



Attorney General's Guidance

The provision of therapy for witnesses prior to trial

1. Scope and purpose

- 1.1 The purpose of this guidance is to provide support for the provision of timely therapy to address the emotional and psychological needs of victims of crime before, during, and after a trial – whilst assisting criminal justice practitioners to perform their duties in accordance with the relevant laws of Jersey and in observance of an accused's protected right to a fair trial pursuant to Article 6 of the European Convention on Human Rights ('The Convention') and a victim's right to respect for private and family life under Article 8 of the Convention. This guidance is primarily aimed at Prosecutors but contains helpful information for the police and professionals involved in the provision of therapy for victims before a criminal trial.
- 1.2 For the purpose of this guidance, the term 'victim' is used throughout for consistency (rather than "complainant", "survivor" or "witness") and refers to adults, young people and children who have made an allegation that a crime has been committed against them. The focus of this guidance is on victims of sexual crime, but it is also applicable to victims of other offences.
- 1.3 It is not the intention to provide detailed clinical or therapeutic guidance to specialist practitioners involved in the provision of therapy, or to prescribe standard operating procedures to police officers, rather it is expected that this guidance will inform the processes and procedures applicable where pre-trial therapy is being considered, provided, or has formed the basis of material being considered during the trial process.

2. Fundamental Principles

The priority needs of victims of crime and access to therapy

- 2.1 The health and wellbeing of the victim should always be the determinative factor in whether, when and with whom they seek pre-trial therapy.
- 2.1.1 Therapy should not be delayed on account of an ongoing police investigation or impending prosecution - all victims must be made aware that they can access therapy to ensure that their emotional and psychological needs are met before, during and after any potential trial.

The purpose of pre-trial therapy

- 2.2 The primary purpose of therapy is therapeutic, not investigative.

Access to therapy notes and disclosure obligations

- 2.3 The knowledge that details of a victim's conversations with their therapist may be seen by criminal justice practitioners and could be used against them by a defence advocate at a future trial is a significant concern for many victims. In some cases, that can undermine their engagement with therapy and/or the criminal justice process. Where therapy is undertaken these fears can, in some cases, inhibit the therapy process and undermine its efficacy with, for example, victims deliberately censoring themselves when discussing issues. It is therefore critical that criminal justice practitioners understand and strictly follow the law and guidance governing the access to, handling and disclosure of material generated as a result of therapy.

Human rights

- 2.4 A victim has a qualified right to respect for their private and family life under Article 8 of the European Convention on Human Rights. A qualified right is one that a public authority may interfere with where the interference is in accordance with the law and is necessary in the interests of (among other things) the protection of the rights and freedoms of others. One of those rights is the defendant's absolute right to a fair trial under Article 6. A fair trial includes fair and lawful disclosure. An absolute right is one that cannot be interfered with. A victim does not waive their right to privacy by engaging with a criminal investigation, but the prosecution may be obliged to interfere with that right by disclosing their personal data to the defendant where it is necessary to do so to ensure the fairness of the trial.

3. What is pre-trial therapy?

3.1 Pre-trial therapy is any type of therapy that is accessed while the criminal justice process is on-going and a trial may be possible. Therapy allows a service user to talk about their emotions and feelings, what triggers them, and to develop the skills and confidence to articulate a narrative of their experience - typical therapies include:

- (i) Counselling and Psychotherapy – These therapies involve a victim talking about their feelings and emotions with a trained therapist. Counselling and Psychotherapy can help to gain a perspective on experiences, address the impact of an incident upon a victim, and find ways to deal with emotional issues. These therapies can provide treatment for emotional and behavioral disturbance, occurring as a result of trauma. Counselling and psychotherapy can address the psychological consequences of abuse such as guilt, shame and difficulty trusting others.
- (ii) Psycho-education – Psycho-educational therapy can help victims to cope with and manage their symptoms by providing them with an understanding of their psychological experiences and trauma response.
- (iii) Trauma focused therapies - More structured trauma-focused interventions include Cognitive Behaviour Therapy (TF-CBT), Eye Movement Desensitisation and Reprocessing (EMDR) and Dialectical Behavioural Therapy (DBT). Such therapies can enable the processing of traumatic events and reduce the likelihood of dissociation in court. Sometimes this leads to additional memories of the incident to be recalled, and can bring fragmented and disorganised memories into a more coherent recall. Therapists can provide service users with the skills to manage their emotions without dissociation as regularly or as severely, to help them communicate their needs, to identify when they are dissociating and to make sense of any explicit memories they have about their trauma. Trauma focused therapies do not change memories but reduce the distress associated with them.
- (iv) Creative therapies – Use forms of non-verbal expression such as art, music and dance to explore and communicate issues, feelings and emotions in a way that can be therapeutic.

