18] is often marginalised. In practice, private and confidential counselling notes are routinely requested by police and prosecutors who are unfamiliar with their duty to consistently comply with legislative obligations under the Human Rights Act 1998[19] and the Data Protection Act 2018.[20] The Data Protection Act requires requests to be strictly necessary and proportionate. We need a law that correctly balances Article 6 and Article 8 rights, which is the maximum privacy possible, whilst preserving fair trial rights.

Despite the legal tests that are set out in the guidance, frontline Rape Crisis and legal advice

[16] Crown Prosecution Service, 'Pre-Trial Therapy – Accompanying Notes for Therapists: Legal Guidance' [26 May 2022]. Available from: https://www.cps.gov.uk/legal-guidance/pre-trial-therapy-accompanying-note-therapists
[17] HL Deb, 18 December 2023, c2070
[18] Council of Europe, European Convention on Human Rights, Articles 6 and 8. Available from: https://www.echr.coe.int/documents/convention_eng.pdf.
[19] Available from: https://www.legislation.gov.uk/ukpga/1998/42/contents
[20] Available from: https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted. For further details regarding the obligations of state and criminal justice agencies under both the Human Rights Act and the Data Protection Act, see Information Commissioner's Office, 'Who's Under Investigation? The Processing of Victims' Personal Data in Rape and Serious Sexual Offence Investigations' [Information Commissioner's Opinion, 31 May 2022] at 20-33. Available from: https://ico.org.uk/media/about-the- ico/documents/4020539/commissioners-opinion-whos-under-investigation-20220531.pdf.

workers routinely witness deeply personal records being requested and obtained by police, passed on to investigating officers, and scrutinised by the police and the CPS. Where the material requested is thought to undermine the prosecution or assist the defence, these notes will be disclosed to defence counsel and to the person who has carried out the sexual violence and abuse. As a result, survivors are often told they cannot or should not access therapeutic support whilst they have an open case; we are aware of police officers and organisations discouraging survivors from accessing pre-trial therapy, as well as some NHS mental health services. This leads to some survivors feeling forced to choose between seeking justice and seeking therapeutic support.

Lord Wills questioned at Second Reading in the House of Lords why *"victims and survivors of rape who have had the courage to report appalling acts of sexual violence [are] still being denied adequate legislation and guidance to prevent intrusive and inappropriate requests for survivors' personal records"*, recognising that this *situation "forces them often to choose between vitally needed therapy and the pursuit of justice."*[21]

A recent letter sent to the CPS from a coalition of leading health organisations, including the British Psychological Society, the British Association for Counselling and Psychotherapy, and the UK Council for Psychotherapy, stresses how the test of relevancy allows for the unnecessary and potentially "devastating" use of survivors' private health information.[22] We believe that the current guidance will continue to prevent survivors accessing both justice and therapy.

"I had a completely supportive victim, an absolutely viable investigation, was sending it to the CPS and then all of a sudden they decided that they wanted counselling records because in the victim's ABE [interview] she said that she's received counselling for a completely unrelated matter to what was being reported and CPS would not drop the fact that they needed to see sight of those counselling records.

Otherwise they would not charge, went to the victim to say this is what the CPS have said even though it's got no bearing on your actual investigation she said i'm not sharing, I'm not exposing my childhood life and my issues with anybody else, that's private and the CPS then dropped the case."

Police investigator participant, Review Into the Criminal Justice System Response to Adult Rape and Serious Sexual Offences Across England and Wales Research Report.[23] This was found to be an unlawful request.

The problem of 'coerced consent'

Up until very recently, disclosure of therapy records was reliant on 'consent' from the survivor. As the Information Commissioner has outlined[24], it is simply not possible for survivors to give true 'consent' as meant under the Data Protection Act in this situation. This is because for true 'consent' a person must be free to decline consent without suffering a detriment. A rape survivor who declines consent always suffers a detriment, even when the request that was made was not a lawful request

[21] HL Deb, 18 December 2023, c2089
[22] British Psychological Society, 'Major Health Organisations Warn CPS Guidance that Allows Rape Victims' Private Therapy Notes to be. Accessed in Court is 'Damaging and Dangerous' [5 August 2022]. Available from: https://www.bps.org.uk/news/major-health-organisations-warn-cps-guidance-allows-rape-victims-private-therapy-notes-be; British Association for Counselling and Psychotherapy, 'Call for CPS to Reconsider Pre-Trial Therapy Guidance' [8 August 2022]. Available from: https://www.bacp.co.uk/news/news-from-bacp/2022/5- august-call-for-cps-to-reconsider-pre-trial-therapy-guidance
[23] George, R. & Ferguson, S. 'Review into the Criminal Justice System Response to Adult Rape and Serious Sexual Offences Across England and Wales: Research Report' [HM Government, June 2021]. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994817/ rape-review-research-report.pdf
[24] "Information Commissioner's Opinion: Who's Under Investigation?", 31 May 2022

and did not form a reasonable line of enquiry.

