Good Practice in Action 026
Legal Resource

Counselling children and young people in school contexts in Scotland

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Context

This resource is one of a suite prepared by BACP to enable members to engage with the *Ethical Framework for the Counselling Professions* www.bacp.co.uk/media/3103/bacp-ethical-framework-for-the-counselling-professions-2018.pdf in respect of counselling children and young people in school contexts in Scotland.

Purpose

The purpose of this resource is to provide information for counsellors, counselling service providers and schools in respect of legal matters relating to counselling in schools in Scotland. We refer throughout to 'practitioners' as a generic term. There is a separate resource providing legal resources for England, Northern Ireland and Wales. See Good Practice in Action 002, which can be accessed at: www.bacp.co.uk/gpia.

Using the Legal Resources

The membership agreement with BACP establishes a contractual commitment by members to abide by the *Ethical Framework for the Counselling Professions*, which includes a responsibility for members to keep the skills and knowledge relevant to their work up to date.

The Legal Resources cannot constitute legal advice or guidance in specific cases, nor are they sufficient on their own to resolve legal issues arising in practice. The Legal Resources do not give a full statement of the law. They are solely intended to support good practice by offering general information on legal principles and policy applicable at the time of writing. The Legal Resources are intended for information purposes only and are not a substitute for professional advice. BACP and the author accept no responsibility for and accept no liability as a result of any person acting or refraining from acting on the basis of the Legal Resources.

Practice issues and dilemmas are often complex, and may vary depending on clients, particular models of working, the context of the work and the therapeutic interventions provided. We therefore strongly recommend consulting your supervisor and also, wherever necessary, a suitably qualified practitioner or lawyer. Some professional insurers will provide legal advice as part of their service.

BACP and the author make no representation or warranty as to the completeness or accuracy of the information contained in the Legal Resources. References in this resource were up to date at the time of writing but there may be changes in particular to the law, government departments, government policies and guidance, websites and web addresses. Organisations and agencies may also change their practice or policies, so please be alert for any changes that may affect your therapy practice.

In this resource, the word 'therapist' is used to mean specifically counsellors and psychotherapists and 'therapy' to mean specifically counselling and psychotherapy.

The terms 'practitioner' and 'counselling related services' are used generically in a wider sense, to include the practice of counselling, psychotherapy, coaching and pastoral care.

Counselling professionals may refer to those with whom we work as 'clients', but in this resource, individuals under the care of the mental health services are referred to as 'patients,' as this is the term used in the legislation.

Introduction

It is not our intention in this resource to turn practitioners into lawyers, but to provide counsellors with sufficient information and signposts to see where boundaries and responsibilities lie, and to decide when it is necessary to seek further legal help and advice. A counsellor working with young people in schools or colleges needs to be aware that there are a number of areas of law that will affect their work. These include practical issues to do with insurance, contracts, employment and provision of services.

Counsellors also need to be aware of children's rights and child protection. Scottish Government policies with regard to children are extensive, and practitioners need to be familiar with them. There are a considerable number of relevant guidance documents, and the Scottish Government continues to develop and publish more.

These are all available on the Scottish Government website at www.gov.scot/Topics/People/Young-People (see also the section on 'Resources, information, guidance and reference works' at the end of this resource).

All counsellors have a contractual duty of care to their clients and a professional duty of care under the law of negligence (delict). They are also subject to the ethical standards of their professional organisation and may be contractually bound to organisations with which they work, to comply with any relevant employment, child protection or data protection policies and procedures. Breach of contract may lead to disciplinary or legal proceedings. Self-employed therapists working in a school or college should check whether their contract with the educational establishment or local education authority obliges them to comply with that organisation's policies and procedures. It is good practice for any self-employed counsellor working with children and young people to have a clear idea of how the child protection procedures in their region operate and also to have access to appropriate legal and practice advice and support. Some useful resources are listed at the end of this resource.

1 The counselling service

1.1 Contracts, employment and self-employment

Counselling in schools can be provided in a number of ways:

- a counsellor can be employed by the local education authority or other educational establishment
- self-employed counsellors can be contracted by the school or local authority to provide a service to children in specific schools
- counsellors may be employees or volunteers with agencies or organisations who are permitted to work with children in educational institutions
- some counselling services may be supplied by the health service (for example in the case of children with special needs) and this may be provided on the school premises (e.g. in residential settings) but the service is likely to be provided by a therapist as part of the healthcare team, in the context of the child's general healthcare
- some counselling services provided by outside organisations are permitted to support children in a school setting.

For all counsellors working in a school, there should be either a written contract of employment (a contract of service) or a contract for the provision of counselling services as a self-employed counsellor (a contract for services). Other counsellors (for example, volunteers and those working for other organisations with permission to see children in a school setting) should have a written agreement that establishes the legal and professional basis on which they are required to work.

Check that your contract sets out the conditions under which you are expected to work, including the policies and procedures with which you are required to comply. Note that under paragraph 243 of the National Guidance for Child Protection in Scotland 2014 (available at www.gov.scot/Resource/0045/00450733.pdf), 'All agencies and organisations working with children and young people are expected to have child protection procedures in line with the national guidance.'

Employment contracts should also contain other details relevant to the employment, for example, pay, leave arrangements, internal complaints, disciplinary procedures and pension rights.

Counselling contracts (both employment and self-employed) should include a clear agreement on the policies, procedures, law and guidance with which the counsellor is required to comply. This might include, for example, compliance with relevant legislation and government guidance (see the section on 'References and further reading' at the end of this resource).

Practitioners should be aware that when the UNCRC (Incorporation) (Scotland) Act 2021 comes into force it will require changes to guidance and policies.

Local Authorities will be providing guidance and the over-arching Scottish Government guidance is in preparation at time of writing.

1.2 Insurance

Insurance providers vary in their terms. You should make sure you are aware of the terms on which the cover is provided and ask questions like:

- What does the policy cover, and what does it exclude?
- Does the cover 'travel with you' (i.e. cover you as a counsellor wherever you work)?
- If you change providers, will the new policy cover new complaints about events or issues that occurred prior to the change?
- Does an employer's insurance cover you for illness, all personal accidents and so on?

Be aware that if you work as a full- or part-time employee in a school, the school insurance policy should cover liability for any accident that befalls you or a pupil while you are working in school premises. If you are self-employed, check that you are fully covered if you are working in a school.

We should all have professional insurance, both for our public liability (e.g. accidental damage to clients or others) and for our professional liability (professional duty of care, negligence etc.).

Check in detail what is covered or excluded from cover on your policy. Often, a policy cover will 'travel with you'; that is, it covers you wherever you are working, whether that is at home, on business premises or in a school.

If you work full or part time from home, be aware that household insurance policies may specifically exclude aspects of cover if the insured person works from home, or the policy might be invalidated if the insurers find out that you have been working from home and the insurers did not know or agree to this; in such cases, if you make a claim, they might refuse to pay out. If you work from home, inform your insurer and get their agreement (preferably in writing) that you are working from home. Some insurers have special policies for home workers, which tie in with our professional insurance cover.

As insurance is a specialist field, we recommend that therapists who are considering taking out insurance policies that cover their professional needs and responsibilities take appropriate advice from a lawyer or a finance or insurance expert who understands insurance law in the context of the needs of the counselling profession. The Law Society of Scotland website is recommended if you do not know of a suitable solicitor: Find a Solicitor | Law Society of Scotland (lawscot.org.uk).

The Insurance Act 2015

Practitioners should be aware that Scottish law in this area is governed by the Insurance Act 2015. For information see the website www.legislation.gov.uk/ukpga/2015/4/contents. Many insurers have produced guidance but practitioners should exercise some care in choosing a reputable source.

1.3 Information about the counsellor and the service

Counselling is a business activity. To conform with professional standards, and also with the law regarding contract terms and trade descriptions, all advertising and other information about the counsellor and the service must be truthful and accurate. False advertising made deliberately or recklessly concerning qualifications or the service provided may be punishable by a fine under Trading Standards legislation.

In serious cases (for example, falsifying qualifications), if deliberate falsehoods are used to mislead clients or employers, not only is a professional complaint justified but it could also constitute a criminal offence.

Information provided to children should be age appropriate and accessible. Where the child has the capacity to make the decisions, it is your responsibility to ensure that he or she has sufficient and appropriate information to make informed decisions.

