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The recent suicide of Frances Andrade, a witness in a child sexual abuse prosecution, has highlighted the issue of victims having access to pre-trial therapy. Peter Jenkins outlines the continued failure by the Government to make explicit recommendations for victims and witnesses to be offered pre-trial therapy, and to fund it. But he goes further to argue the case for a wholesale revision of the UK's adversarial legal system, which would lessen the pressure on victims and witnesses by removing the need for cross-questioning in court

• Pre-trial therapy

• by
• Peter Jenkins

Investigation and court proceedings of alleged abuse seem to be a constant theme in the media, whether involving churches, schools, or high-profile media personalities. However, there is also increasing public concern about the levels of emotional support provided for witnesses giving evidence in such cases, following the recent tragic suicide of one such witness, in a widely publicised case. This led to accusatory headlines in the press and even to a leader in *The Times*, declaring: 'More help must be given to vulnerable witnesses unused to courtroom combat.'¹ MP Keith Vaz called for the revision of the guidance on support in such cases. Similarly, Keir Starmer, the reforming head of the Crown Prosecution Service, has issued a call 'to redouble our efforts to improve the criminal justice response to sexual offending' via a series of roundtable discussions.²

In an adroit and timely response, the Ministry of Justice has recently launched a consultation on a *Draft Code of Practice for Victims of Crime*, setting out new entitlements for vulnerable, intimidated and child victims.³

Pre-trial support

Support for victims and witnesses prior to a criminal trial can apply to a number of distinct groups. These include:

- children under the age of 18, who have been subjected to alleged *abuse*, including neglect or physical, emotional or sexual abuse, or who have been exposed to domestic violence
- adults who are *intimidated* because of their fear and distress about testifying in court

- adults who are *vulnerable* – ie they have a mental disorder or impaired intelligence or social functioning, or a physical disability or disorder.

It is important to distinguish carefully between the different types of support available: between preparation for giving evidence in court on the one hand, and ongoing pre-trial therapy on the other. It can also be important for support roles to be clearly demarcated, and for the different forms of support provided by different people to be distinguished. For example, support workers can provide practical help to a rape survivor, while a counsellor carries out the therapeutic work, to avoid any overlap or blurring of these roles and activities.

Pre-trial therapy guidance

Pre-trial therapy, whether for adults or children, has long been viewed as problematic and contentious within the criminal justice system. In the eyes of the law, it carries two main risks. First, unless carefully controlled, it may lead to ‘coaching’ of the witness, by unwittingly helping the client to rehearse and go over their evidence prior to its actual presentation in court. Second, there is the attendant risk that the therapy will ‘contaminate’ the evidence: that the client in therapy will incorporate their therapist’s reflecting statements into their own understanding and memory of the events.

In response to these concerns, in 2001 and 2002 the Crown Prosecution Service (CPS) issued separate practice guidance on pre-trial therapy for child and adult witnesses.^{4,5} These were later incorporated into *Achieving Best Evidence*,⁶ which sets out clear standards for the provision of pre-trial therapy for both children and adults.

Therapists who take on pre-trial therapy with a vulnerable adult or child witness need to take account of a number of factors. They need to be fully aware of the legal context of the therapy being provided – that is, the relevant mental health and criminal law, court practice and rules of evidence. They also need to be aware of the tensions between the best interests of the client and the public interest in prosecuting alleged offenders. The criminal trial process affects the types of recording appropriate for this kind of work; it needs to be factual, accurate and contextual (referring to date, times and names of persons present at the session). Crucially for therapists, there are potential limits on confidentiality arising first from the need for close liaison with the police and Crown Prosecution Service and, second, from the requirement for both the prosecution and the defence solicitors to have access to the therapist’s records.

The CPS practice guidance covers in detail the implications of the type of therapeutic approach used and the focus of the therapy for the viability of the client’s evidence in court. The guidance outlines:

- the need to avoid any rehearsal of the client’s evidence
- procedures for responding to the client making allegations of further, previously undisclosed, offences
- the need to avoid evidential problems inherent in attempts by the therapist to distinguish fact from fantasy in the client’s account.