When a survivor declines to grant access to her therapy records this is often perceived as her having 'something to hide', which creates a detriment. Furthermore, survivors are often told that if they refuse to consent this will result in their cases being closed and no charge being brought. Even in those rare cases that do go to trial, a survivor can be cross-examined by the defence barrister accusing her of refusing consent because she has 'something to hide', which can influence the jury against her. Many, if not most, survivors are so aware of the negative consequences if they decline consent that they prefer to give consent, and to be seen to be cooperating with the police at all costs, even when they have received legal advice that the request made was not a reasonable line of enquiry.

As a result of these concerns, the Government has introduced clause 22 into the Victims and Prisoners Bill, which removes the ability of survivors to 'consent' to disclosure of third-party records.

However, this proposal unfortunately creates a new and urgent problem for therapists and counsellors: police requests for data will now come directly to them, without the victims' consent, forcing them to make worrying ethical and legal decisions about whether private counselling records are fair to disclose. In this context, creating a higher bar to protect victims' therapy notes from disclosure becomes even more important.

With or without new Clause 22, the current system puts survivors, as well as their therapists, between a rock and a hard place. It cannot deliver on fundamental privacy rights.

The solution

1. **A system with a higher legal threshold of disclosure, which protects privacy and only permits disclosure where there is a genuine evidential value in doing so, in alignment with fair trial rights**

2. **A system where every request has to be approved by a judge to ensure the law is properly implemented and to create clear case law and consistency**

No one should have to choose between seeking justice and seeking specialist, trauma informed therapy. In other jurisdictions with similarly adversarial legal systems, the ability of survivors to seek both justice and therapy is afforded greater protection, at the same time as duly safeguarding the right to a fair trial. One such jurisdiction is Australia.

New South Wales was the first Australian state to introduce a law protecting the confidentiality of survivors' counselling records under the Evidence Amendment (Confidential Communications) Act 1997.[25] It has been operating successfully for over 20 years, within a criminal justice system very similar to that of the UK. In New South Wales, the legal threshold for obtaining counselling and therapy records is *"substantial probative value taking into account the public interest in preserving confidentiality*".[26]

This model makes clear that it is possible to preserve a defendant's right to a fair trial alongside a more proportionate arrangement for disclosure of therapy records, as the higher threshold has not resulted in any miscarriages of justice. Over twenty years there have been approximately 20 appeals to the Court of Criminal Appeal, none of which resulted in the overturning of a conviction.

[25] New South Wales, Evidence Amendment (Confidential Communications) Act 1997, No. 122. Available from: https://legislation.nsw.gov.au/view/pdf/asmade/act-1997-12 .
[26] Ibid.

Today, there are varying models of legal protection concerning survivors' counselling records across Australia[27] and in some US states. In Tasmania, Australia, the protection of counselling notes as confidential is absolute; this is also the case in Kentucky, USA. In other Australian states, legal protection takes the form of a privilege, whereby a survivor can be granted standing with the court's leave to assert or waive the privilege at court.[28] In our view, the New South Wales model takes the most nuanced and balanced approach to the issue and will work effectively within the context of our legal system.

Balancing rights

In New South Wales, a presumption of non-disclosure operates by law under the sexual assault communications privilege.[29] This strikes a middle ground between balancing survivors' and defendants' rights, where confidential counselling notes may only be disclosed in a criminal proceeding where the information is deemed to be of substantial probative value, and where the public interest in disclosure "substantially outweighs" that of non-disclosure.[30] Importantly, the legal test used in the New South Wales model safeguards both the right to privacy and the right to a fair trial; to access therapeutic records an application is made to a court for leave to issue a subpoena, where a party believes the records have substantial probative value.