4. The impact of trauma upon victims

- 4.1 Whilst therapy is one of the best ways of helping a victim recover from the impact that a criminal offence has had on their emotional wellbeing and psychological and mental health, there are aspects of a victim's trauma response that may impact on a victim's presentation.
- 4.2 It is important that criminal justice practitioners have a shared understanding of the different ways in which trauma can impact upon memory. Prosecutors and investigators need to be aware of the impact of trauma for many reasons, including:
- (i) To ensure that the quality of decision-making in a case is as informed as possible.
 - (ii) To highlight case-building opportunities.
 - (iii) To challenge myths relating to victim credibility during the investigative process and at court.
- 4.3 This section is not intended to provide a comprehensive review of the research on the impact of trauma, but to highlight some of the key issues and reasons why these may occur.

Hyper-arousal, hypo-arousal and dissociation

- 4.4 Hyper-arousal, hypo-arousal and dissociation are common in a number of anxiety disorders and are a natural response to stress. Typically, hyper-arousal and hypo-arousal are frequently referred to as 'fight, flight and freeze', which are survival responses to perceived and actual threats. These responses activate physiological processes in the body, either with 'hyper' or heightened arousal (i.e., heart racing, faster breathing, sweating, nausea and dizziness) or, 'hypo' or 'shut-down' freeze responses (i.e., inability to move or speak).
- 4.4.1 Dissociation is a more prolonged and severe response that includes feelings of oneself or others being 'unreal'. It can include changes in the sense of subjective time, 'spacing out' or loss of awareness of the current situation, alterations in the ability to feel emotions, unusual bodily sensations such as analgesia or anaesthesia, paralysis or a sudden loss of skill, and out-of-body experiences. Dissociative flashbacks – a symptom of post-traumatic stress disorder, involve re-experiencing the traumatic event and loss of the ability to differentiate it from the 'here and now'. Whilst not every victim of sexual violence will experience these responses, there is a higher association and likelihood of this occurring with this kind of traumatic event. Dissociation is significantly more likely where a victim has experienced accumulative trauma from multiple or repeated abuse, such as childhood abuse, domestic violence, and torture.
- 4.4.2 It is recognised that it may be the case that the provision of trauma-focussed psychological therapy could augment the victim's capacity to give evidence in court. If a victim feels threatened and has unprocessed traumatic memories, giving evidence

or being confronted with the accused could trigger these responses. That can result in the victim feeling overwhelmed or unable to respond and could significantly interrupt the proceedings, particularly if this led to a more prolonged flashback or dissociative episode. Therapy can facilitate a victim in learning to engage de-arousal and grounding techniques, and/or for the accused and court room to be less likely to activate these responses.

Self-blame, shame and avoidance

- 4.5 Non-disclosure and delayed reporting have historically been misunderstood and have led to the non-progression of cases and poorer outcomes for victims in court. Self-blame and shame are extremely complex; they can be factors in why many people avoid disclosing or fully disclosing aspects of traumatic incidents. Avoidance can also relate to fears of not being believed, fear of the potential impact of disclosure and reporting, and fear of the accused. Avoidance of any reminders of the criminal offence is also common. Care needs to be taken in understanding and working with victims who have presented with these responses to the incident(s).
- 4.5.1 Sexual violence can often result in self-blame due to feelings of shame about the sexual assault; often the victim internalises the experience in the absence of objective external evidence or witnesses to challenge this assumption. Victims can feel that their behaviour in some way contributed to the assault – usually despite the absence of any evidence to support that view or even when there is evidence to the contrary. This has been exacerbated by the perpetuation of rape myths and stereotypes, particularly whereby society has endorsed beliefs that a victim should have been able to say ‘no’ and ‘fight back’ against any potential assailant. Any identification of self-blame should be understood in the context of the victim trying to explain what happened and why it happened; it should not be confused with a legal admission of fault or guilt.
- 4.5.2 The provision of psychological therapy could assist the victim in coping better and in fact reduce the likelihood of such thoughts and reactions being activated in giving evidence and in court.

