

Rape victims' notes being used against them in court puts vital counselling sessions at risk, therapists warn

Police can request therapy notes to aid investigations – but campaigners say these should be kept out of rape trials and warn their use can be 're-traumatising.'

Therapists say they are worried about how their notes could be used by the justice system.

By Serina Sandhu Senior Reporter October 26, 2022 12:30 pm (Updated 1:37 pm)

Therapists have called for their notes to be kept out of rape trials, saying it is “perverse” and “re-traumatising” for victims’ own words to be possibly used against them in court.

One therapist, who claimed he felt enormous pressure from police to release his notes in a sex abuse case, said therapy was in “jeopardy” under the current system.

Campaigners are concerned that notes from pre-trial therapy can be used to diminish victims’ credibility in court, and are calling for them to be confidential in police investigations.

Police can request therapy notes to aid investigations but there are fears they could also be obtained by the defence.

However, a pre-trial therapy expert said there was too little understanding of the concept, and that counsellors need better training in working with police and the Crown Prosecution Service (CPS).

Therapists have told **i** the threat of their notes possibly being requested in police investigations shapes the way they work.

Ali Ross, director of Caya Therapy in south-east London, said he was forced to keep the judicial system in mind when speaking to patients.

He said: “I have concerns about how those notes would be used by the courts. Because once the notes are available for the courts, they can be pulled apart in any which way they want to present them, in any which way anybody wants, with all the ambiguity.”

He has written “pared down” notes and has had “explicit” conversations with his patients about notetaking.

Mr Ross offers to co-write reports of therapy sessions with clients if notes are requested in investigations, to give them more ownership of what is submitted.

Notes from therapy sessions are inappropriate for use outside that setting, he added.

“There are some things that a client and a therapist say between each other that won’t make any sense to anyone apart from that therapist and that client. We go on some quite trippy tangents sometimes.

“We’ll explore fantasy and reality, truth and falsehood and we’re not there to try and determine what exactly happened objectively, we’re there to help somebody understand their subjective experience. So I’m not invested in finding the truth.”

Mr Ross said he was concerned that people were advised against seeking therapy in rape and sexual offences cases. Patients could work with their therapist to minimise the risks that could arise from notes being shared, he added.

Mark Vahrmeier, a psychotherapist registered with the United Kingdom Council for Psychotherapy (UKCP) claimed he was once “badgered” by police to release therapy notes in a sex abuse investigation.

He said the current system made him “very angry” and he warned that victims could be put off receiving therapy, or forced to take part secretly without telling the police.

“Or they take the risk [of having therapy] and then they have to self-censor... which actually defeats the whole purpose of therapy. It’s a catch-22 from every angle,” he said.

“I feel very angry about it. I think to use a victim’s own words against them is perverse and it’s retraumatising. And it closes down the main avenue they have to actually overcome this trauma – that’s shut down to them because it’s no longer safe, is it, if they can use it against you?”

He added: “I think therapy notes absolutely should be privileged because if they’re not privileged, even if they’re not being subpoenaed, the idea of them not being privileged places the whole process of therapy under jeopardy, because one of the basic tenets is of confidentiality.”

In May, the CPS issued new guidance on pre-trial therapy that sought to alleviate victims’ concerns that accessing counselling could damage the prosecution’s case. It stated that notes should only be requested where “relevant”.

However, Caroline Jesper, head of professional standards at the British Association for Counselling and Psychotherapy, which represents more than 60,000 therapists across the UK, said she had concerns about the updated guidance and called on the CPS to review it.

“We’re worried the broad terms used within the guidance mean private therapy notes could be accessed by courts unnecessarily. We fear that the thought of their therapy notes being used in court could prevent rape survivors seeking therapy when they need it,” she said.

“Confidentiality and trust are at the heart of what we provide as therapists and it’s important for victims and therapists that these are not eroded by this guidance.”

Jill Swindells, who runs pre-trial therapy workshops for those working in the sector, believes the new CPS guidance “respects the victim’s privacy more”, and “notes are going to be only handed over that are relevant, and they can be redacted”.

She added: “I don’t understand why so many professional bodies and therapists are concerned. I think it’s just had the spotlight thrown on it.

“Pre-trial therapy is basically following some guidelines while doing your usual practice... There are just other things you need to take into account in terms of not being able to guarantee confidentiality because notes could be requested if there’s a possibility that they [the client] could go and report [a crime] in the future or somebody else could, if it’s not already been reported.

“As soon as [the client] discloses something, we need to work in a ‘pre-trial-informed’ way and give the victims or witnesses the benefit of understanding how things will need to go forward and the possibility of sharing requested notes. Because otherwise they can’t make informed decisions about what they want to do.

As a consequence, if you don't, you're backpedalling because confidentiality might be broken as a result."

Ms Swindells said therapy notes would never be confidential in the justice system. "It's never, ever going to happen, I really don't think, because... the right to a fair trial trumps the right to privacy," she said.

"So we have to work with the criminal justice system, protect our clients' rights as far as we can, make them aware upfront of the implications of their reporting or somebody else reporting [a crime] that their notes might be requested and what all that involves."

The CPS said: "The well-being of victims is paramount in every investigation. Survivors of sexual offences can seek the support they need and not worry their road to recovery will have an impact on court proceedings.

"Balancing a victim's right to privacy with a suspect's right to a fair trial is a sensitive issue. That's why we are clear that therapy notes should only be requested where relevant, and how they may be used must be clearly explained from the outset.

"Our guidance for prosecutors follows the law set out in the Attorney General's guidelines on disclosure. It also reinforces the importance of taking a measured, proportionate, and reasonable approach to lines of enquiry – including requests for therapy notes – so they are not intrusive."

The Attorney General's Office said: "The Attorney General's guidelines on disclosure have significantly enhanced the standards for accessing therapy records. We have raised this standard to ensure thorough and fair investigations are undertaken. The requirement to pursue all reasonable lines of inquiry and examine relevant information are ones that are set by statute and the revised Disclosure Guidelines follow this statutory standard."

It added: "CPS Guidance on pre-trial therapy makes plain that victims should get the help that they need and neither investigators nor prosecutors will stand in the way of this.

"Pre-trial therapy notes will only be accessed in the rare circumstances that they are absolutely necessary to a reasonable line of inquiry. This ensures significant protections for victims while maintaining a fair trial. The health and well-being of victims is absolutely central to this approach."