Consideration should also be given to accessibility for any child with a disability. You have a duty under equality legislation to make reasonable adaptations for those with a disability. Information for children might include:

- facts about the service provided
- an explanation about how the service can be used by the child, and what is/is not appropriate (e.g. preferred methods of contact)
- a clear explanation of confidentiality
- a protocol for obtaining the child's instructions about what information is and is not to be considered confidential, and with whom information can and cannot be shared
- information about child protection, including when confidentiality will be breached by the counsellor and why and how child protection referrals might be made (for example, the fact that the child may not necessarily be informed when a referral is to be made).

1.4 Contractual terms and conditions of counselling services

Contract law is governed by statutes, subsidiary legislation and case law. A contract is a legally enforceable agreement with terms that may be explicit or implied. It does not have to be in writing but it helps to have some written or otherwise recorded evidence of what is agreed, for clarity and as an aide-memoire if required.

While children in Scotland can enter into 'transactions', including services such as counselling, which are of a type common for their age, and not on unfair terms (Age of Legal Capacity (Scotland) Act 1991 s.2) (the 1991 Act), (see section 2.4, on capacity), child clients cannot enter into formal written contracts. Thus this section is restricted to contracts between counsellors and educational establishments, or between adults, such as between a therapist and a parent/carer.

Therapists and others may have different understandings about professional services, terms and obligations, such as confidentiality and referrals (see section 2.6), and contract terms should clarify mutual expectations and limitations on confidentiality. Therapists may be expected to conform with a school or organisation's policies, procedures or guidance and, if so, these terms should be clearly set out in the counsellor's contract with the school or organisation; they should also be understood and agreed in the counsellor's therapeutic alliance with the child client, where they should be reflected in an age-appropriate way. The therapeutic alliance (that is, the agreement about the work that is reached between the child client and the counsellor) is not a formal contract as such in terms of law, but it does have legal consequences.

1.5 The disclosure service in Scotland (Disclosure Scotland) and criminal records checks

Members will be aware that children are considered a vulnerable group and professionals working with them are required to have disclosure certificates. The Disclosure (Scotland) Act 2020 introduced changes to the system of disclosure certificates. One of the more important is that for the purposes of the Act 'child' includes any person under the age of 18 years.

In addition self-employed therapists now have to apply to Disclosure Scotland to become members of the Protection of Vulnerable Groups (PVG) scheme (see below). Useful information on the changes is available at: Types of work covered by PVG - mygov.scot. This change does not affect the meaning of child in other legislation. It should be noted that membership of the PVG scheme now lasts for five years. More information is available on Disclosure Scotland's website.

For those working directly with children or vulnerable adults, the employer or contracting organisation will have a responsibility to run criminal record and other necessary security checks, as appropriate to the practitioner's level of contact with the vulnerable clients. Employers must be registered and must also have the worker's permission to request disclosure of information held under the scheme.

For self-employed therapists, it may be advisable to contact the disclosure service, (see Disclosure Scotland's website www.dbschecks.org for more information), to see whether it is appropriate to become a member of the Protecting Vulnerable Groups (PVG) Scheme, which collates information about persons working with children or vulnerable adults, which may be disclosed. Contact with the disclosure service can be online, by telephone or post (see the end of this resource for full contact details).

An application for disclosure must be in due form and accompanied by documents of identification, details of which are on the website (www.disclosurescotland.co.uk).

For further information see Appendix 7: Child protection. For full details of the operation of the disclosure service in Scotland, and the cost, see the website www.disclosurescotland.co.uk. For up-to-date general comprehensive information about employment law in Scotland, employee rights, working time, health and safety, pay and leave entitlement, disability and discrimination, trade union law, tribunal hearings and so on, see *Employment Law in Scotland by Middlemiss and Downie* (3rd edition, 2020).

BACP has developed a *School-Based Counselling Operating Toolkit* for Wales (available at: School and community-based counselling operating toolkit (revised 2020) (www.bacp.co.uk).

This along with the Department for Education (England) departmental advice for setting up counselling services in schools (available at: www.gov.uk/government/publications/counselling-in-schools) are useful tools, but Scottish readers should note that they are based upon English law, which differs in many essentials from Scots' law, particularly with regard to the capacity of children. The Age of Legal Capacity (Scotland) Act 1991 is the relevant statute.

The reader is directed to s. 2.4 for a discussion of the relevant sections of the Act. BACP recommends the toolkit to practitioners for training purposes, as an awareness-raising resource and as a vehicle to provide information about the use and benefits of school counselling (this too is based on English Law).

2 The legal context in Scotland

2.1 Status of law and guidance

Scottish child law is derived from a considerable body of statute law and subsidiary legislation (both Westminster and Scottish) and case law. This law must be compliant with international conventions, including the European Convention for the Protection of Human Rights and Freedoms (ECHR), and with the United Nations Conventions ratified by the UK, such as those on the rights of children (CRC – often referred to as the UNCRC) and disabled persons (UNCRPD). It should be understood that the ECHR is an international convention not European Law and therefore compliance is still required and is not affected by the departure of the UK from the EU.

Case law comprises the decisions of the courts as they interpret and apply the statutory legislation to issues in individual cases. It works on a hierarchical basis: the decisions of the higher courts bind those of the lower courts, which should in general obey the higher courts' rulings on specific legal issues. Thus, the decision of a sheriff is not as influential as a decision by the or the UK Supreme Cour. Decisions by higher courts are binding on the courts below them.

The hierarchy of courts in Scotland with regard to Children's Hearings matters is:

Supreme Court

Court of Session Inner House

Court of Session Outer House

Sheriff Appeal Court

Sheriff Court

In addition to law, there is a body of guidance, some of which is made under statutory powers and therefore carries a limited legal force.

There is a substantial body of Scots law that regulates children's rights and responsibilities including but not limited to: Age of Legal Capacity (Scotland) Act 1991, Children (Scotland) Act 1995, Children's Hearings (Scotland) Act 2011, Children and Young People (Scotland) Act 2014, Education (Scotland) Act 1980, Standards in Scotland's Schools Act 2000, Additional Support for Learning (Scotland) Act 2004, Vulnerable Witnesses (Scotland) Act 2004, the Victims and Witnesses (Scotland) Act 2014, and the UNCRC (Incorporation) (Scotland) Act 2021. The last has the effect of making the UNCRC directly enforceable in Scottish Courts.

The relevant child protection law and guidance in force in Scotland at the time of writing is listed at the end of this resource. However, as mentioned earlier, the law is always developing and so, as a matter of good practice, do watch for changes. Good sources of information to help you keep updated are local authority lawyers, local authority child protection or safeguarding committees, and the Scottish Children's Reporter Administration (SCRA). Local authority or education authority training may also be available. It should be noted that the departure of the UK from the European Union does not affect the status of the ECHR.

2.2 Primary and secondary education

Nursery education is not compulsory in Scotland (unless a Children's Hearing makes a decision requiring the child to attend a specified nursery). Children begin their primary schooling during the year in which they turn five, unless permission has been granted for delayed entrance. Education is provided at an 'educational establishment,' which is defined in s.135 of Education (Scotland) Act 1980 (in brief) as a school and any institution for the provision of any form of further education, but it does not include a university. Education is defined in s.1(5)(a)(1) as including early learning and childcare.

Children transfer to secondary education (high school) at the age of 11 or 12, where secondary education lasts from the age of 12–18 years (school years S1-S6). At the age of 16 (S4), young people may leave school (at Christmas or at the end of the school year, depending on their birthday).

Some young people choose to complete their high school education at a college that is considered to be an educational establishment.

It should be noted that while parents are under a legal duty to provide their child with an education it is not compulsory to enrol them in a school. Children may be home-schooled. Removal of a child from a state school does require giving the education authority notice.

For information about the education system in Scotland and definitions of some education terms see Appendix 2.

2.3 Who is a 'child' in Scots law?

The age of majority in Scotland is 18 but, for most purposes, people cease to be 'children' at the age of 16. Between 16 and 18 years of age they are considered to be 'young people'. The UNCRC (Incorporation) (Scotland) Bill 2021 refers to all of those under the age of 18 as 'children', which follows the definition of 'child' in the Convention but it should be understood that this is for the purposes of that statute only and does not change the definitions of 'child' in other pieces of legislation. Practitioners are directed to 1.5 above for the definition of child for the purposes of disclosure certificates.