Potential impact of therapy on memory

- 4.6 Changes to memory - Every time a memory is recalled there is a potential for it to be altered in some way. For instance, there may now be an additional memory of an incident being recalled, considered, reacted to, and discussed in a specific context, such as talking to friends, making a witness statement, or in therapy. Recalling a memory can strengthen certain aspects, weaken other aspects that did not come to mind, or introduce new elements. There is little, if any, evidence that such everyday processes introduce inaccuracies into memory except when people are confronted by misleading information or fail to distinguish actual events from products of their imagination.
- 4.6.1 Inconsistencies - Inconsistencies in accounts of events given at different times are normal. With complex or repeated experiences victims have to select which details to

report on any one occasion, and these may not be the same each time they give an account. Therefore, accounts may change over time but still be accurate.

- 4.6.2 Accounts may also vary over time because victims are initially unwilling to disclose certain facts through avoidance or shame. Disclosure, eg, to a therapist, tends to develop over time. It is only when a victim develops a sense of trust that they will more fully disclose what has happened. Some details may never be disclosed.
- 4.6.3 Repeated attempts to remember, commonly lead to more material being recalled. In therapy for PTSD, when processing traumatic memories, it is common to recall additional facts, sometimes quite significant ones. This is believed by many trauma experts to occur because traumatic events result in more fragmented and disorganised memories, at least for the most distressing moments of the trauma. Hence accounts often lack contextual and peripheral details which are not integrated at the time of the traumatic event.
- 4.6.4 Inconsistencies in the details of a narrative are to be expected and should be distinguished from accounts or details that actively contradict each other. It should be noted, however, that inconsistencies in accounts provided by the victim are likely to meet the disclosure test for the purposes of criminal proceedings and that, even considering the information above, inconsistencies may mean that the Code Test for prosecutions is not met. Prosecutors will need to consider this on a case-by-case basis.
- 4.6.5 False memory - There is no substantive evidence that therapy will generate false memories. It is well recognised, conversely, that victims of trauma avoid engaging in trauma-focused therapies where they are required specifically to focus on the memories due to the associated distress. Further, some victims do in fact remember details of the abuse many years later; these are not false memories but rather real memories that had until that point been repressed.
 - 4.6.5.1 Concerns, including within the criminal justice system, have been raised that certain kinds of therapy may have the potential to produce false memories. It has been argued (without specific evidence being provided) that several therapeutic techniques are associated with an increased risk of false memories, including guided imagery, dream interpretation, free association, and hypnotic age regression. Whilst these techniques have a recognised place in therapy, victims should be informed of how these techniques can be viewed given the (undetermined) risk of incurring false memories.
 - 4.6.5.2 However, 'recovered memory therapy', which involves victims identifying memories of childhood abuse that they had no prior recollection of, is not a recognised form of therapy or taught or approved by any professional body. Similarly, neither is the idea that experiences such as child sexual abuse can be 'diagnosed' based on the client's presenting symptoms, even if they have no memory of them.