In effect, the therapist has to show a willingness to work as a member of a multi-disciplinary team that includes the CPS and police, with consequent clear limits to client confidentiality. In addition, an employer or agency that provides therapy under contract may be under an explicit obligation to provide reports to the CPS on the process and outcome of therapy.

The practice guidance sets out very clear parameters for therapy that essentially explain its role as secondary and supportive to the criminal trial process. However, it also makes two crucial points: first, the CPS, and other bodies, do not have the legal power to veto therapy, either for adults or children; second, children have a right to a say in decisions about pre-trial therapy, under Article 12 of the United Nations Convention on the Rights of the Child 1989 (respect for the views of the child). Moreover, if the child’s need for therapy conflicts with the needs of the trial, then the child’s welfare must take priority and the trial should be abandoned.

Criticisms of the guidance

For therapists, if not for lawyers, the practice guidance is likely to make slightly strange reading. Psychotherapy and counselling are distinguished from each other as separate therapeutic approaches – a feat not generally recommended for the faint-hearted. There is also a rather curious list of therapeutic approaches to be avoided as likely to prejudice evidence for the trial. These include interpretive psychodynamic psychotherapy, group therapy, hypnotherapy, psychodrama and regression techniques. There is a marked preference for a therapeutic focus on improving self-esteem and self-confidence, using cognitive and behavioural techniques. Nevertheless, the guidance does represent some sort of accommodation between therapy and the criminal justice system, albeit very much on the latter's terms.

The original practice guidance is over 10 years old and, perhaps, badly in need of revision and updating. Given the predominance of NICE guidelines and evidence-based practice, it is striking that the list of problematic therapies rests simply on expert opinion, without a shred of an evidence base. Anecdotal evidence about its implementation in practice is also concerning. Numbers of counsellors report that the police and CPS still frequently refuse to allow therapy, despite the positive ethos expressed by the guidance. This is supported by some findings by Plotnikoff and Woolfson, drawing on data from Devon and Cornwall NSPCC: 'Some police officers are unaware of the guidance and families were advised that therapy could not take place until after the trial'.⁷

Overall, research into the detailed operation of the practice guidance is generally lacking. Jill Swindells researched this for her counselling degree dissertation, and found a general lack of awareness about the specific requirements of pre-trial therapy among her small sample of 10 therapists. She concluded that 'therapists must appreciate counselling has the potential to make or break a trial; without counselling, a trial may falter or fail; without a trial, the client has no chance of seeing justice done'.⁸

Research into pre-trial therapy

Most research into pre-trial therapy has tended to focus on the experiences of children, rather than adults. Plotnikoff and Woolfson explored the experiences of 50 young people involved as witnesses in criminal proceedings, and their parents.⁷ The young people were aged between six and 17 years, with an average age of 12 years. Most described themselves as feeling 'very nervous or scared' before the trial. After the trial, only a minority of the young people and their parents were positive about the trial experience. Pre-trial therapy was offered to seven of the young people, although social services vetoed this for one of them. Post-trial therapy was later offered to another six young people but by then only two of them wanted it.

Lara (15) told the researchers: 'I was offered a counsellor after the incident by the police at the local hospital but when I called her to make an appointment she said she didn't really "do" children. The counsellor at school said she'd do it. She has been great.'

The mother of a boy aged six said: 'My main concern was that my son couldn't have counselling. The police said it might prejudice the trial but I could do it if he was really "falling apart". He was having nightmares and had trouble sleeping. I did too. I tried to follow up anyway but counsellors wouldn't touch him – they said the police wouldn't like it.'

Research into the STAR project (Surviving Sexual Trauma after Rape) found positive experiences of counselling among young people aged 14–16 years, but few had progressed successfully through the criminal justice system.⁹ STAR separated the role of support worker from that of counsellor and established a database for tracking cases through the criminal justice system. Of 45 survivors interviewed, one third had contact with a counsellor, with most rating the counselling positively. Reasons for not using the service included not knowing it was available, support being obtained from elsewhere, or people thinking 'they could not be helped'. One finding may have wider implications for supporting this client group: 'Developing a positive counsellor/survivor relationship tended to be linked to a flexible approach where the survivor had control'.⁹ These benefits of client empowerment were also reported in a multi-centre evaluation of counselling provision in sexual assault referral centres.¹⁰

Consultations on provision

The adverse publicity arising from recent court cases has coincided, fortuitously, with recent consultations on the provisions for witnesses and victims of crime. In his foreword to the 2012 *Getting*

it Right for Victims and Witnesses consultation document,¹¹ the Lord Chancellor Kenneth Clarke called for ‘first class support, such as practical advice and counselling services’. This document set out two key principles underpinning the proposed nil-cost reforms of the criminal justice system:

- ‘practical and emotional support should be given to those who need it most
- ‘victims should receive help as and when they need it.’