Those aged 16 or 17 do not need parental permission to make most decisions. The law governing this comes from a number of statutes (both Scottish and UK), is complex, inconsistent and sometimes contradictory. Although there are some limitations, for most practical purposes young people are able to make adult decisions including: whether to marry or enter into a civil partnership, where to live, consent to sex, work full time (after school leaving date); and enter into a formal written contract (with some limitations and protections) and to make medical decisions (with limited exceptions). If a young person lacks capacity, a parent or carer can only make financial or welfare decisions if they first obtain the appropriate financial or welfare guardianship. (For more information on the capacity of children, see section 2.4; for information on parental responsibilities and rights see Appendix 1.)

It is important to understand, however, that education law gives parents the right to have their child educated in accordance with their wishes; as a result, whether the young person is over 16 or not, parents have the right to be involved in school decisions and to have access to their child's education records. What is included in 'education records' is discussed at 4.3.

This right does not extend to education provided by a higher education establishment such as a further education college or a university.

A 'pupil' refers to a school student, and straddles the transition from child to young person. Recently students have been referred to as 'learners' but the legal term is 'pupil'. For a full definition, see Appendix 2.

2.4 Children and capacity

Scots law on capacity is governed by the Age of Legal Capacity (Scotland) Act 1991 (the 1991 Act). Gillick Competence and the Fraser Guidelines are English law and, while they can inform discussion, they should be treated with caution in the Scottish context. Reliance should be placed upon the terms of the 1991 Act. Legal capacity (known as being capax) means having sufficient understanding to make decisions that have legal consequences. While the 1991 Act states that people under the age of 16 have no legal capacity, it makes exceptions that actually give children a great deal of power to make decisions. The Act specifically gives children who have sufficient understanding the right to:

1. Instruct a lawyer in a civil law matter. The lawyer will decide whether the child has sufficient understanding to act as the client. Children (and adults) do not require capacity to instruct legal representation when suspected or accused of a criminal offence.

2. Make medical decisions when 'in the opinion of the qualified medical practitioner dealing with the matter [the child is] capable of understanding the nature and possible consequences of the procedure or treatment'. 'Qualified medical practitioner' includes doctors, nurses, physiotherapists, midwives, clinical psychologists, dentists, pharmacists and other medical professionals. It does not include counsellors and psychotherapists unless they are working in a medical environment.

3. Enter into 'transactions' that are common for their age and circumstances and not on unfair terms. Common transactions include making small purchases, but also obtaining services. It is important to understand that a person under the age of 16 cannot enter into a formal written legal contract because this is not something that children commonly do; thus, the child would not be able to engage a counsellor and sign a formal contract which included payment and legally binding contractual terms.

The question of the capacity of the child is vital as it determines whether or not a child can enter into a therapeutic relationship without the consent of a person with parental responsibilities and rights. By therapeutic relationship we mean the agreement between client and counsellor as to the work that will be done together; sometimes called the therapeutic contract. This term has not been used here because of the confusion between what is essentially a therapeutic relationship between the therapist and the child and the legal term 'contract', which has a different meaning in law.

For practitioners working outwith the medical environment, there are two main routes for a child to obtain counselling or psychotherapy services: free services to which a child may self-refer; and services that are contracted for the child by an adult or agency, which are either free or paid for by the adult or agency.

In the first situation, the practitioner must assess the capacity of the child to self-refer. This is not likely to be a high hurdle for the child, and even quite young school-age children may well have sufficient understanding to enter into the 'transaction'.

It is not necessary for the child to arrive fully versed in the nature of the service but rather that the practitioner be satisfied after talking with the child that the child has sufficient capacity (see sections 2.5 on determining capacity and 2.6 on confidentiality).

In the context of interagency discussions (3.31) the National Guidance for Child Protection in Scotland 2021 (updated 2023) says that with regard to capacity:

Consideration is given not only to the child's age but to the child's development, including:

- linguistic abilities
- memory retrieval capacities
- suggestibility
- effects of stress and trauma.

If a therapist forms the view that the child has sufficient understanding, and gives consent, then they may enter into a therapeutic relationship or alliance with the child, including making a plan about the nature of the therapy and the form it will take.

See BACP's *Ethical Framework for the Counselling Professions* in respect of building an appropriate relationship, Commitment to clients, point 4, and particularly Good Practice, points 31 and 32. The child who has the capacity to understand is perfectly entitled to seek counselling, particularly where the service is at no cost, and has the right to confidentiality (see section 2.5 on determining capacity). The therapeutic alliance (that is, the agreement about the work which is reached by the child client and the counsellor) is not a formal contract as such in terms of law, but it does have legal consequences.

Where the child is considered to have the necessary capacity there is no need to obtain the consent of a person with parental responsibilities and parental rights.

Where a child wishes to have counselling and has sufficient capacity to consent and a person with parental responsibilities and rights refuses to allow that counselling (other than for financial reasons), consideration should be given to whether there is a child protection concern.

In the second situation, where the contract for service has been arranged by adults and it is the decision of a person with parental responsibilities and rights that the child should have the benefit of the service, the question arises as to whether the consent of the child is required. The Age of Legal Capacity Act 1991 does not give children the same power to consent to services that they have to consent to medical treatments or procedures. However, practitioners should be wary of a child who is refusing the service but is being required to attend by adults. Practitioners are directed to BACP's *Ethical Framework for the Counselling Professions*, particularly Good Practice, points 26, 27 and 28. For children's capacity to make medical decisions, see Appendix 3 of this resource.

2.5 Determining capacity

It is the responsibility of the practitioners to determine whether they believe that the child has the necessary capacity to enter into an agreement for service where no formal written contract is required. There is no single, definitive test for capacity.

It will be evident that the capacity of a child to make a decision is situation-specific and that the child must have an informed understanding of the issues, including the risks and benefits involved and the consequences of refusal or acceptance. The level of understanding required is dependent upon the complexity of the decision. While a child with capacity has the right to make the decision, they are not required to do so but the decision is for the child to make. A child may prefer to make the decision with the assistance and support of parents/carers.

Each case involving a child client must be decided on its own merits. It is the task of the therapist, with other professional help if necessary, to talk through the situation with the child client. Together, you will need to explore and discuss the child's circumstances and the therapeutic or other options available, considering the possible outcome of each option open to the child, and then decide whether the child has the capacity to make the necessary decisions, including whether to enter into a therapeutic relationship. The same process is necessary in the context of a therapeutic relationship when helping a child to assess whether they will require the therapist to keep confidentiality or to make a referral.

The ability to help a child make a decision will depend on the provision of age-appropriate information and explanations or answers to their questions. Practitioners should also be prepared to reassess capacity. A child may acquire or increase capacity during therapeutic treatment or, because of stress or other factors, may lose capacity, albeit temporarily. Loss of capacity may have no impact on the therapeutic relationship unless decisions need to be made by the child.

Relevant resources and further reading are listed at the end of this resource.

2.6 Confidentiality

In Scotland, under the Age of Legal Capacity (Scotland) Act 1991, once a young person reaches the age of 16, he or she is treated for most purposes as an adult in terms of capacity with some extra protections. Thus, a young person has the full capacity to enter into contracts and all of the confidentiality protections of an adult. See Part 4 on confidentiality.

2.7 Young people aged 16-17 who lack legal capacity (incapax)

Persons aged 16 and 17 are to be treated as adults when it comes to capacity. The Scottish legal term for an adult who lacks the ability to make decisions is 'incapax'. An adult may be only temporarily incapax, or permanently. Where the young person lacks capacity to enter into legal contracts then a financial guardian will be required to make decisions. When it comes to consent to medical procedures or treatment, or the obtaining of services, then this will be the role of a welfare guardian.

The welfare guardian and the financial guardian may be the same person. Guardianships are registered with and supervised by the Office of the Public Guardian under the provisions of the Adults with Incapacity (Scotland) Act 2000. Information is available at Office of the Public Guardian (Scotland) (publicguardian-scotland.gov.uk).

A court may make an intervention order relating to a limited issue that does not require full guardianship.