Under the New South Wales model, a judge is tasked with determining whether counselling records should be disclosed by applying a strict public interest test, consisting of a set of six factors, which include the need to ensure the continued efficacy of the confidential therapeutic relationship.[31]

Additionally, a court can consider a 'confidential harm statement', detailing the harm a survivor is likely to experience if their records are disclosed or used.[32] These statements ensure that judges are made aware of "highly sensitive information in the documents", such as a history of childhood sexual abuse, relationship difficulties, pregnancy terminations, recent episodes of self-harm, or suicidal ideation.[33] Crucially, in New South Wales, a survivor has the right to attend court and put forward the arguments in her favour when a judge decides whether to give an order for disclosure, and be legally represented. This means survivors have an automatic right to argue that their counselling records do not meet the threshold for disclosure.[34]

Under this system, specialist lawyers (independent legal advocates) with the relevant expertise are able to advise and represent a survivor, as well as guide the court on how the law operates and ensure the survivor's right to privacy is adequately safeguarded.[35] Lawyers are available to represent all survivors directly as part of a publicly-funded scheme.[36] This commitment to providing legal advice and representation for survivors ensures an understanding and awareness of their legal rights and ensures there is a means to protect those rights in practice.[37] These mechanisms stand in stark contrast to the current absence of independent legal advice or representation for survivors in England & Wales, where survivors lack access to legal advocates to advise on the suitability of requests for records and the potential impact of agreeing to such requests. Without this survivors' rights are hard to enforce.

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[27] Jillard, Loughman, & MacDonald (n 21)
[28] Ibid, see in particular 254.
[29] New South Wales, Criminal Procedure Act 1986, No. 209, Division 2, S. 295. Available from: https://legislation.nsw.gov.au/view/html/inforce/current/act-1986-209#ch.6-pt.5-div.2
[30] Legal Aid New South Wales, 'Subpoena Survival Guide'. Available from: https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/subpoena-survival-guide/sexual-assault-communications-privilege-sacp
[31] Ibid; Jillard, Loughman, & MacDonald (n 21) at 257
[32] Legal Aid New South Wales, 'Subpoena Survival Guide' (n 26)
[33] Ibid.
[34] Jillard, Loughman, & MacDonald (n 26) at 257
[35] Legal Aid New South Wales, 'Sexual Assault Communications Privilege Service'. Available from: https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service
[36] Legal Aid New South Wales, 'Subpoena Survival Guide' (n 26)
[37] Jillard, Loughman, & MacDonald (n 21)

Proper process: judicial oversight

Under the New South Wales model, applications for access to therapy records are made directly to the court and a judge considers whether the basis for the request meets the legal threshold of "substantive probative value". In our own system, requiring requests to be determined at court will ensure that the law is applied properly, as well as creating consistency and providing guidance for police and prosecutors in the form of established case law. It will remove the highly problematic practice that exists, whereby the police can obtain therapy records on the basis of survivors' 'consent'.

It is also essential to have a judge make the decision to avoid a situation where therapists are faced with having to decide whether to disclose records against their client's wishes. That would put therapists in an impossible position, destroying the relationship of trust with their client and harming their recovery process. Therapists have their own data protection duties to their clients and cannot be expected to hand over their records voluntarily without a court order.

In addition, we are calling for the provision of independent legal advice for all survivors of sexual violence and abuse. Independent legal advice must be provided by qualified and experienced lawyers, to ensure survivors' Article 8 ECHR rights are upheld, which are being breached by current practice around routine access to therapy records.

At Report Stage in the House of Commons, Maria Miller MP pointed out that *"judicial oversight at this pre-charge stage will immensely improve the attitude of the police and the Crown Prosecution Service to survivors of rape, and their practice in that regard."*[38]

We have a separate but related ask for independent legal advice for rape survivors in the Victims and Prisoners Bill. The experience in New South Wales shows us that when independent legal advice was introduced after 2010, this enabled the system to work more effectively.

Conclusion

For the reasons outlined above, we invite peers to support the amending of the Victims and Prisoners Bill to ensure that we keep counselling confidential. We are confident that our proposal would have a positive impact on both investigation delays and police resources, filtering out the current practice of excessive and inappropriate routine requests which frustrate the criminal justice process and deter survivors from engaging further.

[38] House of Commons, Victims and Prisoners Bill Debate [4 December 2023] at 111-112. Available from:: https://hansard.parliament.uk/commons/2023-12-04/debates/5DA8E455-339D-497A-9F0D-8B566B3E8EA9/VictimsAndPrisonersBill