Good Practice in Action 032
Legal Resource

Legal issues in supervision in the counselling professions in England, Northern Ireland and Wales

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Contents

Context 5

Purpose 5

Using the Legal Resources 5

Introduction 6

1 Supervision and contract law 7

1.1 Contracts 7

1.2 Multi-way contracts 9

1.3 Contract terms 10

1.4 Breach of contract 11

1.5 Supervision contract – mutual responsibilities 12

2 Tort and the duty of care in the context of supervision 15

2.1 Negligence 18

2.2 Vicarious liability 19

2.3 Contributory negligence and voluntary assumption of risk 20

2.4 Measurement of the standard of care expected of a therapist 21

2.5 The National Institute for Health and Care Excellence (NICE) guidelines 22

2.6 Management of risk and the standard of care expected of a supervisor 22

2.6.1 Duty of care to the supervisee 22

2.6.2 Duty of care to the supervisee's clients 23

2.6.3 Ethical dilemmas in supervision **24**
2.6.4 Maintaining professional boundaries **24**
2.6.5 Advice-giving **24**
2.6.6 References **25**
2.6.7 Reports **26**
2.6.8 As a supervisor, how do I protect myself against a claim? **26**

3 Insurance 27

4 Confidentiality, supervision records and data protection 27

5 Avoiding potential problems from identification in supervision 28

6 Ethical and legal issues in supervision where the supervisor holds information about a supervisee's client which is not known to the supervisee 29

About the author 30

References 30

Useful contacts and resources 32

Context

This resource is one of a suite prepared by BACP to enable members to engage with the current BACP *Ethical Framework for the Counselling Professions* and to understand the legal issues relevant to the supervisory relationship. The *Ethical Framework* (BACP 2018) is currently under review, and will be replaced in autumn 2026. The new *Draft Ethical Framework* (BACP 2025) is available on the BACP website.

Purpose

The purpose of this resource is to provide information for supervisors, supervisees and organisations about some important legal aspects of the supervisory relationship relevant to practice in England, Northern Ireland and Wales.

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. See Context above for details.

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 accepts 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.

Websites are cited in the text, and additional relevant web links and access dates are included in the Reference and Resources lists at the end of this resource.

In this resource, the words 'counselling,' 'therapist' and 'therapy' are used to refer specifically to counselling and psychotherapy.

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

Introduction

Supervision can vary widely in response to modality, requirements of relevant professional organisations and the nature of the counselling-related service provided. The respective duties and responsibilities of the supervisor and supervisee will also depend in part on each party's professional approach and modality, the terms of their supervision contract and the requirements of any organisational setting within which they may work.

In some organisations, supervisors may potentially have both a managerial and a supervisory relationship with their supervisees, and where there is a management responsibility, there is likely to be an additional employment or other work-based contractual relationship between them. In order to avoid any potential conflicts of interest in such a situation, the *Ethical Framework* (BACP 2018) states that a substantial part or all of 'supervision should be independent of line management, (see Good Practice, point 61).

It follows that a wide range of law will apply to the role of supervision, the main areas of which involve the law of contract, tort (an area of law which includes the duty of care and professional negligence), insurance and employment. These areas of law cannot all be covered in detail here, but this resource highlights some of the legal issues to be considered when entering into a supervisory relationship.

This resource will hopefully enable practitioners to think through dilemmas, spot any potential legal or ethical difficulties and recognise when we may need to seek legal or other professional advice. It also includes a list of useful contacts and resources that may be helpful.

1 Supervision and contract law

1.1 Contracts

Contracts are legally enforceable agreements. Contracts are used to set out agreed terms for the provision of advice or services for a 'consideration' - a legal term which, in relation to counselling-related services will usually mean the fee paid by a client or supervisee in payment for the services, or the consideration might refer to a reciprocal exchange of services, such as in co-supervision arrangements. Legally enforceable contracts embody a number of essential legal components, which may be explicit or implied:

- **an offer** (e.g. the offer to do or supply something, e.g. goods or a service)
- **an acceptance of the offer** (e.g. by agreeing to make use of the offered services, with consensus on the terms of that agreement), and
- **an exchange** (this is the 'consideration' mentioned earlier, e.g. providing money in return for goods or services).

