

Engaging with Victim-Survivors in Rape and Serious Sexual Offence cases: Digital and Third-Party Materials

Findings from Operation Soteria Workshops

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The Research

As part of Operation Soteria we convened three panels of practitioners in January 2023, comprising:

1. One panel of legal experts (a mix of prosecutors and civil rights specialists),
2. One panel of trauma experts (a mix of academics and practitioners),
3. One panel of police practitioners (a range of ranks and forces).

Each panel held three workshops to discuss specific challenges that we found in the first year of Operation Soteria. This briefing sets out what the panels said on issues related to digital and third-party materials^❶ in Rape and Serious Sexual Offence (RASSO) cases.

The challenges: early findings from Operation Soteria

Operation Soteria's year one work found inconsistent practice in relation to the use of digital and third-party materials:

- Digital evidence collection was largely focused on the victim-survivor and not the suspect.
- No forces had detailed guidance on assessing reasonable lines of enquiry or how to discuss and obtain informed consent from victim-survivors.
- Officers often raised with victim-survivors that their phone or third-party materials would be needed early in investigations, including some who scrolled through devices at first response.
- Requests for devices or third-party materials were often made at the Achieving Best Evidence (ABE) interview (or even first response), often with the aim of returning the phone to the victim-survivor quickly.
- No forces had an embedded approach to using less invasive methods, such as screenshots.
- The Crown Prosecution Service (CPS) were perceived as a barrier to changing practice, with expectations that they require full downloads, do not accept screenshots and will ask for a wide range of third-party materials.
- Requirements such as Digital Processing Notices (DPNs) were not consistently adhered to. ⁱ

In year two, a survey of 538 first response officers and 417 investigation officers in 13 expansion forces (see Appendix I for more information) showed:

- Variable practices within and between forces about how and when officers accessed digital evidence and third-party materials.
- A significant minority of officers described concerning practice e.g. at least one case where they sought only verbal instead of written agreement to access a victim's phone.

Key findings

Important cultural shifts are required to ensure requests are relevant, proportionate, and necessary:

- Although some participants reflected on perceived improvements in both police and CPS use of digital and third-party material,¹ it was evident that there is still a significant cultural shift needed; away from seeking all digital and third-party material 'just in case', towards establishing reasonable lines of enquiry, accessing only material which is relevant, necessary and proportionate – as reflected in existing guidance and legislation.
- **The following issues were evident:**
 - An emphasis on officers needing to justify why digital evidence or third-party material was not collected, rather than justifying what, if anything, was needed and then collecting only that information.
 - Police officers gathering digital or third-party material, before taking early investigative advice, on the assumption that the CPS would require those materials.
 - There were indications that police are approaching different forms of digital information, outside the scope of new legislation, with blanket requests allowing access to vast amounts of information, e.g., victim-survivors being asked to sign forms to give access to their entire cloud. Although this practice supposedly avoids inconveniencing victim-survivors, it raises concerns about the need for policy and guidance to reflect current practice and technological advancements, and further highlights the cultural shift required.
- Concerns were raised by some participants that perceptions about victim-survivor attitudes to digital and third-party materials were closely tied to rape myths, e.g., that good victims would hand over their phones.
- Participants in the legal and trauma groups voiced the need to acknowledge the power imbalance that exists between police and victim-survivors which will likely affect how victim-survivors respond to requests made of them, e.g., agreeing to disclosure of their digital or third-party materials simply in order to appear to be co-operative, even when they are advised that a request is not a reasonable line of enquiry or they feel unhappy about what seems to be an unnecessary invasion of privacy. This should be carefully considered in policy development relevant to digital and third-party materials.

Accessing specific relevant information rather than making blanket requests:

- Participants emphasised the need for officers to explore alternative and less intrusive means of gathering relevant information.
- Some participants questioned why police powers to access a suspect's phone, e.g., when the PIN was not provided, were not being used. It was noted that accessing the suspect's phone would potentially change practice around arresting or voluntarily interviewing suspects, which requires further consideration.

