

## LEGAL FRAMEWORKS

### Overview

Counselling young people does not stand in isolation, rather the intervention is underpinned by a legal framework, consisting of a number of differing laws and policies relating to children, some of which vary across the four home nations of the UK. Whilst counsellors working with this young client group are not expected to be experts in the law, they need to have an awareness and some knowledge of the legislation and policies that apply to their clients, the settings in which they deliver their counselling, and their own accountability to the law.

Specifically, these areas relate to:<sup>i</sup>

- capacity and informed consent
- parental rights and responsibilities
- participation
- child protection and mandatory reporting
- mental health
- education
- data protection and access to information
- equality.

Each dimension is considered below, but readers must be aware that all legal issues relating to counselling cannot be covered in a Good Practice Guidance document. Therefore, counsellors should extend their knowledge by further reading and, if necessary, training. The Endnotes linked to each sub-section in this document give readers a wide range of country specific resources, and the further reading section has some suggested in-depth texts. The MindEd sessions noted are also useful learning resources. Whilst the salient points regarding legal frameworks are summarised in this document, other National Counselling Society Good Practice Guidance go into some aspects in more depth, and are referenced throughout.

### Capacity and informed consent<sup>ii</sup>

A client's capability to give valid consent to therapeutic assessment or treatment depends upon their mental capacity to make an informed decision. There is no one test to establish a person's capacity to consent and counsellors must use a significant amount of judgement to establish whether their clients can give informed consent. A child who is deemed to be able to be sufficiently competent to make their own decisions is seen as able to enter into therapy without parental consent. A child or young person who does not have a level of understanding and maturity to be competent to consent cannot engage in counselling without permission from whoever has parental responsibility for the child. Capacity to consent is a complex area when working with children and young people, and GPG 3 'Capacity, Consent and Confidentiality' covers the issues in more depth.

### Parental rights<sup>iii</sup>

The primary responsibility for the welfare of a child, according to [The Children Act 1989](#), generally rests with the child's parents, although this responsibility is extended to anyone who has parental responsibility for the child. If the child is not deemed to be competent to consent to counselling, then permission for therapy must be sought from those with parental responsibility. If the child is not able to give informed consent and does not want those with parental responsibility to be approached, then the counsellor cannot undertake a therapeutic intervention with the child, and nor should the counsellor inform the parents that the child has

requested counselling – the initial consultation is confidential (unless there is a child protection issue). If the child is deemed to be competent to consent to counselling, then it is considered good practice to encourage the child to inform their parents that they are receiving counselling. Often those who are initially reluctant to inform their parents about counselling, change their mind after several sessions have been completed, and thereafter inform parents about counselling.

The law relating to those who have parental responsibility is complex, and therapists are recommended to undertake further reading in this area (see Endnote iii) .

### **Participation<sup>iv</sup>**

Article 12 of the Convention on the Rights of the Child states that children have the right to participate in decision-making processes that may be relevant to their lives and to influence decisions taken about them – within the family, the school or the community. As such, young people in therapy ought to be included in decision making processes that affect them. This is particularly pertinent when counsellors are considering sharing information with other professionals such as a designated teacher for child protection. This is discussed further in GPG 3 ‘Capacity, Consent and Confidentiality’.

### **Child protection<sup>v</sup>**

Attention to child protection and safeguarding is essential to all adults who work with children and young people. There are a variety of obligations laid down in statute across the UK, as well as a significant amount of guidance. Counsellors working with children and young people must make themselves fully aware of their obligations as set out in law and guidance, as well as their duties within their contracts of employment. Often training from the Local Safeguarding Children’s Board. Child protection is discussed in more depth in GPG 5 ‘Risk Assessment and Child Protection’.

### **Mental health<sup>vi</sup>**

Providing therapy in the context of current mental health law is complex, and counsellors are encouraged to familiarise themselves with legislation and guidance that is relevant to them in whichever country of the UK they practise.

The further reading section below has some useful suggestions of resources.

‘Mental Health Difficulties’ are considered in GPG 10.

### **Education<sup>vii</sup>**

Children and young people who face barriers to their learning often need additional support within their education. A variety of legislation and guidance exists which relates to this, with children having rights to access services and additional support to meet their needs. Counsellors working with young clients will need to be familiar with any additional needs a child may have, and consider how this could affect the counselling work the the young person.

The child’s needs or disabilities may be in any of the following areas:

- Behaviour or ability to socialise, e.g. they struggle to make friends
- Reading and writing, e.g. because they have dyslexia
- Ability to understand things

- Concentration levels, e.g. because they have ADHD
- Physical ability

Any of these issues may in turn affect the ability to have the capacity to consent to, or engage in, counselling.

If working in a school, counsellors should talk to the Special Educational Needs Co-ordinator (SENCO) if they have queries over a child's educational needs. Counsellors in other settings may need to discuss additional needs with the child themselves or the child's parents.

### **Data protection<sup>viii</sup>**

The Data Protection Act 1998 has requirements that cover all aspects of processing personal data gathered within the counselling relationship. Counsellors must make themselves aware of these requirements and comply with them in their practice. GPG 4 considers record keeping and data protection in more depth.