5. Legal Requirements

- 5.1 The principal statutory instruments relevant to the provision and use of material arising out of pre-trial therapy are:
- (i) Data Protection - Data Protection (Jersey) Law 2018 ('Data Protection Law').
 - (ii) Disclosure - Part 10 of the Criminal Procedure (Jersey) Law 2018 ('Criminal Procedure Law').
 - (iii) Human Rights - The Human Rights (Jersey) Law 2000 ('Human Rights Law')

Data Protection

- 5.2 The Data Protection Law is the legislation relevant to the processing of personal data for general and law enforcement purposes. It confers a number of rights on those whose data is being processed, and duties upon authorities involved in the processing of personal data.
- 5.2.1 As a 'competent authority' for the purposes of the Data Protection Law, the police can process personal data for 'law enforcement purposes', which is defined in the Data Protection Law as:
- 'the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against, and the prevention of, threats to public security'*.
- 5.2.2 Material arising from pre-trial therapy will inevitably concern the victim's health and as such is highly likely to be considered 'special category data', which can only be processed for law enforcement purposes where the processing is *strictly necessary* for any of the reasons listed in Article 9 of the Data Protection Law - the most likely to apply being:
- (a) 'For the purposes of the administration of justice.'
 - (b) 'For the performance of a function conferred on a person by any enactment'.
 - (c) 'For the establishment, exercise or defence of a legal claim or whenever a court is acting in its judicial capacity'.
- 5.2.3 Under the Data Protection Law consent must be 'freely given', which entails the capability of the victim to withdraw consent as easy as it is to give. The legal obligations upon the police and prosecutors concerning disclosure in criminal proceedings, make it impractical for the withdrawal of consent to result in the cessation of proceedings. Within this context, and understanding the need for safeguards for the rights and freedoms of victims, it is vital that the justification on the grounds of 'strict necessity' is clearly set out by the establishment of a 'reasonable line of inquiry' and 'relevance' as

per the incremental process outlined in section 5.3 below and the process map at Appendix I to this guidance.

Disclosure

- 5.3 The effect of Part 10 of the Criminal Procedure (Jersey) Law 2018 ('The Criminal Procedure Law') and related guidance is that the police have an obligation to pursue all reasonable lines of enquiry. Access to therapy notes can only be requested in an individual case when it is a reasonable line of inquiry that may reveal material relevant to the investigation or the likely issues at trial. What is reasonable in each case will depend on the individual circumstances and any known issues including any potential defence. It is only if the notes contain any material that might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the defendant that that specific material (not the notes in their entirety) will be disclosed.
- 5.3.1 It should be explained to the victim that where the police and prosecution request and obtain therapy notes they are not automatically disclosed to the defence.
- 5.3.2 Disclosure of unused material is a vital part of the preparation for trial. The disclosure regime set out in Part 10 of the Criminal Procedure Law provides a fair and proportionate system for the disclosure of relevant unused material in criminal proceedings in furtherance of the overriding objective; all parties must be familiar with their obligations.
- 5.3.3 The obligations in the regime and other legal obligations upon the police and prosecutors should be applied through the following staged process:
- 5.3.4 Stage 1: Establishing a reasonable line of inquiry - The Attorney General's Guidance on the Service of Evidence and Disclosure of Unused Material ('AG's Disclosure Guidance') emphasizes that a fair investigation involves the pursuit of material following all reasonable lines of enquiry; pre-trial therapy notes offer no exception to this requirement. What is reasonable will depend on the context of the individual case, a reasonable line of enquiry is that which:
- 'Points either towards or away from the suspect. What is reasonable will depend on the circumstances of the case and consideration should be had of the prospect of obtaining relevant material and the perceived relevance of that material'*
- 5.3.5 The Courts have determined that there must be an identifiable basis that justifies a reasonable line of inquiry, reasonable in this context means both reasonable in terms of the line of inquiry (i.e. not fanciful or mere speculation), and also reasonable in terms of the logistics of obtaining documents - as such investigators should be able to clearly articulate why it is a reasonable line of enquiry to obtain material in the possession of a therapist. Any decision to pursue therapy notes as a reasonable line of inquiry should be recorded by the investigator.
- 5.3.6 Early consultation between investigators and prosecutors is strongly recommended in cases of rape and serious sexual assaults. During such consultation the expectation

will be that third party material will be discussed and agreement reached regarding what reasonable lines of inquiry are required based on the facts and circumstances of the particular case. A significant consideration will be the perceived relevance of the material.

5.3.7 Stage 2: Establishing Relevance - Material may be relevant to an investigation if:

'It appears to an investigator that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case'.