Supervision is a formal arrangement, with professional responsibilities (see the *Ethical Framework* BACP 2018). Supervision will take place on terms mutually agreed between the supervisor and supervisee and, applying the legal principles, it implies a legal contract between the parties, irrespective of whether it is a paid service or a reciprocal co-supervision arrangement. Under the UK General Data Protection Regulation, that contract should also include an agreed 'Privacy Notice' covering the terms of confidentiality within which the supervisor and supervisee will work (see GPiA 105 for details of the implementation of the UK-GDPR in counselling and psychotherapy services). In law, it does not matter whether the supervision contract is oral, written, or recorded in some other way, but since it is important in a supervision arrangement to reach a consensus between the parties about the mutually agreed terms of working, it is also advisable to have a written supervision contract, or one that is recorded for future reference in some other way. The contract should be freely accessible to both supervisor and supervisee, providing a reminder and proof of what was mutually agreed.

If terms such as confidentiality, and the duties and responsibilities of the supervisor and supervisee are not clearly specified, mutually agreed, and evidenced, this could lead to difficulties if any cause for professional complaint should arise later on.

Employees should have a contract of employment with their employer, in compliance with employment law. A counselling agency or organisation employing therapists and/or supervisors should therefore have a written contract, or one otherwise appropriately recorded and accessible to its employees.

A counselling agency or organisation is legally liable to their clients for the standard and quality of the service provided by their employees, including its therapists and supervisors. This is based on the legal principle of vicarious liability, which makes an employer liable for the work of its employees when acting in the course of their duty as an employee. This principle has been extended by the courts to cover the work of volunteer therapists and supervisors, even though they are not formally employed. For this reason, and for UK GDPR compliance, it is helpful for volunteer therapists (and volunteer supervisors) to have a written agreement covering the terms of their voluntary service with the organisation.

As organisations, including charities, have a legal liability for the actions of both employees and their volunteers, a placement organisation providing counselling services may be liable for the professional negligence of its therapists, even if its counselling service is provided to its clients free of charge (see 2.2). An organisation that offers placements to students as volunteer therapists during their counselling training therefore has a high level of responsibility to its clients for the standard of therapeutic service provided. That legal and professional responsibility and duty of care to the clients of the placement organisation (and to the placement itself) may be shared with the therapist's supervisor and with the therapist's training organisation.

Under the *Ethical Framework* (BACP 2018), there is an ethical responsibility to the supervisee's clients, which is shared between the supervisee and supervisor.

The level of that ethical responsibility may vary according to the status and experience of the supervisee (i.e. whether the supervisee is a qualified practitioner or not), see 1.5, 2.6 and (BACP 2018: Good Practice, point 67). Legal liability and ethical responsibility may also be shared between the placement and the training organisation as a duty of care to the client.

Collaboration may be necessary between the supervisor, the supervisee's placement organisation and also the student's professional training body, to ensure that the supervisee's work meets professional standards. (see BACP 2018: Good Practice, point 66). In the event of a legal claim for failure of a duty of care on the part of supervisor or supervisee, or a placement organisation, employer or training body, the level of responsibility for each respective person, body or organisation may then be apportioned by the court. When negotiating the supervisory relationship, it is essential for all the parties involved to be clear about the extent of the duty of care and the respective liability of each of the parties involved, and to have a supervision contract that reflects this collective understanding.

The professional duty of care will exist, legally, both in the law of contract and under the law of tort (see 2, *Tort and the duty of care in the context of supervision*). A supervisor owes a legal and ethical professional duty of care to both the supervisee and to the supervisee's clients and has a responsibility to provide competent professional oversight of the supervisee's practice for the benefit of the supervisee's clients.

The supervisor will normally have no direct contractual relationship with the supervisee's client(s), but the supervisor will need to enter into a legally binding contract with the supervisee, (and for a trainee practitioner, possibly including the trainee's placement organisation and training body as well), see 1.2.

1.2 Multi-way contracts

The term 'multi-way contracts' here, means either a single contract that forms an agreement between several parties, all of whom are bound by the same terms; or a number of separate contracts, each contract containing terms that are compatible with those of the others.

Some examples of multi-way contracts might be:

- supervisor/therapist
- supervisor/therapist/employing agency or placement organisation
- supervisor/training organisation/practice placement/trainee.

Where there are multi-way contracts, the terms of each contract should be compatible – that is, they should not conflict with each other, nor should they conflict with the rules and guidance of the professional body of the parties to the contract. For example, the agency policies of the therapist's employing organisation and the policies of the therapist's professional body should be reflected in the therapist's client agreements and the therapist's supervision contract. Therefore a BACP practitioner member, supervisee or supervisor should not agree to a contract containing terms that conflict with the BACP's current *Ethical Framework*. An employer or a placement body should not require a therapist or practitioner to agree to terms of working which are incompatible with the therapist's professional body guidance or rules. Any dissonance would need discussion and negotiation between the parties, before the terms of working are agreed.