- Screenshots of relevant material appear to be in limited use. Participants suggested that where very minimal material was deemed relevant screenshots may suffice, however the wider context of messages is often deemed important, and certain safeguards are required to control how screenshots are gathered and used, i.e., screenshots taken and sent by the victim were not deemed appropriate.
- The police group described being able to access specific information without downloading a phone through specific apps, e.g., Facebook, WhatsApp, Snapchat, which may result in police efficiency savings. Access to specialist digital support was described as crucial to enabling this type of access. Although such practice may be perceived as beneficial to victim-survivors as officers can access material remotely without requiring the victim-survivor's phone, victim impact must be assessed to ensure the rights and interests of victim-survivors are upheld.
- The scope to request specific information in relation to third-party materials was far more limited. Although it was suggested by the police group that specific date parameters can be useful when requesting material, e.g., health records around the time of a sexual assault, 'blanket requests' for third-party material appeared to be the norm. It was not clear what justification would be provided that there is material of relevance to a reasonable line of enquiry in such situations.
- The main types of third-party materials discussed were medical records, school records, social services records and counselling notes or ISVA records, with different potential relevance to a case. These differences could help form the basis for more detailed guidance around identifying any specific relevant material and seeking only that third-party material.

When to discuss digital and third-party materials with victim-survivors:

- **Participants differed in their views about when digital and third-party materials should be discussed with victim-survivors. The police group felt that victim-survivors should be made aware early on of the possibility of their digital or third-party materials being accessed. However, the legal and trauma groups raised some concerns about early discussions (at first response or at the time of the ABE) as:**
 - It is unlikely that relevance to reasonable lines of enquiry would have been established at such an early stage and prior to the suspect interview.
 - The victim-survivor is likely to be in a traumatised or emotional state making it problematic to effectively discuss what would happen with the information and allowing them to make an informed choice.
 - The victim-survivor is unlikely to have appropriate support in place (e.g., intermediaries, ISVAs) at these early stages in the investigation.

- **However, it was acknowledged that some victim-survivors may raise the likelihood of relevant materials unprompted. Views differed on how officers should navigate this:**

- Some felt that officers should not review or gather any material until relevance has been established. Officers should acknowledge the material, advise that they will make a note of it and ask the victim to keep the material.
- Other participants felt that it could be reviewed in such situations, provided the victim-survivor was given a full explanation about its ongoing use, though it was recognised that this may be difficult during first response.
- Careful consideration is required in such cases given the importance of establishing trust and confidence with victim-survivors in the early stages of an investigation.
- Guidance for first response officers is required in relation to digital and third-party material. Some participants suggested that first response officers should never access victim-survivors' phones, with some extremely limited exceptions, e.g., where a suspect needs to be immediately identified.

How to discuss digital and third-party materials with victim-survivors:

- Victim-survivors must be able to make a fully-informed, conscious decision to volunteer their device, with clarity about exactly what information the police would have access to, the reasons for needing that information, and what would happen to that information (including the potential for it to be used in court).
- Some participants questioned whether informed consent is possible in relation to gathering digital and third-party materials, suggesting that the term 'consent' may not be appropriate as once victims have granted permission for the phone to be accessed, they are unable to revoke this at a later stage (which does not meet the requirements for true 'consent'). This should be discussed with victims. The term 'agreement' was a proposed alternative.
- Participants were positive about the idea of legal advocacy being available to the victim-survivor to provide advice about requests for digital and third-party materials, though few had experience of this. One police participant who reported a positive experience suggested that the legal advocate supported the police to pushback against CPS requests to collect information where no relevance had been established.

Supervision, accountability, and oversight:

- It appears that the use of DPNs may have improved but continues to be inconsistent, and the appropriate recording of decision-making processes may not always be adequate. Supervision structures are required to ensure that reasonable lines of enquiry are being identified and recorded effectively.
- Effective implementation of existing and new guidance, legislation and policy, is critical to improving police practice in this area. Appropriate and effective oversight and accountability mechanisms are essential.
- There does not appear to be equivalent, standardised forms for collecting alternative forms of information, e.g., third-party material or other digital material such as from a victim-survivor's cloud. Participants in the police group gave examples of locally developed forms for requesting all information held, e.g., a form stating, "I give consent for you to access any information about this individual in England".

Recommendations

1. **Development of specific guidance for first response officers to establish and outline their role in relation to digital materials.**
2. **Further guidance is required to support police forces to identify relevance in relation to third-party materials. This should include the use and monitoring of the NPCC's interim third-party material request form.**
3. **Appropriate and effective supervision and accountability mechanisms should be established to ensure fair, appropriate and legally founded police practice, which upholds the rights and interests of victims.**
4. **Joint training and ongoing professional development opportunities should be explored between police and CPS. Examples of such training were described positively during the workshops.**
5. **Work to support the pilot of legal advocates should continue.**

Appendix I:

Expansion Force Surveys on Digital Evidence and third-party materials (TPM)

About the Survey

An online survey identified current practices around accessing digital evidence and TPM in 13 police forces across England and Wales, including around 417 investigation officers and 538 response officers (each question had different response rates).

