

Doing clients justice

Do you have to surrender your therapy notes when asked by the police? How can we safely support a client in the process of bringing their abuser to justice? **Peter Jenkins** and **Jill Swindells** answer your FAQs about therapy and the criminal justice system

Q The guidance on pre-trial therapy (PTT) was recently updated. But what is PTT and why is it so controversial?

Peter Jenkins: The term applies when a counselling client is a victim and/or potential witness in a criminal trial. In the past, PTT could be provided for children and young people under 18, and for adults who have experienced sexual violence or other types of crime. It's important to recognise that PTT is different to generic therapy. The key differences include the need for an explicit but flexible contract on the focus of therapy, provision for information-sharing with the criminal justice system (CJS), the nature and potential uses of record-keeping, and the therapy's overall relationship to the trial process. The Crown Prosecution Service (CPS), together with the Home Office and the Department of Health, issued detailed (though non-statutory) practice guidance on PTT in 2002, which has been misinterpreted by many members of the CJS as meaning all therapy pre-trial risks 'contaminating' a case and should be avoided. This left many victims unsupported during a stressful process that can last months or years. The updated guidance released on 26 May this year clarifies recommended practice to help victims get the support they need.

The courts have been concerned in the past about the informal support and potential influence over children and vulnerable adult witnesses, both prior to trial and in court, by people such as social workers and therapists. There was concern that this could potentially lead to supporters guiding or even rehearsing witness evidence in an unfair manner.

The professional standing and public recognition of therapy have also changed dramatically since the original guidance was produced. Therapy is now seen as less of an unknown factor or a threat to the court process and much more as a valuable

support that needs to be accommodated and harnessed appropriately by the courts. This new guidance marks another milestone in that process, in my view.

Jill Swindells: The police, prosecutors and others working in the CJS have never had authority to decide if victims/witnesses could access therapy, but they often advised against it pre-trial, lest it 'taint the case' and the prosecution fail as a result. Too many therapists seem unaware of PTT or, worryingly, see it as irrelevant to their practice. Others have avoided PTT as it felt like a legal and ethical minefield. Appearing in court is highly stressful and successful prosecutions are dependent on victims' co-operation, yet many fail to access appropriate support. I am delighted that the guidance has finally been updated, but my concern is that, without adequate promotion, training and funding, history may repeat itself, little will change and the controversies will continue.

Q What are the main areas that have changed/been clarified?

JS: The old guidance related to victims/witnesses deemed 'vulnerable or intimidated' and children under 18 getting therapy pre-trial, but now all 'victims' can access therapy before, during and post-trial, if they can find PTT free of charge (usually provided by an agency) or fund it themselves. Witnesses are not mentioned, but I would assume they are included.

The new guidance is aimed primarily at police and prosecutors. It clarifies that

they have no role in deciding if a victim can access therapy and it aims to allay fears about therapy interfering with recall and meddling with evidence. It provides a good understanding of the impact of crime on victims' memory and common psychological responses to help address victim credibility myths. Hopefully, this will mean any inconsistencies in accounts and therapy notes are less problematic in future.

The accompanying note for therapists states that therapy should not be delayed for any reason: a wider range of therapies/techniques are allowed; first and subsequent disclosures should be carefully recorded and may involve making witness statements, and therapists may be called as 'professional witnesses'. For both parties, it provides detailed guidance on our roles, responsibilities and procedures regarding data protection legislation compliance and how the police engage with us and our clients, and we with both of them.

Q What are the main differences between PTT and generic therapy for a victim of crime?