Note that a supervisor working with a trainee counsellor may need to have a multi-way supervision contract which includes the supervisee's training organisation and possibly also the trainee's placement organisation or employer, reflecting the agreements about supervision arrangements with the trainee. That contract would need to set out the parties' respective responsibilities and duty of care to the supervisee's clients, e.g. the circles of confidentiality, and the responsibility to report safeguarding issues or practice concerns involving the risk of serious harm to the supervisee or their clients, see the *Ethical Framework*, (BACP 2018: Good Practice, point 66).

The trainee may have contracts with their training organisation, their placement or employer and with their clients, in addition to their contract with their supervisor.

Both supervisor and trainee will have their own professional contracts with their respective professional organisation(s) (e.g. BACP), which will provide the ethical framework within which each party will work together in supervision.

All these contracts need to be compatible. For trainees, there is a specific requirement as to compatibility of contracts, see (BACP 2018: Good Practice, point 83d).

1.3 Contract terms

In order to create an effective and mutually acceptable contract, both parties must first reach a mutual understanding of the scope and terms of their relationship.

When contracting for supervision, both therapists and supervisors need to consider all the relevant ethical and professional issues, legal requirements, and any applicable agency policies and procedures.

Where supervision is carried out alongside separate line management, the supervisee, supervisor and line manager(s) should discuss and agree their respective responsibilities for the service provided, see (BACP 2018: Good Practice, points 60-73).

The parties to a contract can exclude specific duties or liabilities, provided these are reasonable and in 'plain, intelligible language' (see Regulation 7(1) of the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR 1999)).

However, some exclusion clauses are deemed in law to be unfair and so are disallowed, and these include clauses regarding professional negligence and occupier's liability, see the practice note below and the Unfair Contract Terms Acts 1977 (UCTA 1977) and (UTCCR 1999). An exemption clause must clearly cover specific eventualities if it is to be effective, and the burden of proving it falls on the person who seeks to rely on the exclusion.

As this area of law is complex, should a therapist offering professional counselling supervision services wish to try to limit or exclude any part of their potential legal liability to a supervisee, clients or others, they are strongly advised to consider the requirements of the current BACP *Ethical Framework* (BACP 2018) relevant to supervision in discussion with their own supervisor, BACP, or an ethical adviser. Also where appropriate they should take legal advice about imposing any contractual exclusion clauses in the specific circumstances of the case. Professional insurers may also be able to assist with recommendations.

Practice Note

We cannot exclude negligence or occupier's liability in our therapy contracts

Under the provisions of the Unfair Contract Terms Act 1977, we, as therapists and practitioners, cannot exclude our liability for negligence from therapeutic contracts, and neither can we exclude aspects of occupier's liability. It is for this reason that appropriate professional insurance is compulsory for BACP members, and our professional liability insurance should be designed to cover these areas of liability specifically, in addition to a possible wider range of cover. It always pays to check your insurance cover to see exactly what is (or is not) covered in your specific practice.

For further information in respect of supervision, see the Good Practice in Action resources at www.bacp.co.uk/gpia.

1.4 Breach of contract

When a contract is broken, the law allows a variety of remedies, including:

- **rescission:** giving and taking back on both sides to restore the situation as it was before the contract took place (examples include exchange, return of goods and refunds)
- **voiding the contract:** cancelling the whole contract
- **damages:** the legal term for a financial award to compensate for some sort of loss; may be awarded for negligence or breach of contract. In order to succeed in a claim for damages for breach of contract, the claimant needs to prove their case on a balance of probabilities (i.e. that it is more likely than not that the facts found in their case justify the claim they are making).

In the case of therapy, the most appropriate remedy for a breach of the terms of the therapy contract by the therapist (for example being unable to fulfil the therapy contract because of illness etc), would usually be a simple cancellation of the contract and a refund of any fees paid in advance. If the client cannot fulfil the contract, the remedy may be similar, or possibly specific provisions may have been made in the therapy contract for the client's non-attendance.

If the therapist has broken the contract and is deemed to be at fault, then a court might also award damages to the client by way of compensation. The law concerning damages for breach of contract has many complicated rules and the amount of any damages awarded depends upon the particular circumstances of each case. It is advisable to seek legal and/or financial advice in an action about breach of contract, because most cases are settled out of court and parties need to ensure that they settle for a fair sum.

