



The Attorney General Falkland Islands

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The Attorney General's Guidance on Therapy for Witnesses Pre-Trial

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**The Law and Regulation Directorate
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1. Introduction

1. Where a person has been the victim of crime, or has witnessed a crime, they may require therapeutic treatment to assist them in trying to overcome the effect that the crime has had upon them. This is particularly so in cases involving sexual abuse and serious violence. Experience has shown that children and vulnerable adults are frequently those most in need of therapeutic intervention, often at the earliest stage feasible, and long before any trial takes place.
2. Where a witness accesses therapy prior to giving evidence at trial concerns can arise as to the potential for the witness's evidence to become tainted as a result, causing the prosecution case to fail. The need to preserve the evidence from becoming tainted can conflict with the need to ensure that witnesses are able to receive, as soon as possible, immediate and effective treatment to assist their recovery. In the context of this potential conflict, the following matters are relevant:
 - (a) witnesses should not be denied access to treatment;
 - (b) many victims and witnesses express the wish to see the person who committed the crime convicted and punished;
 - (c) there is a wider public interest in ensuring that offenders are brought to justice to prevent further offending;
 - (d) all accused persons are entitled to a fair trial.
3. It follows that there is a mutual interest in ensuring, wherever possible, that witnesses who receive therapy prior to a criminal trial are regarded as witnesses who are still able to give reliable testimony.
4. The purpose of this document is to provide guidance to those involved in making decisions in cases where the provision of therapy for witnesses prior to a criminal trial is a consideration.

2. Therapy

5. The term "therapy" covers a range of treatment approaches, including counselling, but in this context it does not include any physical treatments.

6. A precise definition of psychotherapy is not straightforward, but it has been defined as:

"interventions designed to decrease distress, psychological symptoms and maladaptive behaviour, or to improve adaptive and personal functioning through the use of interpersonal interaction, counselling or activities following a specific treatment plan."

Kazdin (1990)

7. Psychotherapies and counselling can be grouped in a number of ways (for example, psychodynamic, cognitive behavioural, systemic, experiential). They are underpinned by different models of understanding and techniques, and they vary in the context in which they are given (individual, family, group etc) and frequency of sessions.

8. Two broad categories of therapeutic work undertaken prior to a criminal trial can be identified:

Counselling

9. This will address a number of issues, including:

- (a) the impact on the witness of the abuse;
- (b) improving the self-esteem and confidence of the witness;
- (c) providing the witness with information with regard to, for example, abusive relationships. The aim of this is to enable the witness to seek out assistance from others if the witness feels unsafe at some stage in the future.

Psychotherapy

10. This will address a number of issues, including:

- (a) treatment of emotional and behavioural disturbance, for example post-traumatic stress disorder;
- (b) treatment of a witness who has been highly traumatised and shows symptoms which give rise to concern for the witnesses mental health.

11. Both counselling and psychotherapy may require long term involvement with the witness, depending upon the degree of the trauma suffered and the witness's cognitive ability.
12. Preparation for court prior to the criminal trial work may be undertaken to prepare a witness for the trial. The purpose of this work is to:
 - (a) provide the witness with information about the legal process;
 - (b) address any particular concerns or fears which the witness may have in relation to giving evidence;
 - (c) reduce anxiety.
13. The timing of the preparation for court is important. If it is carried out too soon before evidence is given, the witness's anxieties may be increased. On the other hand, if it is carried out at the last minute the witness may feel rushed and be unable to assimilate the information given.

3. Consequences of Pre-Trial Therapy

14. A criminal court can only convict an accused person of an offence if it is satisfied, on the basis of the evidence brought by the prosecution, that the accused is guilty.
15. The general rule is that witness evidence is given orally with witnesses attending court to be asked questions and the evidence probed under cross-examination, to test its accuracy and truthfulness. The court then decides the weight to be attached to the evidence when assessing whether guilt is proved.
16. Discussions prior to a criminal trial with or between all types of witness have been held by the courts in a number of cases to give rise to the potential for:
 - (a) witnesses giving inconsistent accounts of the events in issue in the trial;
 - (b) fabrication, whether deliberate or inadvertent. For example, a witness may: become aware of gaps or inconsistencies in his or her evidence, perhaps when compared with that of others and become more convinced (or convincing) in his or her evidence, but no less mistaken.
17. Therapy is one kind of discussion which may take place prior to a trial. Other examples of discussions which may give rise to the evidence of witnesses being challenged include:
 - (a) informal contacts (for example, with friends and family);
 - (b) operational de-briefing by police officers (for example, after a large public disorder incident);
 - (c) training or coaching.
18. At court, witnesses other than experts are not permitted to sit in court before giving evidence (so that they do not hear the accounts of other witnesses) and they are not permitted to discuss their evidence until the case is concluded.
19. Witnesses may derive therapeutic benefit from simply talking about their experiences. To an extent they will determine when they are ready to do this but the professionals concerned should be aware of the possible consequences of allowing it to happen. These may include allegations of coaching and, ultimately, the failure of the criminal case. It should also be borne in mind that the professionals concerned may themselves be called to court as witnesses in relation to any therapy undertaken prior to the criminal trial.