It should be remembered that a person aged over 16 and under 18 may still be subject to a compulsory supervision order made by a children's hearing. This may contain a requirement that the child attends counselling (as with medical treatment and assessment, this will be subject to the consent of the child who has sufficient capacity). The consent of the guardian will not be necessary in those circumstances. Readers are directed to GPiA 053 LR: *Understanding the Children's Hearing System in Scotland.*

3 Community care and mental health treatment

3.1 Getting it right for every child (GIRFEC) and child protection

Getting It Right For Every Child (GIRFEC) is a Scottish Government policy aimed at achieving best outcomes for the child. There is an emphasis on ensuring that information about children is shared, that agencies coordinate their work with children and use a common language, and that the child and his or her family are at the heart of decision making. Much of the thrust of the Children and Young People (Scotland) Act 2014 is aimed at improving co-operation and strengthening duties to work together.

There are a number of different guidance documents concerning children and child protection in Scotland. See the section on further reading at the end of this resource and Appendix 4, particularly with regard to the concept of 'wellbeing'.

3.2 Local authority duties

Local authorities have a duty to safeguard and promote the welfare of children in their area who are 'in need' or who are 'looked after'. This is similar wording to the parental responsibility in s.1(a) of the Children (Scotland) Act 1995 but it does not give the local authority parental responsibilities and rights. Instead it imposes a duty upon them with regard to the welfare of children who are 'looked after' or 'in need'. Local authorities in Scotland are obliged to assess any child they consider to be 'in need' or, if requested, a child who is 'affected by disability'. A child or parents/carers may request a child in need assessment. The services that are offered to a child in need may include counselling and psychotherapy. (See Appendix 4 for information on the community planning partnership, and Appendix 5 for information on looked-after children.)

3.3 Getting it right for every child (GIRFEC) the role of the named person

The concept of the 'named person' arose from cases of children who were in local authority care or whose circumstances required the involvement of multiple professionals.

It was found that children and families who have multiple-agency support and involvement can feel overwhelmed and unsure who to contact for help and information. Having one of the professionals assigned as 'named person' provides children and parents/carers with a clear source of information. Where there is a child's plan or child protection plan, there must be a named person. That individual has the responsibility of ensuring that children and parents/carers understand what is happening and acts as an easily available resource for them. It has proved very successful in these cases and Scottish Government piloted schemes where all children were provided with a named person. While those pilot schemes appear to have been well received, if not universally popular; the provision of a statutory basis for a named person for each child in Scotland proved very controversial. A group of charities and parents took a case to court and it progressed through appeals through the various levels of court until it reached the Supreme Court (The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51). The Supreme Court judgment was that the information sharing part of the Act is not compliant with Data Protection law.

As a result, it is beyond the competence of the Scottish Parliament. The issue of compliance with data protection, has of course, been made an even greater hurdle with the introduction of the General Data Protection Regulation, which has increased the protection of individuals with regard to the retention and sharing of their information.

Scottish Government tried to produce guidance for the sharing of information with the named person, but this proved impossible. In autumn 2019 the Government accepted that the scheme, as intended in the Children and Young People (Scotland) Act, cannot be made compliant with Data Protection legislation and has withdrawn that part of the Act and the Children (Information Sharing) (Scotland) Bill.

The named person scheme is and will remain voluntary. There is no legal requirement to provide the named person with information concerning the wellbeing of a child.

Where the practitioner has information of relevance to child protection, that information may be shared if the requirements of the GDPR and Data Protection legislation are satisfied, (see 13).

Some areas of Scotland are continuing with the named person scheme, but it is important to understand that children and families cannot be required to work with the named person and there is no legal obligation on you to provide information to them. If a child or family request that you do so because they are taking advantage of the scheme, then you are free to do so.

The well-established named person role for children with multi-disciplinary support, or who are subject to a compulsory supervision order is not dependent on the Act and will continue. Practitioners are directed to: www.bacp.co.uk/about-us/contact-us/gdpr. Practitioners are advised to record any consent to the sharing of information and the specifics of what information could be shared and with whom. Where there may be a question of the child's capacity to consent, extra care must be taken and all steps recorded.

Interested readers may read the judgment in the named person case *(Christian Institute and others (Appellants) v The Lord Advocate (Respondant) (Scotland))* and on the Supreme Court website at: www.supremecourt.uk/ cases/uksc-2015-0216.html.

3.4 Child protection

Child protection law and procedures apply in all educational establishments, and to all the work undertaken by practitioners. The National Guidance for Child Protection in Scotland 2021, updated 2023 has some specific mention of mental health staff.

In an emergency, any person may apply to the sheriff for a Child Protection Order (Children's Hearings (Scotland) Act 2011, s. 39(1)), but such applications are generally made by a local authority.

School counsellors are also expected to comply with the *National Guidance for Child Protection in Scotland 2021 updated 2023* and other relevant government guidance, and should be aware that procedures and protocols can vary across the different local authority areas. Schools usually require counsellors to comply with all relevant child protection law and government guidance as part of their contracts of employment (or, for self-employed counsellors, their contract for services). Please note that even if there is no specific term in a counsellor's contracts, BACP's professional guidelines (the *Ethical Framework for the Counselling Professions*) expect counsellors to comply with relevant law and government guidance for child protection.

Please note that the content of this resource is of necessity general in nature and so it cannot constitute legal advice on any specific case because the context of every practice dilemma is different. Where child protection concerns arise, the practitioner should seek advice if they are unsure. If legal advice is thought to be required it may be available as part of the cover available through a professional insurer. Children who are in need of care, protection, guidance or control may be referred to the children's reporter. Anyone may make such a referral, and the local authority and the police are required to provide the reporter with any evidence they may have that a child is in such need. The reporter decides which children should go forward to the children's hearing and on what grounds; the hearing may then impose a compulsory supervision order. Practitioners who work with such a child may find that they are invited to a hearing and/or asked for a report.

They should familiarise themselves with the system; information is available at the Scottish Children's Reporter Administration's website at www.scra.gov.uk. Further information is available in GPiA 052 *Understanding Child Protection in Scotland* and GPiA 053 *Understanding the Children's Hearing System in Scotland.* The latter contains specific information on reports for the Children's Reporter. See the list of further reading at the end of this resource.

A vulnerable young person is dealt with under the vulnerable adult provisions. Wellbeing concerns do apply beyond the age of 16 (see Appendix 5 for more information).

4 Data protection and information sharing

This section is intended to give practitioners a basic understanding of the principles of the sharing of information. As this is a complex matter, we cannot give definitive answers.

4.1 The law on data protection

All data sharing provisions in the UK must be compliant with the UK General Data Protection Regulation (UK-GDPR). All records concerning an individual's mental health are 'sensitive categories of personal data' in s.11 and schedule 1, part 1 of the Data Protection Act 2018, and accordingly have a very high level of protection (see Appendix 4 for the relevant excerpt from that Act). Unless explicit consent (GDPR Art 9) to the sharing of information has been given, information may only be shared where it is necessary to protect the child or another person (see Appendix 4). The provisions are not dissimilar to those of the previous Data Protection Act and the protections are not weaker. The UK-GDPR is very clear that sharing information is not to be undertaken lightly. Where the child has no capacity then permission must be given by a person with parental responsibilities and rights. It is not necessary to have permission from all persons with parental responsibilities and rights. Explicit consent is explained by the Information Commissioner as being: 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'. This means that the person has a good understanding of:

- what information is to be shared
- who it will be shared with
- what the purpose of sharing is
- who will have access to the information
- the likely consequences of sharing and has consented without any undue influence being exerted by anyone.

Registration with the Information Commissioner

If you process information about your clients or hold information about your clients on computer you are likely to be a 'data controller' in terms of the Data Protection Act and as such you may be required to register with the Information Commissioner.

'Processing' has a very wide definition and includes merely holding information on a computer. Failure to register may result in a fine. For more information see Appendix 6.

4.2 The status of school and counselling records

School records

As parents (see Appendix 2 for the definition of 'parent' for education) have a right to see their child's educational records, the status of counselling records must be properly understood by practitioners.

The definition of an educational record is contained in the Pupils Educational Records (Scotland) Regulations 2003/581 (Scottish SI). Regulation 3(1)(c) states that the records are those that relate to the education of the child. Rule 3 expressly exempts from educational records 'information which is kept and intended to be kept by a teacher or by an employee of the responsible body solely for their own use'. The Pupils Educational Records (Scotland) Regulations 2003/581 (Scottish SI) is clear that while parents have a right to access to their child's educational records, this is not unqualified. The Education (Scotland) Act 1980 s. 6(c) states that sensitive information about the child should not be disclosed.