1.5 Supervision contract – mutual responsibilities

A supervision contract is a formal business contract, and although it is more of a collegiate arrangement between the supervisor and the supervisee, it will follow the same contractual rules set out in 1.4.

The current *Ethical Framework* (BACP 2018) provides good practice guidance on supervision (see Good Practice, points 60-73), which the parties may wish to be reflected in the supervision contract. As discussed below, the *Ethical Framework* also provides that the weight of responsibility for maintaining the quality of the supervisee's practice and client safety will differ when working with a trainee and a qualified counsellor.

In addition to the usual contractual supervision terms applicable to our professions (e.g. those relating to frequency and duration of supervision sessions, fees, holidays, missed appointments, records, confidentiality, modalities, professional ethics and professional conduct procedures, etc.), the supervisory contract may (if the parties agree) refer to other more specific supervision practice elements, including:

- regular meetings (frequency and/or duration as recommended by BACP, minimum levels of which are specified for trainee and qualified therapists (see www.bacp.co.uk/membership/supervision for more information). (The levels above the minimum for qualified practitioners may vary according to the practitioner's level of practice and experience)
- space to consider the supervisee's professional issues
- duty to consider the impact of any possible conflicts of interest, in the light of BACP's *Ethical Framework*
- space to consider the supervisee's personal issues if they impact good practice (but not to include personal therapy)
- commitment to support the supervisee with appropriate advice when necessary
- commitment to bring awareness and discussion of the *Ethical Framework* into the supervised practice as required by BACP (see BACP 2018: Good Practice, point 69).

The *Ethical Framework* (BACP 2018: Good Practice, points 60-73) includes other guidance points which could be reflected in the contract:

In order to provide effective supervision, and in accordance with the ethical principles of openness and transparency, it is suggested that the supervision relationship should include the following:

- Responsibility of the supervisor to bring ethical or professional concerns to the attention of the supervisee

- Reciprocal duty of the supervisee to be open and honest in supervision about significant difficulties or challenges in their client work

- Responsibility to abide by BACP's current *Ethical Framework* and to bring ethical or professional concerns to the attention of BACP if there is an ongoing serious risk to a client and no remedial action is being taken by the supervisee (BACP 2018: Good Practice, point 11, and BACP *Professional Conduct Procedure* 2018)

- Agreement of supervisors and supervisees to review periodically how the responsibility for work with clients is working in practice and how any difficulties or concerns are being addressed (BACP 2018: Good Practice, point 68)

- Trainees – in line with a training organisation's policies, the supervision contract may include a duty for the supervisor to bring ethical or professional concerns to the attention of the supervisee's training organisation if there is ongoing risk to a client and no remedial action is being taken by the supervisee see (BACP 2018: Good Practice, points 74-80; and the BACP *Professional Conduct Procedure* 2018)

- Trainees – in the provisions of openness and transparency, there is an implied responsibility to bring all cases to supervision (i.e. not to be selective about which cases to bring), in order for the supervisor to monitor and support the trainee's practice effectively.

  The *Ethical Framework* requires that a trainee is 'open and honest with trainers, placement providers and supervisors about all issues relevant to their selection, training, supervision and professional practice. (See BACP 2018: Good Practice, point 83e).

The above list is not exhaustive but it gives an idea of the wide range of mutual responsibilities that may be included in a contractual supervision agreement.

Practice Note

It is recommended that trainees and inexperienced practitioners bring all their cases to supervision

The *Ethical Framework* (BACP 2018: Good Practice, point 67) places the primary weight of responsibility for professional standards on the supervisee where the supervisee is a qualified and experienced practitioner.

It is, therefore, implied that when the supervisee is inexperienced and/or a trainee, the weight of responsibility will fall proportionately more heavily on the supervisor.

An inexperienced practitioner or a trainee may not be fully aware of potential practice issues, difficulties or dilemmas arising in their practice, and if they select the cases to bring to supervision, important issues may be missed.

A supervisee may wish (or need) to rely on the advice and support of their supervisor. The supervisor cannot fulfil their professional responsibility under the *Ethical Framework* if they are not made aware of specific cases creating problems or dilemmas of good practice for the supervisee. The *Ethical Framework* (BACP 2018: Good Practice, point 72) therefore advises that it is good practice for supervisees to present in supervision all those cases giving rise to difficulties or challenges. It is certainly legally wise to discuss in supervision all practice difficulties or dilemmas. But will those difficult or risky situations always be safely recognised by a trainee or inexperienced practitioner?