20. The issue raised by all discussions undertaken prior to the criminal trial, including therapy, is whether the process can affect - that is to say undermine - the actual or perceived reliability of that witness's evidence and the weight the court will attach to it.

Records of therapy and confidentiality

21. The administration of justice and the need to ensure a fair trial demand that any information and evidence which could have an impact on the decision to prosecute, the conduct of the case, or the outcome of proceedings is made available to the police and prosecution.
22. The rules of disclosure place certain responsibilities on the investigator, prosecutor and also third parties, that is to say individuals or bodies who are not part of the prosecution. Therapists will generally be third parties for this purpose. Those responsibilities mean that all material that may be relevant to the issues disputed in the case must be preserved.
23. At some stage during the trial process the prosecution must provide the defence with such of the information and evidence as may undermine the prosecution case or assist the defence case. In this way, all of the material that is relevant to the outcome of the trial is put before the court. Relevant material is that which may tend to prove or disprove the issues disputed by the prosecution and defence.
24. Confidentiality of discussions that take place during therapeutic work cannot be guaranteed in advance of a criminal trial because of the duty of disclosure. Bearing this in mind, it is important that an understanding is reached at the outset of therapy, of the circumstances under which material obtained during treatment may be required to be disclosed.

4. Decision Making

25. When making decisions about a case one of the primary concerns for prosecutors will be acting in the best interest of the victim. This is especially so where the case involves a child victim as the welfare of the child is paramount.
26. Where the prosecution are informed that pre-trial therapy is intended to take place the prosecution must do what it can to:
 - (a) identify cases in which the provision of therapy before the criminal trial might be thought to have some material impact on the evidence;
 - (b) assess the likely consequences for the criminal trial in these cases;
 - (c) ensure that these cases are dealt with as quickly as possible;
 - (d) safeguard the confidentiality of therapy sessions wherever possible whilst ensuring that the defence and the court are aware of the existence of information which might undermine the prosecution case or assist the defence.
27. These questions are not unique to therapy which takes place before the criminal trial, but the ethical, medical, welfare and legal issues are of particular importance in these cases.
28. Whether a witness should receive therapy before the criminal trial is not a decision for the police or the prosecution to make. Such decisions can only be taken by all of the professionals from the agencies responsible for the welfare of the witness, in consultation with any carers of the witness and the witness him or herself, if the witness is of sufficient age and understanding.
29. The best interests of the witness are a primary consideration in decisions about the provision of therapy before the criminal trial. In determining what is in the best interests of the witness, due consideration should be given to ascertaining the wishes and feelings of the witness, in a manner which is appropriate to the witness's age and understanding. When making assessments account should be taken of the witness's gender, race, culture, religion, language and (if appropriate) disability.
30. If there is a demonstrable need for the provision of therapy and it is possible that the therapy will prejudice the criminal proceedings, consideration may need to be given to abandoning those proceedings in the interests of the witness's wellbeing. In order that such consideration can be given, it is essential that information regarding therapy is communicated to the prosecutor.

31. Alternatively, there may be some witnesses for whom it will be preferable to delay therapy until after the criminal case has been heard, to avoid the benefits of the therapy being undone.
32. While some forms of therapy may undermine the evidence given by the witness, this will not automatically be the case. The prosecution will offer advice, as requested in individual cases, on the likely impact on the evidence of the child receiving therapy.
33. The prosecution, in giving advice, must attempt to carefully balance the best interests of the witness, including the witness's interest in seeing the offender brought to justice, as well as the wider public interest in prosecuting those accused of criminal offending.
34. Clear lines of communication are required to ensure that everyone involved in the process is fully and reliably informed. Information should be routed through the police contact point although direct consultation between the professionals involved may be advisable in certain circumstances. This should be arranged using named contact points.