### **Equality<sup>ix</sup>**

Although the law relating to equality is complex, as a basic principle young people have a right to be treated fairly and protected from discrimination when accessing counselling. Counsellors must strive to deliver fair and equitable services in an ethical manner. Equality is considered in GPG 1 'Ethical and Professional Considerations'.

### **Disclosure and Barring Service Checks<sup>x</sup>**

Counsellors working in statutory services or agency settings will need a check of their criminal record before working with children or young people.

Criminal Records Bureau (CRB) checks have now been replaced with Disclosure and Barring Service (DBS) checks. Counsellors who wish to work with children in England and Wales must have an Enhanced DBS certificate; those in Scotland will need an Enhanced Disclosure from Disclosure Scotland; and colleagues in Northern Ireland will need an enhanced check from AccessNI.

For counsellors working in private practice there is no legal requirement to undergo a criminal record check but some do as they see this as a reassurance for families of potential clients (see Kirkbride (2016) P52).

### **Pre-trial therapy<sup>xi</sup>**

If a child is identified as a potential witness in a possible criminal trial, then counsellors asked to support the child with counselling must consider guidance issued by the Crown Prosecution Service (CPS). Whilst therapy for these children and young people is not prohibited per se, it needs to be considered on an individual basis, and the impact of having therapy or not carefully analysed. If therapy is considered appropriate, then only certain types of therapy are permitted, and the counsellor must in all cases liaise with the CPS, often via the police. If a client who is in therapy indicates that a court case may be possible in the future, then the counsellor must explore this with police and/or CPS immediately and inform them that the client is in counselling. To do otherwise may prejudice the trial to the detriment of the client.

If counselling does continue, then counsellors must be aware themselves, and inform their clients, that case notes may be subpoenaed by the court.

## Summary

The law and associated guidance relating to counselling children and young people is complex and can vary across the the four home nations of the UK. Counsellors must have an awareness of how this legislation relates to them, their clients, their clients' families and the setting in which they practice. NCS members are encouraged to learn more about these legal frameworks by accessing the materials below.

**Sources and suggested further reading**

---

<sup>i</sup> BACP (British Association for Counselling and Psychotherapy) (2014) *Competencies for Humanistic Counselling with Young People*. Lutterworth: BACP. (P5)

**ii Capacity and consent**

Department of Health Mental Capacity Act (2005) Summary Document

Age of Legal Capacity (Scotland) Act 1991

British Medical Association (2001) *Consent, Rights and Choices in Health Care for Children and Young People*. London: BMJ Publishing Group.

NSPCC (2009) Gillick competency and Fraser guidelines

**iii Parental Rights and Responsibilities**

GOV.UK Parental rights and responsibilities

Children Scotland Act 1995

**iv Article 12 of the Convention on the Rights of the Child****v Child protection**

Working Together to Safeguard Children: A guide to interagency working to safeguard and promote the welfare of children (2015)

Department for Education and Skills (2006) *What to do if you're worried a child is being abused*

Child Protection in Northern Ireland

Children Acts (1989 England and 1995 Scotland)

Children Act 2004 in England and Wales

Criminal Justice (Scotland) Act 2003

**vi Mental Health**

Mental Health Act for England and Wales (1983, 1995 and 2007)

Mind: The Mental Health Act (1983) - an outline guide

The Mental Health (Care and Treatment) (Scotland) Act 2003

---

The Mental Capacity Act (England/Wales) (2005)

The Scottish Government (2005) *The New Mental Health Act: What's it all about? A short introduction*

Northern Ireland Human Rights Commission

**vii Special educational needs overview**

**viii Data Protection Act**

**ix Equality Act Guidance**

**x Disclosure and Barring Service Checks**

DBS England and Wales

Disclosures Scotland

Disclosures Northern Ireland

**xi Pre-trial therapy: Crown Prosecution Service**

### **Suggested further reading**

#### **MindEd Sessions**

<u>CMD</u>	<u>412-014</u>	<u>Applying the Law</u>
<u>CYP IAPT</u>	<u>413-022</u>	<u>Confidentiality, Consent, Capacity and Ethics</u>
<u>CYP IAPT</u>	<u>413-009</u>	<u>Rights and Responsibilities Frameworks</u>
<u>CORE</u>	<u>410-053</u>	<u>Legal and Ethical Frameworks</u>
<u>CORE</u>	<u>410-056</u>	<u>The Mental Health Act</u>
<u>CMD</u>	<u>412-013</u>	<u>Participation in Counselling</u>

Bond, T. (2016) *Standards and Ethics for Counselling in Action. Fourth edition.* SAGE

Mitchels, B. and Bond, T. (2010) *Essential Law for Counsellors and Psychotherapists.* London: SAGE.

Jenkins, P. (2007) *Counselling, Ethics and the Law. Second edition.* SAGE.

Kirkbride, R. (2016) *Counselling Children and Young People in Private Practice.* Karnac. Chapter Five

The Children's Legal Centre (2004) *Offering children confidentiality: Law and guidance*. Essex

Pattison, S., Robson, M. and Beynon, A. (2014) *The Handbook of Counselling Children and Young People*. London: SAGE

**Children's Rights:**

- England
- Scotland
- Northern Ireland
- Wales