JS: Historically, PTT differed from generic therapy in several ways, many of which have now been addressed by the new guidance:

- (i) not all potential victims/witnesses were eligible, *but this is no longer the case under the new guidance*
- (ii) therapy could not commence until after the police interview, *but not now*
- (iii) therapists could not guarantee confidentiality as our notes might be requested, *which remains the case*

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- (iv) clients were not free to discuss with the therapist the details of the criminal behaviour they had experienced, *but they can now*
- (v) therapists were restricted in which modalities/techniques could be used, *but more are possible now.*

When assessing and contracting for either PTT or generic therapy we must provide clients with clear information to enable them to make fully informed decisions about reporting to the police sooner or later, along with the risks and consequences of proceeding with either PTT or generic therapy. For both, we should carefully record first and any subsequent disclosures and proceed on the basis that clients not involved in the CJS who are receiving generic therapy may decide to report later. There may also be disclosures that raise an immediate safeguarding concern.

There are fewer differences now and a lot more clarity on GDPR-related rules and procedures to follow for both PTT and generic therapy.

PJ: Most generic therapy is probably carried out in a dyad, consisting of the therapist and client, whether within an agency context or

in private practice. PTT changes the context of this by radically altering the therapeutic frame. Essentially, the therapist becomes a member of a much wider multidisciplinary team of professionals built around the client, including the police, CPS, lawyers and medical practitioners. In some respects, this team is entirely virtual, as the therapist may never actually meet or interact with any of the other team members. However, the therapist remains a crucial member of this team, with potentially significant implications for the progress and outcome of the criminal trial.

Effective participation in this virtual team requires at least a basic understanding of the professional role and contributions of other team members and an ability to communicate effectively with them as required. Unlike generic therapy, PTT requires a good working knowledge of the criminal justice process and what happens at trial, given the significance of therapy for the potential outcome of the criminal trial, and the impact this may have on the client and their family. Therapy is no longer a private, confidential transaction between client and therapist. BACP good practice accordingly points to the need for clear contracting regarding sharing of therapy records, as well as clarity about compliance with data protection law and the GDPR.

In addition, therapists may be called as witnesses in the court case, probably unlike most other forms of generic therapy practice. They may be asked to clarify specific aspects of their therapeutic practice, or to amplify the meaning of their records, sometimes under hostile cross-examination.

However, in other ways, the new guidance perhaps brings PTT work back into closer alignment with generic therapy. The new guidance has dropped its earlier insistence that therapists avoid in-depth exploratory forms of therapy and instead focus mostly on supporting the client by promoting their coping skills. Techniques such as EMDR and trauma-focused CBT are thus more likely to be used in the future in PTT than was the case before, given the court's past wariness of re-exposure therapies and their assumed potential for contaminating client evidence in court.

Q Can you sum up the current position around police access to counselling notes in relation to criminal prosecution?

JS: The police can request access to our notes at any time but only if it is a 'reasonable line of inquiry', having considered the privacy of the victim, and if they are likely to reveal relevant material considered capable of

undermining or supporting the prosecution. Unfocused requests to browse files by the police or for us to do that for them should not be made.

The police should also seek the victim's agreement before approaching us. Their subsequent information request should provide us with enough specificity of what data are sought and why to enable us to comply with our own data protection obligations as controller and respond in line with the 'data minimisation principle' - restricting which records are shared and redacting irrelevant information where appropriate. Clients should be given the opportunity to review their notes before anything is sent on.

We can refuse requests if our client has not been approached first; if we are unable to obtain client confirmation directly; if the police are unable to evidence agreement, or if the client has objected. We can also refuse if the police seek a speculative review; if it is not clear what exactly is required and why; if more than the minimum is requested; if the request is not compliant with our data protection obligations, or if our notes contain nothing that is relevant to the case.

If we refuse to comply, we will be asked to preserve all documents. A court application could be made for a witness summons to produce the documents requested or to attend court to give evidence held in confidence. All discussions with our clients about data protection and police requests for notes should be fully documented as they may be required as proof of compliance with data protection legislation.

Q Can you explain the concerns around 'coaching' and 'contamination' in relation to victims/witnesses in therapy?

