

## **Summary**

Rape and serious sexual violence are now well understood to be the cause of serious on-going trauma in survivors. Some experience PTSD as a result of their experiences and for many there is need to obtain therapy.

I am pleased the Crown Prosecution Service has re-drafted its' guidance on this topic since the last version is now outdated. and I am encouraged that this guidance states explicitly that therapy should not be delayed due to concerns about criminal proceedings.

I very much endorse the warning to police and prosecutors that therapy notes should never be sought as a matter of course and only where they might be a legitimate line of enquiry. Taken with the new RASSO guidance, also in consultation, I hope this will result in new training for all those involved RASSO cases, putting an end to speculative wholesale investigation of victims' personal lives.

However, I remain concerned that without cultural change, victims may wrongly be encouraged to delay therapy, or the prospect of disclosure of counselling notes may for some act as a disincentive to getting the help they need.

There are a number of different but connected pieces of work going on in respect of sexual violence survivors both in Government and across CJS agencies. All of this work can appear to be happening in isolation and it seems logical that this guidance be completed only after certain other pieces of work have been. For example, you say in the consultation preamble you anticipate a further ICO report later in the year, looking specifically at third party material. Whilst appreciating this piece of work on pre-trial therapy is long overdue, it might be expedient to await the ICO findings in case they conflict with this guidance.

One key theme running throughout is survivors of sexual violence have in recent times been severely let down by the criminal justice system. I would agree. This is why I want to see top down cultural change. So whilst I welcome new and improved guidance, I am interested to know what other measure are being put in place to ensure cultural change is actually delivered.

*The consultation seeks views on the following questions that relate to key objectives of the revised guidance:*

- 1. Will the revised guidance and, in particular, the key message that therapy should not be delayed for any reason connected with a criminal investigation or prosecution, encourage victims to obtain the therapy they need in a timely fashion?*

I note this guidance is not aimed at victims and as such, it will not directly encourage or discourage victims to obtain therapy. This is just as well as the language used is often quite inaccessible. I recommend that to accompany this guidance, there should be an accessible guide for victims, which outlines their right to obtain therapy but also advises them of the potential for disclosure and which 'types' of therapy may be more likely to present issues in a

court case. This should be developed in conjunction with support sector experts in sexual violence.

The messaging for professionals is clear that access to therapy should not be delayed and I welcome this. Alongside this guidance, I would like to hear about training and other measures designed to change a culture in which victims are frequently put off from obtaining counselling by criminal justice agency practitioners advising that therapy could impact a trial. This culture will not evaporate simply because new guidance has been published.

The guidance will also have to reflect any recommendations arising from the government's end to end rape review in respect of disclosure of counselling records and notes. It is essential victims of crime, in particular rape and sexual violence, have unfettered access to therapy to deal with any trauma they have experienced.

Therapy, in general, is focussed upon feelings and emotional responses to trauma rather than facts or rehearsing the details of a traumatic incident. Therefore, counselling notes/ records of therapy should not ordinarily form either a reasonable line of enquiry or be disclosable. The current practice within the criminal justice system of wholesale intrusion into victims' private lives when they report a sexual crime needs to change. This guidance makes clear speculative requests are inappropriate and I welcome this. But once again, I make the point how will this guidance translate into changes of practice on the ground.

The way in which counselling notes are used in court, and arguably at an earlier stage, to undermine or otherwise assess a victim's credibility is an important consideration here and is tied up with rape myths and stereotypes, which are referenced in the new RASSO guidance under consultation. I would like to see a link between the two pieces of guidance, which is currently missing, in the form of an explicit assertion victim credibility should not be assessed in light of counselling notes without a clear and explicit justification.

## *2. Will the revised guidance assist in addressing the perception that therapy will damage the prosecution case?*

Presumably this question is asking about the victim's perception of police and prosecutors? It will certainly assist, however taken in isolation is not enough, as outlined above.