However, none of the 66 questions posed in the consultation paper dealt directly with pre-trial therapy. In the Ministry of Justice response to the consultation,¹² Kenneth Clarke warmed to his theme of the centrality of emotional support: ‘If any of these victims and witnesses come away from an investigation or trial feeling the experience has added to their suffering then we have let them down.’ Criminal justice should therefore provide support services that ‘aim to achieve the two outcomes of cope and recover’ for such victims. The consultation response was geared to answering set questions, of which question 18 – ‘What could be done to improve the experience of witnesses giving evidence in court?’ – could perhaps be loosely linked to the issue of emotional support. However, the consultation responses to this question (paragraphs 86–94)¹² make no mention of pre-trial therapy.

Hopes may have been raised that it would be addressed in the second, follow-on consultation on the 2013 *Draft Code of Practice for Victims*.³ The stated purpose of the draft code is ‘to provide victims with a clear idea of the entitlements and services they can expect from the Criminal Justice Agencies’. It proposes that children and vulnerable or intimidated adult witnesses should be able to claim ‘enhanced entitlements’ beyond those available to other witnesses or victims. These include automatic referral by the police to victims’ services within two days of making an allegation, and ‘to information on pre-trial therapy and counselling where appropriate’. So child and adult victims would have a right to information about pre-trial therapy. But there is, as yet, no proposal to update or revise the practice guidance that governs its actual delivery.

Reforming pre-trial therapy provision

Given this welcome opportunity for revision and updating, the practice guidance should be based on evidence-based practice, rather than on simple assertion. It needs to include a much wider spread of therapeutic approaches with evidence of effectiveness. Jill Swindells suggests specialist training for counsellors in pre-trial therapy, with a register of suitably experienced and trained counsellors in this modality.⁸ Research is urgently needed to check the extent of police and CPS compliance, or non-compliance, with the key recommendations of the guidance.

Any reform of pre-trial therapy provision also needs to acknowledge the thorny issue of funding. Currently, much of the therapy and support for child and adult victims and witnesses is provided by rape support centres and agencies that support vulnerable victims of crime, with government funding of around £40 million.¹¹ However, at least part of the burden of providing this support falls on hard-pressed statutory and third sector agencies, who lack dedicated funding for this purpose. One survey of young survivors of sexual abuse has estimated that 90 per cent ‘do not receive any substantial subsequent support’.¹³ In Austria, by contrast, local authorities are now legally required to provide therapeutic help for young people who have been physically or sexually abused, under legislation sponsored by their Children’s Commissioner.

If the recent consultations really are going to provide ‘first class support’ for child and adult victims of crime, then adequate funding has to be a priority. But there is also a case for taking stock of the adversarial nature of the legal system itself, which dictates the skewed priorities of pre-trial therapy in the first place. New Zealand is now considering introducing elements of an inquisitorial system to address some of the constraints on victims’ access to justice.^{14, 15} In view of the current media concern about vulnerable witnesses in abuse trials here in the UK, it would seem to be an opportune time to introduce some much-needed change to the provision of pre-trial therapy.

Peter Jenkins is a Senior Lecturer in Counselling at the University of Manchester and the author of Counselling, Psychotherapy and the Law (2nd edition; Sage, 2007) and co-author, with Debbie Daniels, of Therapy with Children (2nd edition; Sage, 2010).

Peter Jenkins will be running two BACP Professional Development Day workshops on 'Legal issues in therapeutic work with children and young people', on 31 May in Newcastle and 27 September in Manchester. For more details, see www.bacp.co.uk/events

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