JS: The original guidance was grounded in the belief that discussion of the incident(s) prior to trial, including in therapy, would increase the potential for evidence 'contamination' due to inconsistencies emerging in the narrative, filling gaps in memory with deliberate or inadvertent fabrication, and/or risk creating false memories. The old guidance described 'coaching' as detailed recounting, re-enactment or the use of language potentially seen as 'instruction' if recounted. In both

scenarios, the witness would be perceived as less reliable and their case likely to fail.

The current guidance acknowledges that:

- (i) traumatic memories are more fragmented and disorganised
- (ii) each time memories are recalled, there is potential for them to be altered, but this is normal
- (iii) certain aspects of disclosure may be delayed for valid reasons such as feelings of shame.

Therefore, accounts may change over time but still be accurate, and prosecutors need to consider such insights on a case-by-case basis. 'Coaching', however, is still advised against.

PJ: Historically, PTT touches on the status of children and women as reliable witnesses with regard to sexual assault and rape - as recently as 1976, a judge at the Old Bailey in London famously expressed the view that, 'It is well-known that women in particular and small boys are liable to be untruthful and invent stories.'

The development and use of PTT really originates with the growing awareness in the 1980s and 1990s of the extent of child sexual abuse and sexual assault against women. PTT has been a really important initiative to protect and value the evidence of survivors of sexual abuse, and it represents a crucial part of our history as a profession.

Q We know that convictions for rape are at an all-time low, and one reason given by the CPS is victims' reluctance to pursue a prosecution. Surely therapy has a role to play in making this stressful and potentially retraumatising experience manageable for victims?

PJ: The legal system regarding rape and sexual assault is undeniably undergoing a major crisis at present. Rates of reporting rape and child sexual abuse appear to be rising, but rates of successful convictions are low and falling even further. Women's

advocacy organisations have forcefully argued that rape is becoming effectively decriminalised as a result. Victims' commissioners have pointed to the serious barriers facing victims in giving evidence. In the past, defence lawyers might have focused on the past character and sexual history of victims. This then shifted more towards seeking medical or therapy record evidence, and now mobile phone data, in order to challenge the credibility of witnesses.

The new guidance promises a better balance, hopefully protecting witnesses' privacy to a much greater extent than before. The therapist takes on a key role here as the custodian of the client's confidential material, as contained in the therapy records. In ethical terms, the guidance increases the autonomy of the client in being able to access therapy pre-trial and to talk about their experiences more fully. It also promotes the autonomy of the therapist in being able to provide a wider range of appropriate therapeutic approaches that can be better geared to the client's needs. Crucially, our message to the CJS needs to be that PTT can actually enhance the ability of witnesses to give their evidence, rather than undermine the legal process in court.

In the past, many victims seem to have been incorrectly advised that they could not have therapy before the criminal trial, as this could undermine the prosecution case. There is still, for me, a troubling sense of therapists feeling de-skilled when it comes to the law. Some agencies and some therapists are either unfamiliar with the criminal justice system or unaware of the PTT guidance, or just lack professional confidence in standing up assertively for the rights of child and adult victims and survivors of abuse to access therapy pre-trial. Therapists working in this field need to remind CJS professionals that accessing PTT is not only endorsed by key guidance from the Ministry of Justice but that victims and families also have a legal right to be informed of support services such as PTT under the latter's statutory Code of Practice for Victims of Crime.

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'WITH MY THERAPIST'S HELP, I COULD MAINTAIN SOME BOUNDARIES WHILE I TOOK MY ABUSER TO COURT'

In March this year I sat in court as my childhood abuser was given a 25-year sentence. The trial itself had been a gruelling experience. But so had the previous three-and-a-half years - the time it took to get there from my initial police report. Even with therapy, that wait was almost unendurable.

I'd been seeing my therapist for some time before I reported the abuse. As soon as I made that report, I found myself dragged into a system - a conveyor belt of intrusion - where the investigating officers sent pages and pages of documents to sign, permitting the police to request my doctor's notes, my therapist's notes, any social services records, all the way back to my childhood. Form after lengthy form to be read, initialled and signed, and this intrusion to be consented to, lest the case be dropped and my abuser be free to continue his crimes.

