

## CAPACITY, CONSENT AND CONFIDENTIALITY

### Overview

For counselling to take place with children and young people informed consent must be given.<sup>i</sup> Counsellors need to be able to judge their clients' capacity to give informed consent, and assess whether they can consent to their own therapy or not. If they do not have the capacity to consent, then consent needs to be sought from those with parental responsibility.

Evidence shows that young people identify one of the the most useful aspects of counselling to be the *confidentiality* of the counselling relationship.<sup>ii</sup> Similarly, young people cite *having an opportunity to talk openly and be listened to* as one of the most helpful aspects of counselling,<sup>iii</sup> and it could be argued that this occurs within a relationship of trust, that is based upon the contract of (limited) confidentiality.

Confidentiality is never absolute with children and young people because, unlike adults who are permitted to take risks with their own lives, children and young people need to be protected from significant harm, therefore no service can or should offer total confidentiality to a child or young person.<sup>iv</sup>

Specifically, this Good Practice Guidance reflects the following considerations for counsellors:

- Is the child or young person sufficiently competent to consent to a counselling relationship?
- What should counsellors do if the child or young person does not have the capacity to consent to counselling?
- Offering a confidential counselling relationship to a child or young person
- The limits of that confidential relationship

There is much legislation, specific guidance, and national and local policy relating to the areas of confidentiality, consent and capacity. Whilst an outline of the main issues will be provided in this document, it cannot cover the depth and breadth of topic. Therefore, counsellors are encouraged to extend their learning by using the resources recommended in the Further Reading section below, and are advised to always work within their competence.

### Formal confidential relationships

Examples of formal confidential relationships are most obviously identified in the relationship between a medical doctor and their patient, or a between a lawyer and their client. However, case law has established that a counselling or advisory relationship can create an obligation of confidentiality between counsellors and their clients.<sup>v</sup>

### Legal consent

In order for legal consent to counselling to be valid, three elements need to be fulfilled.<sup>vi</sup>

- The person being asked for consent must be capable of consenting, that is they must have the capacity to consent.
- The consent itself must be given freely.
- The person giving the consent must be suitably informed, that is they must understand what they are consenting to.

Once consent has been given for a counselling intervention, it can also be withdrawn at any time.

## Capacity to consent

Adults, that is those over the age of 18, are regarded by law to be competent to consent to their own medical treatment. Only in exceptional circumstances, when an adult is too incapacitated to make decisions for themselves, would they be deemed to be incompetent to consent.

If a young person requesting counselling is between 16 and 18 years of age, they too are usually regarded as competent to consent to their own treatment (which would include psychological therapy/counselling).<sup>vii</sup>

## The Gillick Case

The Gillick Case<sup>viii</sup> has had a fundamental affect on how medical practitioners can treat under 16's without parental knowledge or consent, and subsequently how counsellors working with this age group can justify providing counselling without parental consent, if the child is judged to have 'sufficient understanding'. The decision is binding in England and Wales, and similar provision is made in Scotland by The Age of Legal Capacity (Scotland) Act 1991.<sup>ix</sup> <sup>x</sup>Government departments in Northern Ireland have said that it is likely that they too would apply the 'Gillick Principle' when making judgments<sup>xi</sup>.

Therefore, under 16 year olds are deemed to be able to consent to their own treatment, **if** they have sufficient understanding of what that treatment is - that is, they are competent.

A number of factors need to be considered in order to be able to make a judgement of competence, and competence is **not** dependent upon age. However, it is often noted that it is unlikely that 13 year olds and under (or 12 year olds and under in Scotland) have the capacity to consent to their own treatment. In the counselling field, and especially in school counselling, the judgement of capacity to consent of 11 to 13 year olds is often made on an individual basis by the counsellor in partnership with school staff.

Capacity to consent to treatment depends upon the child:

- being capable of understanding what counselling is
- having sufficient intelligence and understanding to give consent
- being capable of making up their own mind

Capacity to consent may be impaired if the child:

- has mental health problems
- is under the influence of drugs or alcohol
- has special educational needs

If a child is not competent to consent to counselling, for whatever reason, then counselling cannot take place without consent from someone with parental responsibility for the child.

NB Consent is only necessary from one person with parental responsibility.<sup>xii</sup>

### **Gaining informed consent**

The process of gaining informed consent from potential young clients, or their parents/carers, involves the counsellor:

- being able to describe what the counselling intervention is, in a way that can be easily understood
- explaining the possible benefits and the potential risks of the counselling intervention
- describing what alternatives may be available.

The counsellor should actively encourage and answer questions about the proposed counselling, and address any concerns or fears that may arise in the discussion.

Once informed consent from someone with capacity to consent has been gained, then counselling can begin.

### **Confidentiality**

Broadly speaking, the duty of confidentiality owed to young clients who are capable of consenting to their own counselling is the same as that offered to adults.<sup>xiii</sup> Whilst there is no definition of a confidential relationship in statute, common law regards some relationships as confidential and the relationship between counsellor and client is one such situation.