Again, there needs to be whole system change here. The reality on the ground is that the defence will use counselling records to undermine the credibility of a victim if they can and this is currently seen by the system as legitimate. However, this must be challenged as it feeds into rape myths, stereotypes and unconscious bias. Juries are influenced by how a trauma victim presents and how a defendant presents, and they can hold biased views about class, race, age culpability etc. Most importantly, those who have experienced trauma can appear disorganised or chaotic and sometimes 'self-medicate'. Counselling/ therapeutic notes can be used to play into the juries 'just world' bias and result in victim blaming.

## *Will the revised guidance assist in raising awareness of how a traumatised victim may present?*

Yes, to a point. However, the guidance needs to be contextualised within wider guidance and be accompanied by training and other measures to ensure this understanding of presentation is woven throughout and ultimately explained and outlined to a jury to mitigate any bias etc.

3. *Will the revised guidance including the content of Annex A assist in raising awareness about different forms of trauma-based therapy?*
4. *Is the revised guidance covering therapies that might cause difficulties at pages 12 and 13 accurate, useful and comprehensive?*
5. *Is the revised guidance for therapists at pages 5 and 6 covering discussions with a victim prior to the commencement of pre-trial therapy accurate, useful and comprehensive?*
6. *Does the revised guidance including Annex B provide sufficient clarity to therapists around how to record a disclosure of criminality made by a victim during the course of therapy?*
7. *Does the revised guidance provide sufficient clarity to therapists around procedures to follow when called upon to assist with a police investigation?*
8. *Does the revised guidance provide sufficient clarity around the circumstances when an investigator might seek access to pre-trial therapy notes during the course of an investigation including the importance of avoiding speculative enquiries?*
9. *Does the revised guidance provide sufficient clarity around the process that should be followed when an investigator seeks access to pre-trial therapy notes including obtaining the victim's informed consent?*
10. *Does the revised guidance provide sufficient clarity around the circumstances when an investigator will be required to pass material contained within pre-trial therapy notes to a prosecutor?*
11. *Does the revised guidance provide sufficient clarity around the circumstances when a prosecutor might be required to disclose material contained within pre-trial therapy notes to the defence and how, during that process, consideration is given to the consent of the victim?*
12. *Do you have any other feedback you wish to share around how the revised guidance could be improved?*

I am not qualified to answer these questions. However, I will touch upon some of them in a more generalised way here.

The guidance does not deal well with the situation where an individual has been in therapy for some time and only at that point makes a disclosure of non-recent sexual abuse. As the first account will be within the context of therapy, this does make the notes of therapy sessions potentially a reasonable line of enquiry, but there is no guidance here about what the parameters might be. This is similar to the situation regarding digital downloads, where complainants' data held on phones was being routinely downloaded in its entirety. There's a risk here that all counselling/ therapy notes may be sought. The guidance does need to be far tighter here.

The guidance assumes parity amongst therapists, but not all persons who hold themselves out as therapists will be familiar with this guidance or indeed professionally accredited. The 'profession' is quite unregulated. How prosecutors and others deal with this in the context of

criminal proceedings is not covered. There is increased risk to victims who are in a therapeutic relationship with such a therapist of their prosecutions collapsing because the situation has not been adequately discussed with them at the outset as per the guidance.

Again, the language here is inaccessible in places and there should be accessible guidance for victims/ survivors and for therapists.

The list of therapies contained within the guidance is not exhaustive and could do with being more detailed as it could lead to ambiguity and confusion.

The situation with children is unique and this guidance does not deal with the views held by some in the system that children automatically make unreliable witnesses. As with rape myths and stereotypes, which also apply to children, this inherent belief that children present more challenges in respect of reliability needs to be addressed. The situation with regards to children and refusal to consent to records being disclosed i.e. discontinuance or a public interest immunity application is also not well delineated even though the considerations will be different for children and adults.