We have not collected data which identifies whether digital evidence or TPM was relevant and proportionate in each case. Instead, we have sought to identify general trends. Data collection took place between January and April 2023, and asked officers to reflect on their 10 most recent RASSO cases.

Survey results: Response Teams on Digital Evidence:

- Variable first response practices.
 - Most officers did not tell the victim-survivor that they may need to hand over digital devices, or actually request access to them, at first response.
 - However, 36% officers had accessed a victim's phone in at least one recent case.
 - 17% had sought access in at least half of their most recent cases (including n=27 who had sought access in every recent case).
- Screenshots were the most common method of accessing digital devices at the first response stage, including amongst officers who said they had not recently accessed phones.
- When asked where the relevant line of enquiry most commonly came from, more than half (64% of 285 responses) said it was usually the victim-survivor saying there was relevant evidence on their phone.
- A small proportion (12%) said that relevance most commonly came from experience of similar cases, and a further 5% said they mostly accessed phones because their force's guidance encouraged it to be considered. This appears speculative and contradicts the 'thinking approach' of R v Bater-James.
- Because most did not access phones, only 117 respondents described how they sought the victim's agreement. Of these 117, 42% opted for verbal instead of written agreement at least some of the time.
- This survey began in January 2023 and so is after the November 2022 requirement for DPN written consent, but some of the cases that respondents were recalling may have occurred before this point.
- A third of first response officers were 'fairly' or 'very' confident that they understood victims' rights around digital devices, however this included almost all of the 12% who had suggested the most common reason to access a phone was speculative force guidance or similar cases.

Survey results: Investigation Teams on Digital Evidence

- The average estimate from all 417 investigating officers was that they had accessed a victim's digital device in 54% of their most recent cases.
 - Most officers (61% of 417) had sought access to digital devices in at least half of recent cases, including 71 (17%) who sought access in every recent case.
 - Others reported less frequent access, including 9% who said they had not accessed a victim's digital device in any recent case.
- Most officers (64%) felt that downloading the phone was the most common method of accessing phones, with only a couple of the forces using screenshots routinely (19% of 346 responses).
 - While the survey did not determine proportionality, it is noteworthy that R v Bater-James set out the need to identify the least invasive route to accessing digital material.
- When asked how they usually identified the relevance of digital material, most investigating officers (60% of 345) said it was the victim-survivor telling them about digital evidence.
 - However, a small number said that was mostly about 'experience of similar cases' (15%) or 'force guidance' (2%).
 - While the survey cannot determine whether access to digital devices was relevant and proportionate in specific cases, these bases for accessing phones could be speculative.
- While the vast majority of officers sought the victim's written agreement (almost always via a DPN), 50 officers (16% of 310) had sought verbal agreement only in at least one recent case. This is despite a requirement to use a DPN and gain written consent.

- Most (70%) investigation team officers were 'fairly' or 'very' confident that they understood victims' rights around digital devices, however this included the 15% who had suggested the most common reason to access a phone was speculative force guidance or similar cases.

Survey results: Investigation Teams on Third-Party Material

- Access to TPM was more common than access to phones, with officers estimating that they had requested this evidence in an average of 61% of recent cases (n=337).¹
 - Most (70%) had accessed TPM in at least half of recent cases and another 23% had accessed it in every recent case. However, 17% said they never request TPM.
- When asked to list the three most common sources of TPM, 93% (of 315) said GP or medical records not directly related to the incident, 90% said social services records, while 68% said counselling or therapy notes.
 - Some officers (23%) listed school or university records among the top three sources of TPM while the remaining answers were spread between family courts, work records, or compensation claims.
- Most officers (32%) said the relevance of this evidence was most commonly from the victim-survivor telling them about TPM, but 24% said it mostly came from experience of similar cases and 9% said it was mostly because force guidance encouraged TPM.
 - An estimated 20% of TPM requests were said to be a direct request from the CPS.
- Most (58% of 285) said they were 'fairly' or 'very' confident that they understood victims' rights around TPM. This included those answering that relevance usually came from similar cases rather than specific foundations.



Further Information

Please contact o.smith@lboro.ac.uk for further information about this work.

Project

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