5.3.8 If therapy notes are considered relevant, the AG's Disclosure Guidance explains that reasonable steps should be taken to identify, secure and consider the material. Where requests are made for material relating to therapy, investigators should consider the following:

- (i) Why is it believed that the material contains relevant information (if it is believed that it is likely that no relevant material will be contained within the material, a request should *not* be made).
- (ii) Depending on the stage of the case, does the material need to be obtained or would a request to preserve the material suffice until more information is known?
- (iii) Consider the scope of the material required; investigators should not as a matter of routine apply for the entirety of an individuals' medical records/therapy notes, for example it may be sufficient for an investigator to only seek material relating to a particular month or year. Investigators should ensure that the request is focused, so that only relevant information is being sought.
- (iv) The process of disclosure and its role in the justice system should be clearly and understandably expressed to the third party. They must be kept apprised of any ongoing disclosure decisions that are made regarding their material.

5.3.9 Stage 3: Balancing rights - The Human Rights Law requires public authorities not to act in a way that is incompatible with the rights and freedoms guaranteed under the European Convention on Human Rights. Consequently, investigators and prosecutors need to be aware of circumstances when the right to a fair trial (Article 6 convention rights) and the privacy of complainants and witnesses (Article 8 convention rights) are engaged.

5.3.10 Fulfilling disclosure obligations in accordance with Part 10 of the Criminal Procedure Law and the related guidance is a vital part of ensuring a fair trial in accordance with Article 6 of the Convention. To comply with Article 6, during the course of an investigation, the investigator or prosecutor may decide that it is necessary to request

and/or process personal or private information from a complainant or witness to pursue a reasonable line of inquiry.

5.3.11 When seeking to obtain and review such material, investigators and prosecutors should be aware that these lines of inquiry may engage an individual's Article 8 right to respect for private and family life, such material may also include sensitive 'special category' data. Because of this tension between observing protected rights, investigators and prosecutors should apply the following principles:

- (i) Collecting and/or processing personal or private material can only be done when in accordance with the law, strictly necessary, and proportionate.
- (ii) In order for requests to obtain material to be lawful, necessary and proportionate an investigator must be pursuing a reasonable line of inquiry. Seeking the personal or private information of a complainant or witness will not be a reasonable line of inquiry in every case, an assessment of reasonableness must be made on a case-by-case basis and regard may be had to:
 - (a) the prospect of obtaining relevant material; and
 - (b) what the perceived relevance of that material is, having regard to the identifiable facts and issues in the individual case.
- (iii) If, by following a reasonable line of inquiry, it becomes necessary to obtain personal or private material, investigators will also need to consider:
 - (a) what review is required;
 - (b) how the review of this material should be conducted;
 - (c) what is the least intrusive method which will nonetheless secure relevant material;
 - (d) are particular parameters for searching best suited to the identification of relevant material;
 - (e) is provision of the material in its entirety to the investigator strictly necessary; or alternatively, could the material be obtained from other sources, or by the investigator viewing and/or capturing the material in situ? An incremental approach should be taken to the degree of intrusion.
- (iv) The rationale for pursuing the reasonable line of inquiry and the scope of the review it necessitates should be open and transparent. It should be capable of articulation by the investigator making the decision. It should provide the basis for:
 - (a) consultation with the prosecutor;

- (b) engagement with the defence; and
- (c) the provision of information to the witness about how their material is to be handled - it is imperative that the reason for seeking access to the material and the limitations on the possible use of that material are fully explained to the witness.
- (v) If a witness refuses access to their private or personal material, the investigator and prosecutor should consider whether the witness has been provided with enough information about why access is required and what use can be made of any material obtained, and whether the witness could be provided with any better explanation that may change their decision. The investigator and prosecutor should consider the reasons for refusal and how the trial process could address the absence of the material in order to determine whether it may be possible for the defendant to have a fair trial in the absence of disclosure.
- (vi) Disclosure of such material to the defence is in accordance with the law and necessary if, but only if, the material meets the disclosure test in Part 10 of the Criminal Procedure Law. Personal information which does not meet this test but is contained within the material to be disclosed should be redacted.
- (vii) Where there is a conflict between Article 8 privacy rights and a defendant's right to a fair trial, investigators and prosecutors should bear in mind that the right to a fair trial is an absolute right. Where prosecutors and investigators work within the framework provided by Part 10 of the Criminal Procedure Law and the AG's Guidance on Disclosure an unavoidable intrusion into privacy rights is likely to be justified if any intrusion is no more than necessary.