Counselling is not part of the education of a child, and counselling records contain sensitive information. Therefore records to do with the counselling are not part of the educational records; even where counselling is part of the child's plan or a coordinated support plan, the records are not open to all, any more than the medical records of a child would be. (For more information see Appendix 6.)

Children and their parents and carers should also be aware of the status of records, and who may have access to them.

The child's power to restrict access to educational records

The Pupil's Educational Records (Scotland) Regulations 2003 reg.10(3)(a) allows a child to request that information be withheld from a specified person or persons where there is a risk of significant harm or distress to the pupil or another person. This means in practice that if the responsible body receives a request from the child, in writing, requesting that information be withheld from a particular person or persons, the schools have tended to be sympathetic. If a child client has concerns that a parent is likely to ask to see counselling records, a counsellor is entitled to assist the child in making the formal request to the responsible body for nondisclosure (for further information, see Appendix 3 on children's capacity).

Counselling records

If the child does not have the capacity to make his or her own decisions, then those with parental rights and responsibility, or with the care of the child, will normally have the right to make decisions, and also the right to see the child's therapy records (with certain exceptions allowing the therapist and school to maintain secrecy to safeguard the wellbeing or safety of the child or others, or to safeguard a police or other investigation in the context of child protection). This is never a simple matter and will require careful consideration. However, it is entirely appropriate for the contract between parent and practitioner to have provision for information to be kept confidential at the request of the child. It is essential that practitioners be prepared to reassess capacity, as the parent's or carer's right to access to the records will end when the child acquires capacity.

4.3 Sharing information for child protection purposes

The guidance from the Information Commissioner for Scotland (ICS) (www.itspublicknowledge.info/home/ScottishInformationCommissioner.aspx) is:

Where a practitioner believes, in their professional opinion, that there is risk to a child or young person that may lead to harm, proportionate sharing of information is unlikely to constitute a breach of the Act in such circumstances.

Please note that the ICS uses the word 'harm'.

'Harm' is defined in the National Guidance for Child Protection in Scotland 2014 as '...the ill treatment or the impairment of the health or development of the child, including, for example, impairment suffered as a result of seeing or hearing the ill treatment of another. In this context, "development" can mean physical, intellectual, emotional, social or behavioural development and "health" can mean physical or mental health. Whether the harm suffered, or likely to be suffered, by a child or young person is "significant" is determined by comparing the child's health and development with what might be reasonably expected of a similar child' (see page 13 of the National Guidance for Child Protection in Scotland 2014 at https://hub.careinspectorate.com). For more information, see: www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing. See also the National Guidance for Child Protection in Scotland 2014 at: https://hub.careinspectorate.com and the Information Commissioner's Office letter headed Information Sharing between Services in Respect of Children and Young People Letter dated 28 March 2013 at www.no2np.org/wp-content/uploads/ICO-statement_2013.pdf.

Only that information relevant to child protection can be shared and it can only be shared with the appropriate person. The need to intervene to prevent harm arising may mean that information should be shared before a situation reaches crisis. If there is a risk to the child it will also be necessary to comply with child protection procedures, which normally involve direct communication with social work or the police. The reader is directed to GPiA 052 LR: *Understanding Child Protection in Scotland.*

4.4 Consent

The sharing of information is important in terms of both GIRFEC and child protection, but great care must be taken. It is important to understand when you require consent, and when you may share without consent.

Information provided to the child about the service should state clearly the conditions with which the counsellor is bound to comply (for example, child protection safeguards, record keeping, data protection requirements and so on), expressed in terms the child will understand. Data should not normally be shared without the informed consent of the person who is the subject of the information. Careful recording of what has been explained to the child and exactly what has been agreed are strongly advised. A child who has an understanding of the issues will normally be the person to consent to the sharing of data. Where the child does not have sufficient capacity, the same level of consent will be required from the child's legal representative. This will usually be the parent or carer. Where the carer does not have parental responsibilities and rights it may not be appropriate for them to make a decision with such serious consequences so care should be taken.

In some cases it may be necessary to share information without consent. If seeking consent would be adverse to the child's wellbeing then information may be shared. The Data Protection Act 2018 allows the sharing of information if this is for the exercise of functions of a public nature and in the public interest, or because it is in the legitimate interests of the therapist or the person to whom the data are disclosed and is not prejudicial to the child. It is essential that any decision to disclose data is recorded, together with the rationale for the disclosure. Information provided to the child about the service should state clearly the conditions with which the counsellor is bound to comply (i.e. child protection safeguards, record keeping and data protection requirements), expressed in terms the child will understand (see section 1 and Appendix 6 of this resource). The National Guidance for Child Protection in Scotland 2021 – updated 2023 has a useful section on sharing without consent in the context of child protection:

Sharing without consent

1.134

Where there may be a child protection concern, information may be lawfully shared without the need for consent to be obtained from the individual(s) to whom the information relates.

The following considerations will be helpful to support relevant, proportionate, timely, safe and effective information sharing:

- if there is evidence that a child is at risk of significant harm, relevant information can be shared with a statutory agency without delay. Consent is not required or appropriate because the information must be shared in order to protect the child. Consent should only be sought when the individual has a real choice over the matter. However, where appropriate, agreement and understanding about the sharing of information may be helpful in engaging individuals in the process

- the needs, feelings, views and wishes of the child should be taken into account and documented. They may also need additional support to understand and communicate

- information sharing decisions must be based not only upon considerations about the safety and wellbeing of the individual, but also the safety of others

- information can be shared without consent if, for example, a practitioner is unable to gain consent from the individual in time to prevent risk of harm, or if gaining consent could place a child at risk

- relevant personal information can be shared lawfully if, for example, it is to keep a child or individual at risk safe from neglect or physical, emotional or psychological harm. This must be done in a way that complies with the relevant areas of law such as data protection, human rights and confidentiality

- in all circumstances, it is important to be transparent with children and families so that they know what information is to be shared or has been shared and in what circumstances. In certain exceptional circumstances, it may not be appropriate to advise the individual that information is to be shared

- children and their families should also be aware that they can challenge whether sharing information is proportionate

- a record should be made of the reasons and considerations that informed the decision to share the information.

1.135

If, where there is a possible child protection concern, a decision is made not to share information, consider:

- what are the reasons for deciding not to share information?

- what harm could result if this information is not shared?

- what are the possible risks for the child or young person or for others if information is not shared, and how serious could those risks be?

- Reasons for not sharing should be recorded.

Appendices

Appendix 1
Making decisions for children

Parental responsibilities and parental rights

Where a child does not have the capacity to make decisions, an adult must make the decisions for them. Where there is a person with parental responsibilities and rights, the decision making is their responsibility, and the law expects them to make those decisions for the benefit of the child. The aspect of parental responsibilities and parental rights that is most relevant here is the responsibility and right to act as the child's legal representative. This involves entering into transactions on behalf of the child and giving consents that have a legal effect on the child's behalf. Each person with parental rights, including the right to act as the child's legal representative, may exercise those rights separately, but they should generally consult one another and seek the views of the child before doing so. A therapist may proceed on the basis of a decision by one parent, provided this is in good faith – that is, that the therapist is unaware of any dissent or deception (see the paragraph on parental responsibilities and rights below). If therapeutic treatment is considered necessary and in the best interests of a child, and those with parental responsibility refuse, the decision may be made by a children's hearing or a court. This will always be subject to the capacity of the child to refuse medical treatment. There is no case law in Scotland with regard to a court issuing an order forcing a child to undertake treatment against their will.

Parental responsibilities and parental rights: what are they?

Parental responsibilities and rights (PRRs) are contained in Sections 1 and 2 of the Children (Scotland) Act 1995. The 1995 Act is clear that these must be exercised for the benefit of the child so parents have a duty to carry out their PRRs in the best interests of their child.

Parental responsibilities (Section 1 of the 1995 Act)

a) *To safeguard and promote the child's health, development and welfare.* This gives parents a duty to care for their child properly and refers to the day-by-day care the child needs in order to grow and develop. It would include ensuring that the child is appropriately fed, clothed, housed and educated, and receives necessary treatments such as medical and dental care and so on.

b) *To provide, in a manner appropriate to the stage of development of the child: (i) direction; (ii) guidance, to the child.*
This is the responsibility to provide boundaries and guidance.

c) *If the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis.* Where a child is not resident with a parent, that parent has a duty to maintain their relationship with the child for the benefit of the child.

d) *To act as the child's legal representative.*
This means acting for the child's interests by making decisions that have legal consequences on behalf of a child who cannot make decisions for him or herself. Examples include managing the child's money or obtaining services for the child, including counselling. Parental responsibilities can only be exercised in so far as they are practicable and in the interests of the child.