Information shared by young clients within the counselling relationship is confidential as long as it is not in the public domain – for example if the client has told a number of people that she is pregnant, and the information is accessible to others, then this information is not deemed to be confidential.

When working with young people, it is usually important to them that the information they share is treated with respect and is kept confidential. This allows them to be able to talk freely and honestly within a relationship of trust.

However, there are certain factors to bear in mind when working with this client group:

- If a child is at risk of significant harm, then information must be shared with others as a matter of urgency in order to protect the child (see Information Sharing below)
- Sharing information in a timely manner is key to safeguarding and promoting the welfare of children. Involving others can enable effective early interventions to prevent problems from escalating.
- Young people do not always want their issues to be kept confidential, and often they would prefer a counsellor to support them to share information with other adults, such as family members or school staff.

### **Contracting**

Problems relating to maintaining and breaching confidentiality are greatly minimised when counsellors are clear in their contracts with clients, their families (if appropriate), and the settings in which the counselling takes place. Explaining the boundaries of confidentiality to young people and the adults in their lives, before counselling begins, can be hugely beneficial at a later date. Counsellors articulating clearly what can and what cannot be kept confidential is important so that clients can make informed decisions about what to disclose, and the adults around the child can have clear expectations about what they can and cannot be told.

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Allowing time for questions when contracting, and testing the boundaries by suggesting hypothetical situations relating to confidentiality, can be very helpful to all.

It is also good practice to regularly raise the issue of confidentiality during the counselling process as it reminds clients of the agreements made. Further information regarding contracting can be found in GPG 4 'Contracting and Record Keeping'.

### Confidentiality when attending counselling in schools

Whilst the content of school counselling sessions is generally confidential,<sup>xiv xv xvi</sup> the actual attendance at counselling is impossible to be kept private. At least one member of school staff, and often more, will need to know which pupils attend counselling in school in order to record and monitor pupils' contact with other services, and also to authorise missed lessons to attend sessions with the counsellor. Despite this, counsellors ought to aspire to provide school services that are discrete.

Further information is available in Good Practice Guidance 9 'Working in Schools'.

### Sharing information

Counsellors working with this age group of client can often be asked to share information relating to counselling with adults close to the client (often parents or school staff). Similarly, the current safeguarding climate expects professionals working with children and families to share information to support and protect these families. The document *Working Together to Safeguard Children (2015)*<sup>xvii</sup> clearly describes the standards and procedures with which professionals are to comply and what is expected of them, including the requirements regarding sharing information. Whilst this is statutory guidance for England, similar regulation exists across the other three home nations which concur with the principles of 'Working Together'<sup>xviii</sup>.

Counsellors who have the explicit consent of the client to disclose to others something from a counselling session are not breaching confidentiality. However, it is good practice to agree with the client exactly what they are happy for the counsellor to share and to record this in writing. Some counsellors involve their client in the writing of the letter or email to the other party, thus involving them in their own care and sharing of their own information.

Specific and detailed guidance relating to sharing information across the four home nations of the UK is provided by a comprehensive NSPCC factsheet.<sup>xix</sup>

The Caldicott Principles relating to sharing information between agencies were developed by the Caldicott Committee in 1997 and are relevant to the counselling professions. These have been re-confirmed by Department of Health in 2013.<sup>xx</sup>

They are:

Principle 1 – Justify the purpose(s) for using confidential information

Principle 2 – Only use it when absolutely necessary

Principle 3 – Use the minimum that is required

Principle 4 – Access should be on a strict need-to-know basis

Principle 5 – Everyone must understand his or her responsibilities

Principle 6 – Understand and comply with the law.

In cases where the counsellor is asked to share information, but does not have permission to do so from the client, then the counsellor has a duty of confidentiality to that client, unless there is a strong case not to do so (see 'Breaching Confidentiality' below and GPG 5 'Risk Assessment and Child Protection').

In practice, often a discussion with the client themselves can result in permission being given to share information, but often only to identified individuals rather than a 'blanket' disclosure.

Further discussion on information sharing is within GPG 6 'Working Within and Across Other Agencies'.

### **Breaching confidentiality**

Breaching confidentiality occurs when the counsellor is not authorised by the client to share information.

When issues of risk are identified, the National Counselling Society (NCS) believes that the welfare and safety of young clients is paramount. When decisions are to be made regarding breaching confidentiality, NCS urge members to consider such situations carefully with appropriate others (such as supervisors, line managers, and insurers).

A counsellor has a duty to promote the welfare of their young clients, and also to avoid harming them (*see Working Together 2015*). Whilst considering breaching confidentiality, alongside these duties to the client, a variety of factors may need to be taken into account.

Counsellors will want to consider:

- national safeguarding and child protection agendas in the countries in which they practice
- local guidance regarding safeguarding and child protection
- the public interest argument for breaching confidentiality
- their own moral codes
- the ethical code(s) within which they work
- their conditions of employment
- the agency policy (or their own policies if in private practice)

Further information about breaching confidentiality when someone is at risk of significant harm to self or others is within the GPG 5 'Risk Assessment and Child Protection'.