I was extremely fortunate that my therapist helped me to reclaim some control over the disclosure. She put in the hard yards, separating out the notes that mentioned the abuse from all the other things we'd discussed: my infertility, my sexuality, my professional and personal identity. With her help, I was at least able to maintain some boundaries.

The new guidance empowers all therapists to challenge requests as it recognises the sensitivity and confidentiality of pre-trial therapy notes. It makes it clear that the police and CPS are no longer able to make blanket requests for notes.

I welcome this guidance, and I hope it empowers more therapists to act as mine did. Her willingness to defend my boundaries had an immeasurable therapeutic impact. Many people like me, abused in childhood, are used to the idea that our boundaries don't matter. Showing that you are willing to stand up for your clients' dignity and privacy has the potential to be equally transformative.

In the years it took to get to court, therapy had a crucial role to play. I found that the legal process stripped me of my identity. To the police and CPS, I was simply 'the witness' - a source of raw material to be used to obtain a conviction. I was expected to be compliant in the surrendering of my privacy, available at their convenience. Meanwhile there was no recognition of my fears, my pain, my frustration.

In getting to trial, the echoes of childhood abuse have been retraumatising. Now begins the equally important work of post-trial therapy. And the therapy room is a private space once more.

Dr Emma Byrne is a former scientist, author and broadcaster. She is in training on the Diploma in Gestalt Counselling at the Gestalt Centre, London.

Q Is there a risk that the new PTT guidance could deter victims from seeking therapy? BACP recently co-signed a letter along with BPS, UKCP, NCS and the Royal College of Psychiatrists to urge the CPS to reconsider the guidance because of this concern.

PJ: Despite the positive changes represented within the new PTT guidance, there is still

concern that the changes do not go far enough in protecting therapy notes and client privacy from intrusive access by the courts. The PTT guidance is voluntary, not statutory. It simply advises on best practice, rather than providing therapists with legally recognised privilege. (Privilege would prevent counselling notes from use as evidence in court, and also protect therapists from being required to give evidence in court, as applies to therapists in the US, for

example.) One hundred MPs have sought to have the new PTT guidance overturned, on the grounds that it concedes too much ground over sharing therapy notes, and will deter victims from seeking therapy.

Rebecca Hitchen from End Violence Against Women Coalition (EVAW) has argued strongly that 'scrutinising therapy notes in a courtroom strips them of their context and sends a message loud and clear that it is survivors who are on trial, rather than the men who raped them'.

Given this risk of inappropriate use of therapy notes in court, it may fall to therapists to protect their clients taking part in PTT by using absolutely minimal forms of recording, which are still consistent with agency requirements and the *Ethical Framework*. Therapy records that are very brief and factual may prove far less enticing to the courts as a source of evidence likely to open up new lines of cross-examination at trial.

Q If I see a client for assessment who has experienced childhood sexual abuse but is unsure whether they want to involve the police, and I don't have specific PTT training, should I turn that client down (even if they are in need of support)?

JS: Surprisingly, the new guidance does not require a therapist following PTT guidance to be specifically trained, or even fully qualified or experienced. But the decision to take on this client is worth careful consideration in supervision, specifically whether:

- there are safeguarding issues - client's age/vulnerability or any ongoing risk to them or others
- your supervisor has PTT training or experience to support you
- you have a good enough understanding of the new PTT guidance
- you know enough about the CJS generally, and reporting specifically, to help the client make an informed decision
- the client can access Independent Sexual Violence Adviser (ISVA) services to support decision making and any follow-on needs
- there is a local agency or private practitioner with more relevant experience/training that you could refer them on to
- you can adhere to the *Ethical Framework* - for example, working within limits of competence, providing an adequate service, honouring the client's trust and avoiding harm.