Trainees: It is submitted therefore, that it would be difficult for a supervisor to fulfil their legal responsibility of their duty of care to a trainee and the trainee's clients, and fulfil their responsibility to collaborate with training and placement providers to ensure that the trainee's work meets professional standards' (BACP 2018: Good Practice, point 66), unless the trainee is willing to bring all their cases to supervision, and also consents to the necessary collaboration and sharing of information about their work where appropriate and necessary.

Inexperienced practitioners: They may not always at first recognise a practice issue that requires assistance, therefore it may be regarded as good safe practice for them to bring all their cases to supervision, at least until both the supervisee and their supervisor are both confident about the supervisee's ability to spot any potential difficulties or challenges, and they can work together to realistically assess the standard and quality of the supervisee's practice, and maintain client safety.

2 Tort and the duty of care in the context of supervision

The law of tort in England, Wales and Northern Ireland is the general law of civil liability (in Scotland, it is called 'delict'). The word 'tort' (colloquially meaning a wrong or an injustice) was probably imported into law from old French, having evolved from the medieval Latin 'tortum' (originally derived from 'torquere', to twist) and 'tortus' (meaning twisted, crooked, and so untrustworthy).

A tort is therefore a wrong or injustice of some kind in relation to land, property or people. Liability in tort may arise as a result of negligence, lack of care, or reckless or criminal actions resulting in personal injury to people or damage to property. In the case of therapy, it would include the breach of a therapist's or supervisor's duty of care to provide a professional and competent service to a client or to provide a professional supervision service to a supervisee. Tort law does not include employment, contract or commercial law, which are separate areas of law governing work, business and service agreements, including therapeutic contracts (see section 1.1, Contracts).

The principal remedies available for breach of the law of tort are injunctions (orders to do, or not to do, something) and damages (financial awards by the court).

Tort is a complicated area of law, and legal liability does not always depend on malicious intent. A person might be liable in tort without deliberately having intended to cause any harm, perhaps through a reckless or inadvertent act or omission, which, although unintentional, may nevertheless constitute a lack of the required standard of professional care.

The Supreme Court (then the House of Lords) considered the issue of the duty of care in the case of *Phelps v Hillingdon London Borough Council* [2000] 3 W.L.R. 776.

This was part of a group of four appeals, all heard together, to decide whether a duty of care was owed by an educational psychologist to a child (and/ or the child's parents) concerning their failure to diagnose dyslexia. The damage claimed arose from the impact of this failure upon the children concerned.

Lord Slynn of Hadley commented:

...it is long and well-established, now elementary, that persons exercising a particular skill or profession may owe a duty of care in the performance to people who it can be foreseen will be injured if due skill and care are not exercised, and if injury or damage can be shown to have been caused by the lack of care. Such duty does not depend on the existence of any contractual relationship between the person causing and the person suffering the damage. A doctor, an accountant and an engineer are plainly such a person. So in my view is an educational psychologist or psychiatrist and a teacher including a teacher in a specialised area, such as a teacher concerned with children having special educational needs..

By analogy with the educational psychologist in that case, counsellors, psychotherapists, coaches, and so on, all owe a duty of care to their clients and supervisees to carry out the task of therapy with due skill and professional competence.

In *Phelps v Hillingdon London Borough Council*, the House of Lords made it clear that not only is a duty of care owed to those in a direct contractual relationship but, in some circumstances, it will also be owed to third parties (i.e. those not in a direct contractual relationship with the person claimed against).

Considering the responsibility:

It must still be shown that the educational psychologist is acting in relation to a particular child in a situation where the law recognises a duty of care.

A *casual remark, an isolated act may occur in a situation where there is no sufficient nexus between the two persons for a duty of care to exist.*

But where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, prima facie a duty of care arises. It is sometimes said that there has to be an assumption of responsibility by the person concerned [...]

There can be no doubt that if foreseeability and causation are established, psychological injury may constitute damage for the purpose of the common law. But so in my view can a failure to diagnose a congenital condition and to take appropriate action as a result of which failure a child's level of achievement is reduced, which leads to loss of employment and wages.

This case highlights the particular responsibility of an educational psychologist but it could equally apply to any person who might be relied upon to make a formal diagnosis.

Practice Note

In the supervisory relationship, and generally in the therapeutic relationship, do not act, diagnose, or give advice beyond your qualifications or expertise

Therapists would be very unwise to take responsibility for any formal diagnosis unless they have the specific qualifications, training and experience to do so.