### **Exceptions to the duty of confidentiality - public interest**

In some cases, disclosing information, because it is the public interest to do so, can outweigh a duty of confidentiality to a client. Courts are likely to favour a therapist's breach of confidentiality if they are, in good faith, reporting a suspected or actual serious crime.<sup>xxi</sup>

Similarly, the courts are likely to support a therapist who breaches confidentiality to prevent serious harm of their client or others. Child protection is discussed more fully in GPG 5 "Risk Assessment and Child Protection".

**Good practice when sharing information and breaching confidentiality**

When the need arises to share information with others, it is best practice to try and discuss this with the client first. The counsellor should try to come to an agreement with the child about what information can be shared and with whom. It is highly unlikely that the total content of the sessions need to be disclosed to others, and the counsellor ought to try and negotiate only the information that is necessary for them to pass on. It is good practice to make a written record of this discussion and decisions made.

NB It may not always be necessary to seek consent or inform the family about a referral to a child protection agency, if to do so might increase risk to the young person.

Further issues regarding disclosures are considered in GPG 5 'Risk Assessment and Child Protection'.

**Summary**

Counsellors must be knowledgeable and skilled when obtaining the necessary consent for counselling. They must ensure that issues relating to confidentiality are explained and understood by their clients and relevant adults.

Any information shared by the counsellor must be done in the best interests of the client, who should be at the centre of the decision, and with careful consideration of all relevant issues.

Counsellors who develop a written policy regarding confidentiality are likely to find this helpful in their practice.

**References and suggested further reading**

- <sup>i</sup> Mitchels, B. and Bond, T. (2008) *Confidentiality & Record Keeping in Counselling & Psychotherapy*. London: SAGE. (P120)
- <sup>ii</sup> Cooper, M. (2013) School-based counselling in UK secondary schools: a review and critical evaluation. Lutterworth. BACP/Counselling MindEd (Page 10)
- <sup>iii</sup> Griffiths, G. (2013) *Helpful and unhelpful aspects in school-based counselling: clients' perspectives*. Lutterworth: BACP: Counselling MindEd
- <sup>iv</sup> DfE (Department for Education) (2015). *Working together to safeguard children*
- <sup>v</sup> Corum Children's Legal Centre. *Offering children confidentiality: Law and guidance*
- <sup>vi</sup> NHS Choices. *Consent to treatment*
- <sup>vii</sup> Corum Children's Legal Centre. *Offering children confidentiality: Law and guidance*
- <sup>viii</sup> Gillick v. West Norfolk Area Health Authority, 1985
- <sup>ix</sup> Age of Legal Capacity (Scotland) Act 1991
- <sup>x</sup> COSCA (Counselling and Psychotherapy in Scotland) (2006) *Establishing Counselling Services for Children and Young People: Guidance on Good Practice and the Law in Scotland*. Stirling
- <sup>xi</sup> NSPCC: A child's legal rights
- <sup>xii</sup> Mitchels, B. and Bond, T. (2010) *Essential Law for Counsellors and Psychotherapists*. London: SAGE.
- <sup>xiii</sup> Pattison, S., Robson, M. and Beynon, A. (2014) *The Handbook of Counselling Children and Young People*. London: SAGE Chapter 17
- <sup>xiv</sup> DfE (Department for Education) (2016) *Counselling in schools: a blueprint for the future*. London
- <sup>xv</sup> DoE (Department of Education) Independent Counselling Service for Schools (2012) Operating Handbook
- <sup>xvi</sup> WAG/BACP (Welsh Assembly Government/British Association for Counselling and Psychotherapy) (2011) *School-based counselling Operating Toolkit*.
- <sup>xvii</sup> DfE (Department for Education) (2015) *Working together to safeguard children*
- <sup>xviii</sup> Legislation relating to Children: Key legislation outlines professional duties to ensure the welfare of children is paramount, and our responsibilities to ensure that they are protected from significant harm. The Children Act 1989, 2002, 2004; the Children (NI) Order (1995), The Children (Scotland) Act (1995) and supported by Working Together to Safeguard Children (2015).
- <sup>xix</sup> NSPCC (2014) *Information sharing and confidentiality for practitioners – things to know and issues to consider*.

<sup>xx</sup> DH (Department of Health) (2013) *Information: To Share or not to Share*

<sup>xxi</sup> Mitchels, B. and Bond, T. (2010) *Essential Law for Counsellors and Psychotherapists*. London: SAGE. (P70-72)

### Online Resources

#### MindEd Sessions

<u>HC</u>	<u>401-0011</u>	<u>Capacity and Consent</u>
<u>CYP IAPT</u>	<u>413-022</u>	<u>Confidentiality, Consent, Capacity and Ethics</u>
<u>Core</u>	<u>410-053</u>	<u>Legal and Ethical Framework</u>
<u>HC</u>	<u>401-0012</u>	<u>Confidentiality</u>

BACP (British Association for Counselling and Psychotherapy) (2014) *Competencies for Humanistic Counselling with Young People*. Lutterworth: BACP.