Parental rights (Section 2 of the 1995 Act)

It is important to note that parental rights are conferred on a parent to enable the parent to fulfil his or her parental responsibilities. Parental rights are best thought of as powers to carry out parental responsibilities. Parental rights are accordingly not 'freestanding' and should not be exercised except in the interests of the child.

a) *To have the child living with him or otherwise to regulate the child's residence.*
This is an important right and the state may only interfere with it if it is necessary for the protection of the child, or where there is a dispute between people with PRRs. In Scotland only a court or a children's hearing can make the decision to remove a child from the care of someone with PRRs.

Removing a child from parental care does not necessarily remove the right to determine the residence of the child, and removal of parental rights is a decision only a court can make. Parents can only decide where their child lives until the child's 16th birthday. Beware the myth that children can decide from the age of 12. Note that this right also allows a parent to decide that the child will live with someone other than themselves.

b) *To control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing.*
This parallels the parental responsibility to direct and guide described (in section 1.b) and gives parents the power to carry out their responsibility.

c) *If the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis.*
This parallels the responsibility above and gives parents the power to carry out that responsibility, but the interests of the child trump the right of the parent. This right is protected in law and is the reason that regulation of contact requires a children's hearing or a court decision.

d) *To act as legal representative for the child.*
This parallels the responsibility above and gives parents the power to carry out their responsibility.

Section 6 of the 1995 Act requires a person with PRRs who is making a major decision about a child to take account of the views of the child who is able to form and express a view. This does not mean that they are required to obey the child's preferences, but they should use the child's view to inform that decision.

Who has parental responsibilities and rights and how they are acquired?

a) Mothers: A mother always has automatic PRRs with respect to any child she gives birth to.

b) Married fathers: If a father is married to the child's mother at the time of (or subsequent to) the conception of their child, he automatically has PRRs for their child.

c) Unmarried fathers of children whose birth was registered (or amended) in Scotland after 4 May 2006: Where the child's parents were unmarried, and the child's birth was registered outside of Scotland there are complexities, and advice should be taken. From 4 May 2006, in Scotland, an unmarried father automatically acquires parental responsibility for his child if, with his consent, he is named as the child's father on the registration of the child's birth. This law does not operate retrospectively.

d) Unmarried fathers who do not qualify under c. above: unmarried fathers may acquire parental responsibility for their biological child if:

- they sign and register an agreement with the mother of the child (under s.4 of the Children (Scotland) Act 1995)
- they are awarded PRRs by a court under s.11 of the 1995 Act.

e) Second female parents: Section 4A of the 1995 Act provides that where a child has a parent by virtue of s.43 of the Human Fertilisation and Embryology Act 2008, the biological mother and the other parent (who may be a woman) may sign an agreement whereby the other parent is to be treated as a parent by virtue of s.42 of the 2008 Act. Practitioners who encounter this type of situation should direct the client towards legal advice rather than try to give firm advice themselves.

f) Other people: people other than biological parents can acquire PRRs under some circumstances:

- by an order of a court under s.11 of the 1995 Act
- a person who is granted a residence order under s.11 of the 1995 Act has parental responsibilities and rights for as long as the child continues to reside with them and the order is in existence
- a person who has been made guardian under the will by a person who has since died has full PRRs.

Carers' powers

Section 5 of the Children (Scotland) Act 1995 makes carers responsible for doing what is reasonable to safeguard a child's health, development and welfare. Carers may consent to surgical, medical or dental treatment on this basis in cases where the child cannot consent on his or her own behalf; however, this power is limited. Where a carer knows that a person with PRRs would refuse consent to the treatment, the carer cannot override this and substitute their own decision. This is applicable whether the parent(s), the local authority or anyone else has PRRs.

The effect of permanence orders on PRRs

Unlike an adoption order, which severs all ties between the birth family and the child, a permanence order does not necessarily do so. A permanence order vests the local authority with the right to decide where a child will live, and also makes the local authority responsible for giving guidance to the child. Other than the right of residence, the order will regulate who has parental rights and responsibilities. It is common for the order to extinguish all parental responsibilities and rights (apart from contact) from those who have them and invest them in the local authority. Every parental responsibility and parental right must be held by a person.

The local authority cannot have responsibilities and rights relating to contact with the child, and so these will generally remain with parents, unless there is a prospective adopter or foster carer who may be entrusted with contact. The court may regulate contact between the child, parent(s) and others. If asked to grant authority to adopt, the court may also dispense with the right to oppose a petition for adoption.

This protects the child from further uncertainty and the stress of a court action. Importantly, a permanence order gives the child the status of a 'looked after' child. Since most children who become subject to permanence orders have already been subject to a compulsory supervision order (CSO) this is a continuation of status.

Where a child is subject to an order made by a children's hearing, such as an interim compulsory supervision order or an interim variation of a compulsory supervision order (ICSO or IVCSO), parental responsibilities and rights are not removed, but the person who has PRRs may not be able to exercise them.

For example, where a hearing has placed a child with a person who is not the parent, the parental right to determine the child's residence has been suspended, but not removed. A hearing may attach a condition to an order requiring that a child has a particular sort of treatment, such as therapy. This will be effective against a person with PRRs but may be ineffective if a child, who has capacity, refuses the treatment. Many parents of children subject to orders by a hearing continue to care for their children at home; or, where the children are placed outwith the home, many parents continue to make decisions.

Appendix 2
Education

Who are parents for education purposes?

The definition of parent for education is very wide, and does not depend on having parental responsibilities and rights. Section 135 of the Education (Scotland) Act 1980 defines a parent in this way (our italics):

'parent' includes guardian and any person who is liable to maintain or has [parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, [or has care of] a child or young person.

It is important to realise that this has the effect of making a person who has no PRRs but has the care of the child an equal to a person with PRRs for the purposes of education. This will mean, of course, that there is a potentially wide class of people who have access to a child's education records.

Who is a pupil?

When Scottish education law refers to 'pupil', this is defined in s.135 of the 1980 Act as a 'person of any age for whom education is or is required to be provided under this Act'. A child is defined in the same section as a person 'of school age'. School age is defined in s. 31 as being over five and under 16. Section 8 of the Education (Scotland) Act 1980 provides that a pupil must be educated in accordance with the parent's wishes. This means that a parent has a right simply as a parent to make decisions about the education of their child; it is irrelevant whether the child has capacity or not, or is over 16.

Appendix 3
Children and capacity for medical decisions

Capacity is governed by the Age of Legal Capacity (Scotland) Act 1991, and medical decisions (the 1991 Act).

The capacity to make medical decisions is contained in the Age of Legal Capacity (Scotland) Act 1991 section 2 (4):

A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature of the procedure or treatment.

Consent also means refusal, and it can include any part of an examination. While a court or a children's hearing can order that a child receives particular medical or dental treatment or procedure, this is always subject to the child's capacity. No child with capacity can be forced to undergo any treatment or procedure.

In the case of psychiatric treatment, the test for capacity is more complex where the child patient is deemed to be incapable of consent. Where the child's inability to consent is due to non-age (being too young), then the parent or carer will have to make the decision.

Where in normal circumstances the child has the capacity to make the decision, but that capacity has been lost due to the effects of serious psychiatric illness and the situation is serious, medical practitioners may not ignore the child's capacity and rely on others to make the decision, but would need to consider a medical treatment order in the same way that they would for an adult. This was the decision of the Sheriff in the case of Houston Applicant, 1996 SCLR. This gives the child who is ordinarily competent the same protections as an adult in the context of medical treatment orders.

Who decides whether the child has the capacity to make a medical decision?

A qualified medical practitioner is not limited to doctors (who are registered medical practitioners) but includes nurses, midwives, physiotherapists, clinical psychologists and pharmacists. The medical practitioner cannot be overruled in this decision by a person with PRRs.

What test is used to decide?

The test is whether the individual child is able to make the particular decision. For example, a child may have the capacity to consent to a procedure such as having a simple fracture treated, but not to agree to complex cancer treatment.

