



# Pre-trial therapy

## Take home message:

- **Survivors should not delay accessing therapeutic support to help them cope and recover from what happened**
- **Survivors should not talk about the incident in therapy – instead focus the development of coping strategies**
- **Some types of therapy (e.g. EMDR) may cause problems at trial and should be avoided**
- **Only counsellors who have completed pre-trial therapy training should deliver pre-trial therapy.**
- **If a survivor talks about an incident/s in therapy, they risk the court requesting access to their therapy notes.**

<b>Policy owner:</b>	<b>SMT</b>
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## 1. General Statement of Intent

1.1 Exposure to sexual and/or domestic violence can lead to significant psychological and emotional difficulties and the specialist services and trauma-specific interventions delivered by *Survive* (including support work, counselling, trauma therapy and EMDR psychotherapy) can assist survivors in their recovery.

1.2 On 26 May 2022, the Crown Prosecution Service (CPS) updated its guidance on pre-trial therapy. This new CPS guidance supersedes previous guidance and aligns with the Attorney General's Guidelines on Disclosure (2022) and is clear that:

- the health and wellbeing of survivors is paramount and they are free to obtain therapy without delay if they wish to do so;
- survivors should be allowed to have their emotional and psychological needs met before, during and after a trial; and
- accessing therapeutic services, should not be delayed for any reason connected with a criminal investigation or prosecution.

1.3. This policy outlines the basis on which *Survive* will provide pre-trial therapy to survivors of sexual and/or domestic violence.

1.4 This policy applies to all staff, sessional workers and volunteers who deliver therapeutic services to *Survive* clients.

## 2. Context

2.1 The CPS guidance recognises that:

- the primary purpose of therapy is therapeutic and not investigative and that '*confidentiality, privacy and trust*' are crucial to therapeutic relationships;
- therapeutic relationships enable survivors to explore important issues relating to their safety, emotional responses and psychological needs;

- the knowledge that details of survivor conversations with their therapist may be seen by criminal justice practitioners and could be used against them by the defence at a future trial is of significant concern to survivors and could undermine their engagement with therapy and/or the criminal justice process;
- these fears can inhibit the therapy process and undermine its efficacy, for example, where survivors deliberately censor themselves with discussing issues.

2.2 There is an expectation of privacy and confidentiality attached to the nature of the therapeutic services *Survive* delivers and the information we hold about clients/former clients. The status of clients/former clients as victims of crime does not diminish this expectation of privacy and confidentiality.

2.3 Information held about clients/former clients (including counselling notes) will almost inevitably constitute 'special category data' as defined by the UK General Data Protection Principles (GDPR) meaning data protection regulations will apply (ICO). (See *Survive's* Disclosure Policy).

2.4 *Survive* recognises the additional harm, distress and anxiety any information request can cause to survivors who are already dealing with the impact of being subjected to sexual and/or domestic violence.

2.5 *Survive's* default position is **to not share** any information about clients/former clients with third parties (including the police, prosecutors or defence) unless:

- we are legally obliged to do so (i.e. in receipt of a Court Order);
- we have written permission from the client/former client to do so; or
- the client/former client requests we share their information with third parties.

This is to protect the information rights of clients/former clients and to ensure *Survive* complies with data protection legislation (see *Survive's* Disclosure Policy).

2.6 See Appendix 1 for an overview of responsibilities in relation to this policy.

### 3. Prior to Therapy

#### 3.1 Informed decision making

3.1.1 The decision whether to offer pre-trial therapy shall be made by *Survive* in consultation with the client. The police and CPS have no role in the decision-making process but should be made aware.

3.1.2 *Survive* believes in survivor autonomy and that survivors are best placed to know what they need and that it is for them to make decisions about whether or not to seek pre-trial therapy including the timings and form of therapy undertaken.