5. The Use of Therapy

Reducing Risk

35. The risk of compromising the evidence of a witness can be removed if the following guidance is carefully followed. The stated principles mark the distinction between the use of psychotherapy and counselling by qualified practitioners and formal preparation of the witness for the giving of evidence in court. Where such preparation takes place, the witness should not discuss or be encouraged to discuss the evidence which s/he is to give in the criminal proceedings but may receive general support to help them through the process of appearing in court.
36. All people who work with witnesses before a criminal trial should be aware of the possible impact of their work upon subsequent evidence in the trial. Some types of therapeutic work are more likely to be seen as prejudicial and thereby undermine the perception of a witness's credibility and reliability or to influence a witness's memory of events or the account they give. Preparation for court and carefully planned preventive work which does not focus upon past abuse presents less of a problem than interpretive psychodynamic psychotherapy. Hence, there is a spectrum of evidential risk to the criminal trial which should be considered.
37. The least problematic aspect of therapy will focus on improving self-esteem and self-confidence, often using cognitive/behavioural techniques. Other issues which might be addressed include:
 - (a) the reduction of distress about the impending legal proceedings;
 - (b) the treatment of associated emotional and behavioural disturbance that does not require the rehearsal of abusive events.
38. Careful recording is essential and, prior to therapy beginning, the witnesses need for such therapy should be clearly stated.

Professional therapists

39. Professionals offering therapy may be working within the Health and Social Work Department, the voluntary sector or privately. The context in which therapy occurs can therefore vary.
40. There are a number of factors relating to qualifications, training and experience which can guide the relevant professionals about the competence of any single individual to undertake psychotherapy or counselling with a witness who is to be a witness in a criminal trial.

41. Providers and purchasers of therapy for witnesses in this situation must ensure that any therapist or counsellor has appropriate training according to the level of work to be undertaken, as well as a thorough understanding of the effects of abuse. Membership of an appropriate professional body or other recognised competence would be expected in these circumstances. They must also have a good understanding of how the rules of evidence for witnesses in criminal proceedings may require modification of techniques.
42. Witnesses may receive preparation for the experience of giving evidence in court. This must be given by suitably trained individuals, who will need to be aware of the clear distinction between the preparation of a child for the experience of giving evidence in court and the provision of therapy or counselling to address trauma.

Assessment of need for therapy

43. Assessment of the need for therapy of any witness during the pre-trial period should only be undertaken following consultation with the relevant other professionals involved. This may be appropriate in the context of a strategy discussion or child protection conference (where the witness is a child). A meeting of all relevant professionals might be convened for the purpose of discussing an assessment and treatment strategy.
44. The function of any such discussion should be to discuss the needs and best interests of the particular witness. The discussion should include the logistics of setting up a specialist assessment of the witness, with agreement on who will undertake this assessment and which professional agencies will support the assessment, for example by bringing the witness to appointments and working with the family.
45. Although it would be inappropriate to pre-empt the outcome of a subsequent specialist assessment for therapy of whichever kind proposed, it is nonetheless important that priority be given to the best interests of the witness. The impact of any therapy upon the conduct of the criminal case should also be fully discussed. The prosecution will advise, as requested, on the likely effect of a particular type of therapy on the evidence of witnesses in individual cases and will need to be informed about any planned or ongoing therapy. Where a criminal case is at an advanced stage, it may be possible to consult the judge in chambers as to the potential consequences of a proposed course of action.
46. It is vital that a trained professional person with a recognised competence in such assessments should see the witness and any relevant family members. One or more careful assessment interviews should be conducted in order to determine whether and in what way the witness is emotionally disturbed and also whether further treatment is needed.
47. It is important to note that not all witnesses who are assessed in this way will need therapy. Final recommendations from the assessment will indicate the type of therapy or intervention, if any, required by the particular witness. It will be important for such findings to be made available to other relevant agencies involved as soon as possible after the assessment is completed.

Important issues regarding an assessment

48. A whole range of issues may arise in the course of any assessment, but for those undertaking an assessment of witnesses to determine whether they require therapy, it is important to address the following areas.
49. Developmental factors must be taken into account during the assessment. Witnesses, especially child witnesses, may have different levels of understanding. An assessment should therefore address the development in both emotional and cognitive terms, as well as any relevant physical illnesses or developmental problems which might affect a person's performance as a witness in court, and which could be worked with in the course of therapy provided prior to the criminal trial.
50. A witness with specific needs may, with the appropriate assistance, be a competent witness. An assessment of witnesses with specific needs, including physical and learning disabilities, hearing and speech impairments should be conducted in conjunction with specialist workers who are trained in these areas of work.
51. The issue of possible suggestibility in an interview situation, or during cross-examination in court should also be addressed during an assessment. It should be remembered that some witnesses, particularly young children, learning disabled witnesses, very severely abused witnesses who have been intimidated or physically beaten, or severely emotionally disturbed witnesses are more likely to produce erroneous or ambiguous responses to leading questions from interviewers, than are less vulnerable or emotionally mature witnesses. Particular care, therefore, should be taken in the assessment of such vulnerable witnesses to use short, plain, words, to ask open questions where possible and to avoid convoluted, hypothetical or other leading questions.
52. In respect of child witnesses the assessor should use a limited range of selected assessment tools such as drawing materials and appropriate toys (for example, non-anatomical dolls) to supplement questioning within a session. The use of anatomical dolls in assessment for therapy is unlikely to be necessary, since specific investigative work about alleged abuse (which may or may not involve anatomical dolls) will already have been undertaken in the joint investigative interview. The use of any materials which suggest or presume that abuse has taken place should be avoided.
53. If deemed clinically appropriate, witnesses should also have a separate psychological and/or developmental assessment to obtain baseline data on their cognitive and emotional functioning. Such a psychological assessment will indicate whether the witness has specific needs which may require assistance in court, for example an intermediary or interpreter, as well as contributing to an understanding of the witnesses emotional needs.