Note: In the case of emergency medical treatment, medical practitioners may rely on their own clinical judgment if the child is unable to consent because of injury or lack of capacity and those with the power to consent are unavailable.

Appendix 4
Scottish Government policy

Wellbeing

Wellbeing is a new concept introduced by the Children and Young People (Scotland) Act 2014 (the CYP Act 2014).

It is a wider concept than welfare or best interests and should not be confused with child protection. It is part of the Scottish Government's policy of supporting efforts to avoid the need for child protection measures, by introducing targeted support and early intervention. Section 96(1) and (2) of the Act give some guidance as to when and with what criteria assessment of wellbeing should be made.

Assessment of wellbeing

Section 96 of the Children and Young People (Scotland) Act 2014 applies where, under the Act, a person is required to assess whether the wellbeing of a child or young person is being (or would be):

- promoted
- safeguarded
- supported
- affected or
- subject to an effect.

The person assesses the wellbeing of the child or young person by reference to the extent to which the child or young person is (or would be):

- safe
- healthy
- achieving
- nurtured
- active
- respected
- responsible
- included.

Community Planning Partnership

The National Guidance for Child Protection in Scotland 2021 – updated, builds upon the guidance issued in 2014, and references the anticipated new ways of working and procedures that some community planning partnership areas are already implementing. Local police commanders, and chief executives of health boards and local authorities (a group referred to as the 'chief officers') are expected to co-operate to ensure that their agencies work together to implement effective childcare and protection. They are expected to involve as appropriate the Scottish Children's Reporter Administration, the Crown Office and the Procurator Fiscal Service. Chief officers are responsible for overseeing child protection services, acting in conjunction with all the public, private and third sectors involved (see paragraphs 134-152 of the *National Guidance for Child Protection in Scotland 2014).*

Appendix 5
Looked after children

Who is a looked after child?

A child has 'looked after' status if one of the following applies:

- The child is cared for by the local authority on a voluntary basis (s.25 agreement 1995 Act)
- The child is subject to a child protection order
- The child is subject to an order by a children's hearing including: a compulsory supervision order, interim compulsory supervision order, interim variation of compulsory supervision order
- The child has been removed by a constable under emergency powers
- The child is subject to a protection order from another UK jurisdiction.

Although a child subject to a child protection order is not a looked after child, the local authority has the same duties towards them as if they were (Children's Hearings (Scotland) Act 2011 s.44 (2)).

Extra support for young people who were looked after children

Young people who were looked after are entitled to ask their local authority for extra support until their 26th birthday. To qualify, the young person must have had looked after status at the time of their 16th birthday or subsequently. Some children are looked after on a very temporary basis and are less likely to receive the support mentioned here.

Although children's hearings are now under the Children's Hearings (Scotland) Act 2011, most of the young people currently entitled to ask for this extra support will have been through the hearings system under the Children (Scotland) Act 1995. Under that Act the most commonly encountered long-term looked after status is likely to arise if one of the following apply: the child was accommodated under s.25 of the Children (Scotland) Act 1995 (voluntary care); they were subject to a supervision requirement or temporary order by a children's hearing, or a permanence order, or an order made in another part of the UK.

Under the 2011 Act, looked after status will arise if the child was subject to a compulsory supervision order, an interim order by a children's hearing, a permanence order or an order made in another part of the UK. When a child or young person leaves care, there is supposed to be planning (pathway plan) in place and support through the transition out of accommodation.

A young person with former looked after status who requires counselling or support may ask their local authority to assess them. The local authority is obliged to undertake the assessment, but is not obliged to provide the support unless it considers that it is necessary and may offer support that differs from that requested.

Support is available in Scotland from local area Child and Adult Protection Committees. The Adult Support and Protection (Scotland) Act 2007 can be applied for the support of young persons aged 16-18, where the criteria are met. Counsellors supporting children under the age of 16 need to ensure that ongoing support is provided where necessary and watch that the young person aged 16-18 does not fall between gaps in local services and legislation.

Appendix 6
Data protection and information sharing

Registration with the information commissioner

Most therapists now use some form of digital processing for making appointments, keeping records and other communications with clients, colleagues and employers in the provision of their therapy services.

Communications within a counselling or psychotherapy service (in whatever context it takes place), particularly appointments or other data related to providing and receiving services, constitutes 'sensitive personal data'. Counsellors and psychotherapists working in schools are likely to be contractually bound to comply with data protection legislation because of the education context of their work, irrespective of their own personal methods of data processing. Failure to register when required to do so is an offence of strict liability, punishable with fines. Counsellors deciding whether or not to register should consult the Scottish Information Commissioner's Office for assistance.

Scottish Government 'golden rules' for sharing

- Adhere to the principles of the Data Protection Act 2018
- Share information that is necessary, relevant and proportionate
- Record your rationale
- Make the child or family aware of why you are sharing (unless child protection concerns make this unadvisable)
- Seek consent but only where appropriate.

Sharing information with the named person

The sharing of information with the named person is regulated by the Children and Young People (Scotland) Act 2014 s.26, which says:

1. A service provider or relevant authority must provide to the service provider in relation to a child or young person any information which the person holds which falls within subsection (2).

2. Information falls within this subsection if the information holder considers that:

    a. It is likely to be relevant to the exercise of the named person functions in relation to the child or young person,

    b. It ought to be provided for that purpose, and

    c. Its provision to the service provider in relation to the child or young person would not prejudice the conduct of any criminal investigation or the prosecution of any offence.

3. The service provider in relation to a child or young person must provide to a service provider or relevant authority any information which the person holds which falls within subsection (4).

4. Information falls within this subsection if the information holder considers that:

    a. It is likely to be relevant to the exercise of any function of the service provider or relevant authority which affects or may affect the wellbeing of the child or young person,

    b. It ought to be provided for that purpose, and

    c. its provision to the service provider or relevant authority would not prejudice the conduct of any criminal investigation or the prosecution of any offence.

In considering for the purpose of subsection (2)(b) or (4)(b) whether information ought to be provided, the information holder is so far as reasonably practicable to ascertain and have regard to the views of the child or young person.

5. In having regard to the views of a child under subsection (5), an information holder is to take account of the child's age and maturity.

6. The information holder may decide for the purpose of subsection (2) (b) or (4)(b) that information ought to be provided only if the likely benefit to the wellbeing of the child or young person arising in consequence of doing so outweighs any likely adverse effect on that wellbeing arising from doing so.

7. The service provider in relation to a child or young person may provide to a service provider or relevant authority any information which the person holds which falls within subsection (9).

8. Information falls within this subsection if the information holder considers that its provision to the service provider or relevant authority is necessary or expedient for the purposes of the exercise of any of the named person functions.

9. References in this section to a service provider or a relevant authority include any person exercising a function on behalf of a service provider or relevant authority.

10. Other than in relation to a duty of confidentiality, this section does not permit or require the provision of information in breach of a prohibition or restriction on the disclosure of information arising by virtue of an enactment or rule of law.

Section 27 of the Act states that where information is provided in breach of a duty of confidentiality, and the recipient is informed of that breach of the duty, the information shall not then be shared with others unless it is permitted or required by any enactment or rule of law. By 'enactment or the rule of law' is meant, currently, the provisions of the Data Protection Act.

Appendix 7
Child protection

What is significant harm?

The relevant extract from the *Scottish Government's National Guidance for Child Protection* in Scotland 2014 states that 'harm' means the ill treatment or the impairment of the health or development of the child, including, for example, impairment suffered as a result of seeing or hearing the ill treatment of another. In this context, 'development' can mean physical, intellectual, emotional, social or behavioural development; and 'health' can mean physical or mental health. Whether the harm suffered, or likely to be suffered, by a child or young person is 'significant' is determined by comparing the child's health and development with what might be reasonably expected of a similar child.

There are no absolute criteria for judging what constitutes significant harm. In assessing the severity of ill treatment or future ill treatment, it may be important to take account of: the degree and extent of physical harm; the duration and frequency of abuse and neglect; the extent of premeditation; and the presence or degree of threat, coercion, sadism and bizarre or unusual elements. Sometimes, a single traumatic event may constitute significant harm, for example, a violent assault, suffocation or poisoning. More often, significant harm results from an accumulation of significant events, both acute and long-standing, that interrupt, change or damage the child's physical and psychological development. To understand and identify significant harm, it is necessary to consider: the nature of harm, either through an act of commission or omission; the impact on the child's health and development, taking into account their age and stage of development; the child's development within the context of their family and wider environment; the context in which a harmful incident or behaviour occurred; any particular needs, such as a medical condition, communication impairment or disability, that may affect the child's development, make them more vulnerable to harm or influence the level and type of care provided by the family; the capacity of parents or carers to meet adequately the child's needs; and the wider and environmental family.