6. Guidance for the process of requesting material from therapists

Transparency and speaking to victims

- 6.1 The police should make it clear to victims that their wellbeing is paramount and that they are free to obtain therapy without delay if they wish to do so.
- 6.1.2 If it is determined that obtaining therapy notes represents a reasonable line of inquiry, then the police should speak to the victim prior to approaching the therapist. The police should seek the agreement of the victim and inform them of their right to object at any time to the processing of their data. The conversation should be recorded and communicated to the prosecutor.

Police contact with therapists

- 6.2 Where a therapist is working for a professional agency and access is sought to the material generated, it is important that an approach is made to the agency. The following steps should be taken:
 - (i) Inform and Preserve – Contact the agency and inform the therapist of the investigation and alert them to the need to preserve relevant material.
 - (ii) Specify the Request - Whilst there is no need to provide extensive operational detail, it is important that any request for information is specific (for example highlighting a specific time period or issue). The Officer should be able to demonstrate the relevance of their specific inquiry to the investigation.

Where a therapist refuses to comply with the police request

- 6.3 Where a therapist has refused a police request for material within therapy notes, where it has been determined to be a reasonable line of inquiry, the prosecutor should be informed. On occasion, therapists may be willing to co-operate but may wish to do so in compliance with a court order rather than on the request of the investigator. Investigators and prosecutors should request that the third party preserve the material and this request should be documented.
 - 6.3.1 In these circumstances the prosecutor will have two options:
 - (i) Consider whether there are other routes to obtaining the material which are appropriate to pursue within the circumstances of the case.
 - (ii) Make an application to the court for a witness summons ordering the production of the material.

Applying for a witness summons

- 6.4 Article 98 of the Criminal Procedure Law sets out the conditions that need to be met for the Court to grant a witness summons. Rules 29-32 of the Criminal Procedure (Jersey) Rules 2021 ('Criminal Procedure Rules') provide guidance on the procedure to be adopted when applying for a summons. Where the material sought is considered to be 'confidential' such as therapy notes, Rule 31 of the Criminal Procedure Rules installs additional requirements for the granting of the summons:
- (i) A seven day notice period allowing all persons served with the order to make representations relating to the application.
 - (ii) A requirement that the court is satisfied that it has been able to take adequate account of the duties and rights, including rights of confidentiality, of the proposed witness and of any person to whom the proposed evidence relates.
- 6.4.1 The Courts have recognized that any interference with the right of confidentiality must be proportionate and requires a balance between the rights of the victim and defendant. Consequently, Prosecutors should routinely serve any application for a witness summons (for the production of therapy notes), upon the witness (the therapy provider) *and* the person to whom the proposed material relates (the victim). It is important that victims are given notice of the application and the opportunity to make representations.

7. Challenges associated with the provision of pre-trial therapy

- 7.1 Witnesses may derive therapeutic benefit from talking about their experiences, but any detailed recounting or reenactment of the offending behaviour should be avoided if possible. Therapists should be made aware that when a witness gives evidence, the court is likely to be told about the accounts the witness has given in the past; this is the reason why a difficulty can arise when therapy generates accounts of the offending. If the account given to a therapist differs in some material regard from accounts previously given to the police, then this may be used as a basis to undermine the victim's credibility.
- 7.2 The following (non-exhaustive list) provides examples of aspects of the therapeutic process that can cause such difficulties:
- (i) Therapists or counsellors should avoid discussing the evidence which the individual or any other witness will give, including exploring in detail the substance of specific allegations made.
 - (ii) Therapists should avoid using leading questions (questions which suggest the answer to be given) as a compliant or suggestible witness may adapt their answer; creating an apparent inconsistency in their account.
 - (iii) Prior to any criminal trial, group therapy involving the *specific recounting of abuse* is best avoided. The particular risk of this kind of group therapy is that the witness may adopt the experiences of others taking part in the therapy. Structured group therapy approaches which help in a neutral way to improve the witness's self-esteem or provide psycho-educational emotional support are unlikely to cause difficulties.
 - (iv) Peer-led group therapy conducted in the absence of a specifically trained external moderator should not be offered to the vulnerable or intimidated witness prior to the trial.