54. Some witnesses are so severely traumatised that the short term provision of, for example, once or twice weekly therapeutic sessions may be either inadequate for their needs or positively disturbing for them, particularly for children whose home or alternative care situation has not been fully resolved.
55. The assessment and following discussions may lead to the conclusion that therapy should be delayed until the criminal proceedings are at an end (though in such cases prosecutors will wish to do all that they can to expedite the proceedings). This does not, however, preclude the important provision of general support for the witness and family or briefer forms of more focused therapy.

Potential problem areas

56. Problems may arise when the therapist attempts to distinguish fantasy from reality. In this kind of situation, the therapist should be as open to the idea that material presented as factual truth may be a distortion, as they are to a fantasy being a representation of reality.
57. Interpretative psychotherapy may, therefore, present evidential problems even if carefully conducted. The professional background and training of the therapist, the provision of adequate supervision arrangements, the appropriateness and robustness of the policies of the agency providing therapy will all help to obviate problems.
58. There are therapeutic approaches that would very definitely present problems as far as evidential reliability is concerned. These would include hypnotherapy, psychodrama, regression techniques and unstructured groups.

6. Summary

59. It should be understood that those involved in the prosecution of an alleged offender have no authority to prevent a witness from receiving therapy.
60. The police and the prosecution should be made aware that therapy is proposed, is being undertaken, or has been undertaken.
61. The nature of the therapy should be explained so that consideration can be given to whether or not the provision of such therapy is likely to impact on the criminal case. Direct consultation between the professionals involved may be desirable in some circumstances.
62. Records of therapy (which includes videos and tapes as well as notes) and other contacts with the witness must be maintained so that they can be produced if required by the court. They should include, in the case of therapy, details of those persons present and the content and length of the therapy sessions. It is not expected, for practical reasons, that verbatim written records will be kept.
63. At the outset of therapy an understanding should be reached with the witness and the carers if the witness is a child, of the circumstances under which material obtained during therapy might be required to be disclosed. Maintaining a witness's trust will remain important and it can be confirmed that those aspects of the therapy that have no material relevance to criminal proceedings will not have to be disclosed. However, what is "relevant" may change as the case progresses and so confidentiality cannot be guaranteed.
64. In newly arising allegations, therapy should not usually take place before a witness has provided a statement or, if appropriate, before a video-recorded interview has taken place.
65. If the prosecutor advises that the proposed therapy may prejudice the criminal case, those responsible for assessing the witness should take this into account when deciding whether to proceed with the therapy. It may still be in the best interests of the witness to proceed with the therapy but this must be weighed against the interest of the witness in seeing the offender brought to justice.
66. The therapist should be made aware of any pending criminal proceedings before commencing the therapy and should also be aware of the implications of using techniques which may result in the witness evidence being discredited.
67. Therapists or counsellors should avoid using leading questions or discussing the evidence which the individual or any other witness will give, including exploring in detail the substance of specific allegations made.

68. Prior to the criminal trial, group therapy where the specific recounting of abuse takes place is best avoided. The particular danger of this kind of group therapy is that the witness may adopt the experiences of others taking part in the therapy. As a general principle, group therapy should not be offered to the witness prior to the trial.
69. Witnesses may derive therapeutic benefits from talking about their experiences, but any detailed recounting or re-enactment of the abuse may be perceived as coaching. Therapists should recognise that the criminal case is almost certain to fail as a consequence of this type of therapeutic work. This should be differentiated from the accepted practice of allowing witnesses, prior to giving evidence, to refresh their memory by reading their statements or viewing their video recorded interview.
70. Professionals 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.
71. During therapy, witnesses should never be encouraged to extend their account of the abuse which they have suffered. However, it is acceptable to offer general reassurance and support to a witness during this difficult process.
72. Any disclosure of materially new allegations by the witness undergoing therapy, including possible disclosures of their own behaviour, or any material departure from or inconsistency with the original allegations should be reported to the police.
73. Prosecutors must be informed that the witness has received therapy. Prosecutors must then obtain an assurance that the witness did not, in the therapy session(s), say anything inconsistent with the statements made by the witness to the police. Prosecutors may need to be made aware of the contents of the therapy sessions as well as other details specified in the above paragraph, when considering whether or not to prosecute and their duties of disclosure.

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