3.1.3 *Survive* will help clients make an informed decision about accessing therapy before, during or after a trial and help them understand the implications and potential consequences of accessing pre-trial therapy including:

- the implications of different types of therapy in terms of involvement of the Criminal Justice System (CJS);
- potential requests from the police to access data *Survive* holds about them (e.g. counselling notes)
- such data being shared with third parties including the defence;

3.1.4 This information will be provided in a form that is accessible, taking account of any issues relating to language, disability, and any communication difficulties both in initial

discussions about the proposed therapy and in the provision of the therapy itself. This information shall be sensitive to issues relating to protected characteristics.

### **3.2 Consent**

3.2.1 Consent to engage in pre-trial therapy shall be recorded from the client, with the agreed conditions, prior to starting any therapy in relation to both the therapy and the handling of any potential information requests from third parties, including the police, prosecutors or defence (see *Survive's* disclosure Policy).

3.2.2 The Therapist shall record consent from the client on their client record on Charity Log. Consent must be reviewed and re-confirmed if therapy extends beyond 6 months.

### **3.3 Training and additional support to therapists**

3.3.1 Therapists providing pre-trial therapy shall have appropriate training according to the level of the work to be undertaken. Therapists should be assessed to determine that they are able to demonstrate appropriate knowledge and understanding of the process of providing pre-trial therapy.

3.3.2 In cases where a Court Order is issued for disclosure of therapy notes and records or a therapist is required to give evidence, *Survive* will provide additional support and supervision to the therapist. Where necessary, *Survive* will provide access to court skills training.

## **4. During Therapy**

### **4.1 Confidentiality**

4.1.1 Client notes and records will be handled in accordance with *Survive's* Confidentiality, Data Protection and Information Sharing Policy.

4.1.2 The engagement in pre-trial therapy may be disclosed to the CPS.

### **4.2 Prejudice to criminal proceedings**

4.2.1 The CJS places great reliance on the oral evidence of witnesses. Any conversations which take place before a criminal trial between a witness and another person could be construed as contaminating witness evidence, therefore, *Survive* and the client have a mutual interest in keeping the integrity of the witness evidence intact.

4.2.2 The provision of pre-trial therapy should not prejudice the criminal proceedings. Any detailed recounting or re-enactment of the offending behaviour may be perceived as coaching and may affect the criminal case.

4.2.3. Any professional providing therapy should not use leading questions. Leading questions are those where a survivor is provided with suggestions of what may or may not have happened and persuaded that this was likely. This is based on the premise that the therapist is seeking to confirm a preconceived hypothesis they either have additional knowledge of or suspect to have happened. This is quantifiably different to the type of questions used to elicit thoughts and emotions that occurred during the events which have contributed to the subsequent psychological and emotional distress.

### **4.3 Therapies and techniques requiring specific consideration**

4.3.1 Therapists need to be mindful of practice guidance relating to the use of appropriate models of counselling and psychotherapy and techniques that may be used. This does not mean that a survivor should not undertake certain therapies. It does, however, mean that survivors should make informed decisions about what therapy to access and when, prioritising their needs, health and well-being.

#### 4.3.2 Group therapy

- The defence are likely to argue that hearing the accounts of others who have been subjected to sexual violence or engaging in discussions with them may unduly influence their own account.
- The defence may argue that the potential for confusion, collaboration, undue and even unconscious influence and fantasy is much higher than in other types of therapy.
- Although the defence could seek to use memories recalled or shared in the course of this type of therapy to undermine the credibility of related evidence, it is for the victim to decide whether to access this type of therapy.
- Group therapy that focuses on psychoeducation emotional support and coping strategies should not be considered to be in any way undermining.

#### 4.3.3 Hypnotherapy – Hypnotic Age Regression

Hypnotic age regression can pose difficulty in the criminal justice process if the only evidence of a particular event is obtained as a result of taking the person back into childhood in their imagination. Any 'events' that are remembered in this way should be treated with caution. If the only evidence of a particular event is obtained because of hypnotherapy, it may not be considered reliable evidence.

#### 4.3.4 Imagery Re-scripting / Re-framing

Imagery re-scripting/ re-framing is a technique more commonly used for historical traumatic events. The survivor describes in detail the traumatic event that is either audio-recorded or documented in a detailed narrative. The survivor is asked to listen to or read the account and identify alternative endings or bring in other people to help facilitate a different ending. Although effective for treating PTSD, The Survivor's Trust do not recommend this approach pre-trial.