Appendix 1 – Process map for disclosure of material arising from pre-trial therapy

The Responsibility of investigators and Prosecutors

A staged approach should be taken by the prosecution team in relation to the obtaining and disclosing of pre-trial therapy notes:

The investigator should ask the victim whether they have received therapy since the incident occurred? If so, the investigator should enquire what therapy was obtained and whether the incident was discussed. An accurate record of this conversation should be made and retained. The prosecutor must be informed that the victim has received therapy.

YES



Establish a reasonable line of inquiry: If the case is pre-charge, the investigator should consider obtaining Early Advice to discuss the position with a prosecutor. Access to therapy notes can only be requested in an individual case when it is a reasonable line of inquiry that may reveal material relevant to the investigation or the likely issues at trial.

NO



The investigator should record this information, inform the prosecutor of the result of this conversation, and confirm to the victim that they are free to obtain therapy at any time if they wish to do so.

Prosecutors should record this information in a disclosure management document.

YES



Contact victim: The investigator should speak to the victim prior to approaching the therapist, and seek their agreement to obtain the relevant therapy notes. An accurate record of this conversation should be made and retained.

AGREEMENT
NOT
PROVIDED



The investigator should explain the reason for the request and the use that can be made of the material.

If agreement is still refused, consider:

1. Whether the evidential test within the Code on the Decision to Prosecute is met.
2. If any interference with the victim's Article 8 rights is necessary and proportionate to the aim of securing a fair trial for the defendant? Is it possible for the defendant to have a fair trial in the absence of the disclosure?
3. If there are alternative methods to obtain the notes.

An accurate record of this conversation should be made and retained.

AGREEMENT PROVIDED



Contact therapist: The investigator should request the therapy notes from the therapist, explaining the reason why it is a reasonable line of inquiry to review the notes, and that the victim has consented.

Requests must be clear and reasoned, however investigators are not required to provide extensive details about the investigation to a therapist, but the request for information must be specific (ie, spanning a specific time period and related to a particular issue).

IF THE NOTES CONTINUE TO
BE REQUIRED



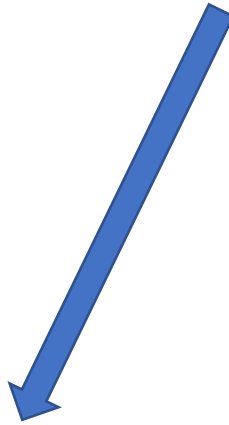
Consider Witness Summons: If the therapist will not provide the notes voluntarily, the investigator should meet with the Prosecutor as soon as possible, with a view to considering if it is appropriate to make an application for a witness summons to obtain the material.

REQUEST ACCEPTED



Consider the notes and identify any relevant material. The notes should be appropriately listed and described on the unused schedule. Copies of any material that might be expected to meet the disclosure test should be suitably redacted, if required, and provided to the prosecutor.

SUMMONS GRANTED



SUMMONS REFUSED



Consider whether a fair trial is still possible in the absence of disclosure of the therapy notes.

MATERIAL THAT MEETS THE DISCLOSURE TEST



Where it is determined that material meets the disclosure test, the Prosecutor should firstly consider whether the material impacts upon the decision to charge of the application of the full code test.

If the full code test is met the prosecutor should disclose material that passes the disclosure test and the investigator should be informed what material has been disclosed to the defence.

The investigator should then explain to the victim that therapy notes have been disclosed whilst ensuring that the content is not discussed – avoiding any form of ‘coaching’. An accurate record of this conversation should be made and retained.