For further information see pages 13-14 of www.gov.scot/Resource/0045/00450733.pdf.

Appendix 8
Scotgov mental health services

National Guidance for Child Protection in Scotland 2021 – updated 2023

Mental health services

2.119 All mental health staff in child and adolescent services and within adult services must be competent to identify concerns about children and young people. Mental health services are largely community based, with some inpatient facilities, and delivered by multi-disciplinary teams including social workers. They may become aware of children and young people who have experienced, or are at risk of, abuse and/or neglect, and should raise concerns in line with local policy. Within adult services, consideration should then be given to the impact of the mental ill health of a significant person in the child's world. If they are concerned that a person's mental health could put children at risk of immediate or significant harm, they must take action in line with local child protection procedures.

2.120 Mental health practitioners should take account of any wider factors that may affect the family's ability to manage and parent effectively, including strengths within the family in relation to the child's needs. For further information, see the section on parental mental health problems. Mental health practitioners have a potential key role in both adult and child support and protection, because they engage with vulnerable people. They play an important role in reducing any risks arising from adult mental health difficulties identified within the child's plan.

2.121 In some cases, adults and older young people may disclose abuse experienced some time ago. Even if they are no longer in the abusive situation, a crime may still have been committed and other children may still be at risk. Advice should be sought from professional advisors within their health boards.

About the author

Morag Driscoll, B.A. (Hons), M.A., M.Phil., LL.B. Dip.LP. Morag has been a solicitor in private practice, a reporter to the children's hearing and Director of the Scottish Child Law Centre. She is a former member of the Council of the Law Society of Scotland, was convenor of the LSS Child and Family Law Sub-Committee from 2002-2022 and is a consultant and trainer in Scottish Child Law. Morag has authored a number of articles and publications, including the Scottish Government Guidance for Foster Carers, was one of the authors of the *Annotations to the Children's Hearings (Scotland)* Act 2011, and co-authored the 2nd Edition of *Child Abuse, Child Protection and the Law.*

Acknowledgements

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We are grateful to the late Sheriff Brian Kearney for his kindness in peer reviewing this resource in its earlier editions, and for his helpful comments in the course of writing it.

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Please note that embedded in this guidance document online, are web links to all of the GMC's current additional subsidiary guidance.

Guthrie, T. and Driscoll, M. (2021) *Child Abuse, Child Protection and the Law*, 2nd ed. W. Green: Edinburgh.

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Scottish Law Commission (2009) *Consumer insurance law: pre-contract disclosure and misrepresentation* (Law Com 319, Scot Law Com 219:2009). Available at www.scotlawcom.gov.uk (accessed 15 April 2026).
K Border Agency *Arrangements to safeguard and promote children's welfare in UKBA.* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/452689/codeofpracticechildren1.pdf

Resources, information, guidance and reference works

Statutes

Adoption and Children (Scotland) Act 2007

Children (Scotland) Act 1995

Children and Young People (Scotland) Act 2014

Children (Care, Care Experience and Services Planning) (Scotland) Bill – awaiting Royal Assent but passed by the Scottish Parliament

Children's Hearings (Scotland) Act 2011

Civic Government (Scotland) Act 1982 as amended by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

Criminal Justice (Scotland) Act 2003

Criminal Justice (Scotland) Act 2006

Criminal Justice and Licensing (Scotland) Act 2010

Criminal Procedure (Scotland) Act 1995

Data Protection Act 2018

Disclosure (Scotland) Act 2020

Domestic Abuse (Scotland) Act 2011

Domestic Abuse (Scotland) Act 2018

Education (Scotland) Act 1980

Equality Act 2010

Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011

Freedom of Information (Amendment) (Scotland) Act 2013

Freedom of Information (Scotland) Act 2002

Human Rights Act 1998

Mental Health Care and Treatment (Scotland) Act 2003

Police Act 1997

Prohibition of Female Genital Mutilation (Scotland) Act 2005

Protection from Abuse (Scotland) Act 2001

Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

Protection of Vulnerable Groups (Scotland) Act 2007

Public Services Reform (Scotland) Act 2010

Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

Sexual Offences (Scotland) Act 2009

Social Work (Scotland) Act 1968

UNCRC (Incorporation)(Scotland) Act 2024

Victims and Witnesses (Scotland) Act 2014

Victims, Witnesses and Justice Reform (Scotland) Act 2025

Vulnerable Witnesses (Scotland) Act 2004.

Conventions and protocols

The European Convention on Human Rights 1950

European Convention for the Protection of Human Rights and Fundamental Freedoms

Protocols made under the European Convention for the Protection of Human Rights and Fundamental Freedoms

United Nations Convention on the Rights of the Child.

Scottish Government publications

Scottish Government publications are listed on the website www.gov.scot/Publications/Recent and some may be available to access online or download as PDFs.

Scottish Government publications in print are also available from: BookSource, 50 Cambuslang Road, Cambuslang Investment Park, Glasgow G32 8NB; Tel: 0845 370 0067; Fax: 0845 370 0068; Email: scottishgovernment@booksource.net

Getting it Right for Every Child: The Approach in Practice 2008

Getting it Right for Every Child: Wellbeing Indicators

Getting it Right for Every Child: Practice Briefings

Getting Our Priorities Right

Guide to Implementing Getting it Right for Every Child 2012

National Guidance for Child Protection in Scotland 2014 and 2021, updated 2023

National Framework for Child Protection, Learning and Development

National Parenting Strategy

National Risk Framework for Assessment of Children and Young People 2012

Scottish Government Child Protection Guidance for Health Professionals 2013

Scottish Government Suicide Prevention Strategy 2013.

Standards for Those Working with Children in Conflict with the Law 2021

Working with Children and Young People who have Displayed Harmful Sexual Behaviour

Scottish Executive and Scottish Office publications

Scottish Executive and Scottish Office publications are available at: www.scotland.gov.uk.

Code of Practice to Facilitate the Provision of Therapeutic Support to Child Witnesses in Court Proceedings (2008)

Framework for Standards and Children's Charter (2003)

Getting it Right for Every Child (2006)

Interviewing Child Witnesses in Scotland (2008)

'It's everyone's job to make sure I'm alright': Report of the Child Protection Audit and Review (2003)

Protecting Children and Young People: The Charter (2004)

Protecting Children and Young People: The Framework for Standards (2004)

Sharing Information about Children at Risk (2003).

Useful ICO and ICOS publications

A Complete Guide to Notification (2010)

Advice on How to Safeguard your Personal Information (2011)

Anonymisation: Managing data protection risk code of practice (2012)

A Practical Guide to IT Security (2012)

Data Sharing Code of Practice (2011)

Employment Practices Code (2011)

How do I Handle a Subject Access Request? (2013)

Privacy Notices Code of Practice (2010).

Legal resources

Family Law (www.familylaw.co.uk). Access to Jordans Publishing's Family law reports

Family Law Directory (www.familylawassociation.org)

Family Law Week (www.familylawweek.co.uk)

Justis.vlex (www.vlex.co.uk). Online resource

UK statute law (www.legislation.gov.uk)

UK statutory instruments (www.opsi.gov.uk/stat.htm).

Contacts

Adoption UK (Scotland)
www.adoptionuk.org/scotland

Children's Hearings Scotland
Area 2/1/1, Ladywell House, Ladywell Road, Edinburgh EH12 7TB;
Tel: 0131 244 3696; Fax: 0131 244 4745; www.chscotland.gov.uk

Disclosure Scotland
Basic EHU, PO Box 250, Glasgow, G51 1YU. Tel: 0870 609 6006;
Fax: 0870 609 6996; Email: info@disclosurescotland.co.uk
www.mygov.scot/disclosure-types

Information Commissioner's Office – Scotland
45 Melville Street, Edinburgh EH3 7HL; Tel: 0131 244 9001;
Email: Scotland@ico.org.uk; ico.org.uk

Scottish Children's Reporter Administration (SCRA)
Ochil House, Springkerse Business Park, Stirling FK7 7XE;
Tel: 0300 200 1555