I have significant concerns about the impacts of delays in proceedings and how these impact upon victims accessing therapy. Previously, victims have been advised not to seek therapy until the conclusion of a trial. Prior to Covid-19, from investigation to verdict, some proceedings were taking up to 2 years. We now have an unprecedented back-log in the courts following lockdown, and these time frames only likely to grow. We know victim attrition can be linked to a number of issues, including concerns about disclosure, lack of support and feeling they are being scrutinised, but delay also has a significant impact. This is exacerbated when victims are advised against accessing therapy and can lead to feeling stuck and unable to move on. Some victims will withdraw in an attempt to move on with their lives. The impact of delay needs to be addressed in the guidance, highlighting potential positives of therapy, which can often reduce the rate of attrition.

Finally, although we did not ask specific questions about pre-trial therapy, the findings of my recent survey of rape survivors<sup>1</sup> found the following which helps to underline what we have said above:

*Highlighting the value of professional help, [a chart in the report shows] a trained counsellor/ psychologist was rated highest, with 71% of the 218 respondents who received such support valuing this as very important. The high number of respondents receiving this kind of support perhaps implies that this group were likely to be quite advanced in processing the rape, which perhaps ties in with feeling able to tell their stories despite the attendant trauma.*

*We asked survivors about whether the police asked for access to their mobile phone data, other digital devices, medical, counselling, social services or education records. Two thirds of survivors said that the police had requested access: 26% saying that all of these were requested, 40% saying that only some were requested. Just over a quarter of respondents said that access was not requested (26%), and the remaining 9% were not sure.*

*Survivors were asked about how the police explained the reasons for accessing digital and other records, as well as how they would access those records. One in three agreed that the police clearly explained why any requests to access my mobile phone and other private data were necessary (11% strongly agreed, 22% agreed). Around one in five survivors agreed*

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<sup>1</sup> Rape Survivors and the Criminal Justice System October 2020

<https://victimscommissioner.org.uk/news/survey-finds-rape-victims-have-lost-faith-in-the-justice-system/>

*that the police clearly explained how they would ensure that they would only access mobile phone and other private data that was relevant and necessary.*

*Many survivors said that they wanted to help with the investigation and achieve a positive outcome. Some did not believe that they could refuse such requests, that they did not have anything to hide, or thought the requests were simply part of normal investigation procedures. However, most survivors had concerns around the disclosure of personal data and access to records.*

*Many survivors said they felt that the requests were invasive, intrusive, violated their privacy, and that they concerned about how that information could be, or was, used against them in court. Some survivors compared the request to the violation inflicted by the rape. Other survivors said the volume of digital data and records requests exceeded what they thought was reasonable. In the words of one survivor: 'One thing is for sure, the police and CPS must stop using requests for spurious information about victims as a deterrent to report'. Other survivors told us that they thought the disclosed information was irrelevant to the investigation.*

*Throughout the criminal justice process, survivors talked about how their credibility was repeatedly tested. We found evidence that survivors' fears about not being believed is inhibiting the reporting of rape. Many survivors felt that complaints which solely relied upon their testimony would not have enough evidence to proceed.*

*When some survivors reported incidents to the police, several told us about how they did not feel believed, but felt interrogated, were called a liar, or they felt the incident was minimised. Survivors described how individual officers made them feel disbelieved. In addition, most survivors had concerns about the requests to access their personal records and many felt they were under suspicion or were treated like a criminal. Survivors said officers had told them they would not be believed by a jury.*

*I felt it was very invasive, especially as so much of it (education records/social services/counselling for pre-existing anxiety and depression) was irrelevant and so was digital data.*

Female, White, bisexual, aged 16 to 24, reported in 2019

*I have a history of mental illness and being told that I would have to give up my medical records was a huge part of why I was unsure about going ahead with the investigation. Before it was closed, I had avoided seeking help earlier on (i.e. therapy) because I was scared about this being used against me in a trial.*

Female, White, straight/heterosexual, aged 25 to 34, reported in 2019