#### 4.3.5 Debriefing

The process of repeatedly recounting the details of a criminal offence should be treated with caution.

### 4.4 Records

#### 4.4.1 CPS guidance (2022) states that:

- therapy is not an investigative process and as such, there is no expectation that therapists should take verbatim notes in relation to a survivor's disclosure/s of criminality for the benefit of the CJS;
- therapists do not have an obligation under the CPIA to reveal material to the investigator or prosecutor, nor is there a duty on therapists to retain material which may be relevant to the investigation:
- if the investigator believes that *Survive* holds material relevant to their investigation, it is incumbent on them to alert *Survive* to the need to preserve the relevant material;
- if access is refused, the investigator can still request that the material is preserved.

4.4.2 Therapists are not investigators or evidence-gatherers. The therapist should make notes and not ask investigative questions. The therapist should briefly note themes discussed without investigative detail and only document what the client describes. Clients should be encouraged to speak freely without fear that their words are being logged verbatim.

4.4.3 The therapist should make an immediate factual, concise, and accurate record of the session at the end of each session. The record should contain the following details:

- date, time, and location of the session;
- name of the therapist;
- names of anyone else present;
- content and themes of the session.

4.4.4 Therapists should avoid the use of jargon and take care to use language that will not be perceived, if repeated by a witness, as evidence of the witness being instructed. The language content of the therapy and counselling sessions is guided by the survivor but equally it must be recognised that survivors do use different forms of language in differing situations and contexts.

4.4.5 If the client talks about their abusive experience for which the alleged abuser is awaiting trial, the therapist should acknowledge what the client has said and make appropriate, generalised comments but should not ask probing investigative questions.

4.4.6 Should a client disclose further abusive experiences, the therapist should support the service user to disclose to the police, should they wish to do so.

4.4.7 There is no requirement to stop therapy if, during the course of therapy, the survivor decides to report the offence/s to the police.

4.4.8 The therapist should be aware that there is a possibility that the client will share with them information not known to the police or prosecution which is relevant to the criminal investigation and thus the therapist could potentially become a witness in the case.

4.4.9 Any therapy sessions involving reprocessing of traumatic memories (i.e. trauma therapy EMDR), or any discussion of the details of the offence need to be clearly documented.

## 5. Disclosure of Records

5.1 *Survive's* default position **is to not share** any information about clients/former clients with third parties (including the police, prosecutors or defence) (see *Survive's* Disclosure Policy).

5.2 If the police or CPS believe that material which could affect the outcome of the prosecution is being withheld, an application may be made to the court for a witness summons to obtain the material.

5.3 The CPS disclosure duties require the prosecution to disclose anything to the defence (including material generated as a result of therapy) if it might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused.

5.4 The CPS will inform the defence that therapy has taken place. The defence may, where appropriate, apply to the court for disclosure by way of a witness summons issued to the person holding the records (e.g. *Survive*).

5.5 It will be for the court to decide whether any part of the records of therapy should be disclosed but in the majority of cases public interest immunity would be applied for to prevent therapy records being disclosed. To protect the interests of the survivor, a request can be made to the Judge to view the records and notes to assess relevance to the case.

5.6. Notes made by sessional workers or sub-contractors belong to *Survive*. Any disclosure to the CJS must therefore follow *Survive's* Disclosure Policy).

## **6. Giving Evidence**

6.1 An expert witness is a witness who provides to the court a statement of opinion on any admissible matter calling for expertise and who is qualified to give such an opinion. They will usually be appointed by the defence, CPS, or police and will be given specific instructions for the report. Usually where one party has called an expert the other is permitted to seek their own expert evidence.

6.2 A therapist working with a survivor cannot be an expert witness but can be called to give evidence as a professional witness. A professional witness is called to court to give factual evidence regarding their findings and would not be called to give evidence about their opinion as to the truthfulness of a survivor or other witness. For example, they may be asked for clarification of notes or an opinion on the survivor's presentation in therapy.