SUPPORT AND INFORMATION

- The updated Crown Prosecution Service guidance on pre-trial therapy is available at www.cps.gov.uk/legal-guidance/pre-trial-therapy
- There are three relevant BACP Good Practice in Action legal resources, available from www.bacp.co.uk/gpia: *Working with the Crown Prosecution Service Pre-trial Therapy Guidance (CPS 2022) in therapy with adult and child witnesses in the criminal courts in England and Wales* (GPiA 128, in press); *Sharing records with clients, legal professionals and the courts in the context of the counselling professions* (GPiA 069); and *The United Kingdom General Data Protection Regulation (UK-GDPR) legal principles and practice notes for the counselling professions* (GPiA 105).
- *Keeping Secrets: childhood sexual abuse and pre-trial therapy* is a free report from the Bluestar Project. This reports a major survey by sexual abuse charity The Green House of therapists and agencies providing PTT for children and young people. It includes a guide to note keeping and PTT protocol. bit.ly/3nPrGc7

Q If a client says they have no intention of reporting their abuse to the police, and I start therapy with them on that basis, where does that leave me if they then decide to report after all?

JS: This scenario demonstrates the importance of us all being PTT informed and GDPR compliant. If, at the assessment stage, we explain the implications of reporting now or later, including note-sharing matters, and any issues relating to our model/approach to therapy that might have the potential to damage a future court case, we will have done all we can to ensure our client is able to make informed choices now and later. Clients may need time to

reflect on their reporting intentions. During this time of uncertainty, a PTT-informed approach could be adopted.

It is important to have a signed contract/agreement that covers the key points, so a client who decides to report later has something to refer back to and we have a copy for our records to evidence transparency and compliance.

However, if we haven't done this initially and we are still working together when the client reconsiders reporting, we have an opportunity to explain then and to recontract for PTT with them if they decide to report. We should also highlight that their earlier notes might be requested. If we are no longer working with the client, we might be approached by the police first and should follow the new guidance on note sharing, including giving the client an opportunity to review their notes and what disclosure is proposed.

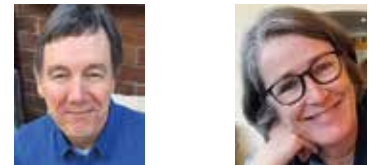
Q Is there any therapeutic benefit to PTT if we can't focus on the crime? What can we work with?

JS: The original guidance strongly advised against discussing the crime(s), particularly details of allegations, encouraging clients to extend their accounts and using leading questions. After all, we are not investigators and there is little therapeutic benefit in so doing. The new guidance is less directive and simply advises against certain therapies/techniques, such as 'debriefing' involving 'repeatedly recounting the details', and 'group therapies' requiring participants to 'share their experiences related to criminal offences'. The danger of therapy notes being inconsistent with police statements/interviews remains but in future this should be less problematic if/when it is better understood by prosecutors.

We have much to offer clients in understanding and coming to terms with the impact of crime, avoiding future victimisation, reducing stress, improving mental health and self-care, rebuilding self-esteem and confidence and developing resilience and also coping strategies for criminal justice involvement and life in general.

As one PTT client put it, 'Talking about how you feel about it and not "it" helps! It's about me and not them, how I feel about it, learn to live with it, take it forward, accept it and not feel ashamed of it. It doesn't have the weight or burden it used to. I've learned from therapy to have more insight. I don't feel a victim anymore. Now I feel in control and have real confidence. I can talk about it now without getting too upset, and I want justice. If I get justice, fantastic, amazing, but if not, I've still learned from it.' ■

Disclaimer: While every effort has been made to ensure the information in both this article and the signposted BACP resources are legally accurate, they are for guidance only and should not be used as a substitute for legal advice.



About the authors

Peter Jenkins is a counsellor, supervisor, trainer and researcher. He has been a member of both the BACP Professional Conduct Committee and the UKCP Ethics Committee. He has published a number of books on legal aspects of therapy, including *Professional Practice in Counselling and Psychotherapy: ethics and the law* (Sage).

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