6.3 It is important to ensure the survivor is aware that the therapy they have received may be raised during a trial. As a result of the "Speaking to Witnesses in Court" initiative, prosecution counsel will speak to the survivor in advance of giving evidence. The purpose of cross-examination will be explained to them to test the reliability, authenticity, and accuracy of their account, to weaken the case against the defendant. The prosecutor will intervene if inappropriate questions are asked but the defence will be permitted to challenge the evidence of the service user and highlight any inconsistencies or other perceived 'weaknesses' in the case.

6.4 To prevent contamination of the evidence, witnesses (other than experts) are not permitted to sit in court before giving evidence (so they do not hear the accounts of other victims). They are not permitted to discuss their evidence until the case is concluded.

## **7. Access, review, training**

7.1 Line managers will inform all new staff and volunteers of this policy as part of their induction.

7.2 A soft copy of this policy will be stored on Sharepoint and HR Breathe

7.3 The SMT will review this policy every 3 years, unless there is further legislative change.

7.4 Staff and volunteers must complete mandatory pre-trial therapy training before delivering pre-trial therapy and complete a refresh every three years.

### ***Links to other policies***

Disclosure Policy

Confidentiality, Data Protection and Information Sharing Policy

Safeguarding and Public Protection – Adults at Risk

Safeguarding and Public Protection – CYP

## Further reading

Attorney General's Office. (2022). Attorney General's Guidelines on Disclosure. Available at: [gov.uk/government/publications/attorney-generals-guidelines-on-disclosure](https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure). Accessed 7 July 2022.

CPS (2022). Pre-trial therapy. Available at: [cps.gov.uk/legal-guidance/pre-trial-therapy](https://cps.gov.uk/legal-guidance/pre-trial-therapy) Accessed 22 June 2022.

CPS (2022). Pre-trial therapy - Accompanying notes for therapists. Available at: [cps.gov.uk/legal-guidance/pre-trial-therapy-accompanying-note-therapists](https://cps.gov.uk/legal-guidance/pre-trial-therapy-accompanying-note-therapists). Accessed 7 July 2022.

Equality and Human Rights Commission (2018). The Human Rights Act. Available at: [equalityhumanrights.com/en/human-rights/human-rights-act](https://equalityhumanrights.com/en/human-rights/human-rights-act) Accessed 22 June 2022.

ICO (no date). Principle (c): Data Minimisation. Available at: [ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/data-minimisation/](https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/data-minimisation/) Accessed 7 July 2022.

ICO (no date). Special category data. Available at: [ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/](https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/). Accessed 7 July 2022.

ICO (2022). Information Commissioner's Opinion: Who's Under Investigation? The processing of victims' personal data in rape and serious sexual offence investigations. Available at: [ico.org.uk/media/about-the-ico/documents/4020539/commissioners-opinion-whos-under-investigation-20220531.pdf](https://ico.org.uk/media/about-the-ico/documents/4020539/commissioners-opinion-whos-under-investigation-20220531.pdf) Accessed 22 June 2022

Ministry of Justice (2015). Revised CPIA Guidance Code of Practice. Available at: [gov.uk/government/publications/criminal-procedure-and-investigations-act-code-of-practice](https://www.gov.uk/government/publications/criminal-procedure-and-investigations-act-code-of-practice) Accessed 23 June 2022.

# Appendix 1

## Pre-trial therapy checklist

Are the police/prosecutors aware that pre-trial therapy is taking place?

Does the client understand the implications and potential consequences of accessing pre-trial therapy including:

- the implications of different types of therapy in terms of involvement of the Criminal Justice System (CJS)?;
- potential requests from the police to access data *Survive* holds about them (e.g. counselling notes)?
- such data being shared with third parties including the defence?

Has the client consented to pre-trial therapy and has this consent been logged on Charity log?

Have you undertaken pre-trial therapy training?

Do you know what to include in your session notes?

Do you know what to do if you receive an information request from the police, prosecutors or defence?