Care must be taken in giving advice in the context of therapy and supervision. If incorrect advice is relied on, and acted upon, and this directly causes damage to a client, then in certain circumstances, a legal responsibility and liability could arise – see the discussion below.

This principle of acting only within our qualifications and expertise may be extended in legal cases to include the professional duty of care, for example in supervision.

Page and Wosket state: 'The supervisor may have to give authoritative action or advice about best practice when a client is at risk and a supervisee needs guidance or direction' (1998:22). Supervisors should however be very careful about the nature and quality of any advice that they give to a supervisee.

If the supervisee acts on advice given by the supervisor, on which the supervisor ought to have realised that the supervisee might rely, and a client suffers damage as a result, the supervisor may have a certain level of liability in tort, refer to the *Ethical Framework*, (BACP 2018: Good Practice, points 60-73) for guidance on the respective responsibilities, and see Part 1.5 for discussion.

Note that the levels of responsibility for the supervisee's practice are flexible and the weight of responsibility for client work may change by agreement in accordance with the qualification and practice experience of the supervisee. We have already seen that for trainees, the supervisor has a duty to:

> *'collaborate with training and placement providers in order to ensure that the trainee's work with clients satisfies professional standards'* (BACP 2018: Good Practice, point 66).

For qualified practitioners, the requirement shifts the weight of responsibility on to the practitioner:

> *'When supervising qualified and/or experienced practitioners, the weight of responsibility for ensuring that the supervisee's work meets professional standards will primarily rest with the supervisee.'* (BACP 2018: Good Practice, point 67)

The focus of supervision is necessarily on the needs and interests of the supervisee's clients (Page and Wosket, 1998).

The appropriate sharing of information among professionals is essential here, and good professional practice necessitates that the supervisee is honest and open in bringing difficulties in their work to supervision. This information-sharing should happen in the context of the confidentiality agreements in both the client contract and the supervision contract, to ensure that the client's expectations and agreement with the therapist should be compatible with the therapist's supervision contract.

In situations where a client may be (or may become) identifiable in supervision, either directly or indirectly through circumstances, it is particularly important that the contract terms on confidentiality of both the therapist/client and the supervisor/ supervisee reflect this possibility, and all parties agree on what should happen in that situation.

2.1 Negligence

The law of tort includes the legal concept of negligence, which in the case of the counselling and psychotherapy professions, would be based on a breach of our duty of care that has caused some sort of quantifiable damage. In law, in order to prove a case of negligence, lawyers refer to the 'nexus of causation', meaning the degree of connection between the negligence that has been alleged and proof that the damage suffered by the claimant was actually caused by that negligence.

In order to establish a case against a therapist or supervisor, the claimant (the plaintiff, or person making the claim) would have to prove certain elements against the defendant (the person claimed against), i.e.:

- that a duty of care exists
- that there has been a breach of that duty of care (conduct falling below the standards that the law demands)
- in the case of advice, that the defendant could have foreseen that any advice they gave would be relied upon (known as foreseeability)
- that as a result of the action/omission complained of, the plaintiff suffered damage
- that the actions/omissions complained of were the cause of the damage.

The court would need proof of damage that could be redressed somehow by financial compensation or an injunction.

Damage might include financial loss as a result of loss of work through psychiatric illness, or a misdiagnosis, for example, but may not necessarily include hurt feelings (i.e. 'mere grief, distress and upset'; see *McLoughlin v O'Brian* [1983] 1 AC 410 at 431).

Many instances of alleged therapeutic negligence are the subject of complaints to professional bodies, and some are the subject of legal claims. It seems that many, if not most, of the legal claims that could be brought to trial are settled out of court. Of the few court cases that proceed to a full hearing and judgment, only a few will be included in the main UK law reports.

All this means that we have very few reported UK court cases on professional negligence in the context of therapy to provide us with guidance. By looking at the experience of insurers, however, we can at least gain some insight into the type of actions or omissions that might give rise to complaints or legal claims.

As we have already seen, depending on the practitioner's particular therapeutic approach and modality, advice-giving may sometimes form an essential part of therapy (for example, CBT may include recommendations for specific homework) and sometimes it may not. A claim in contract or in tort may potentially arise in respect of an economic loss allegedly resulting from acting upon advice or information that has been given negligently by a therapist, but it is more usual to find that claims in tort for negligent advice are brought against solicitors, financial advisers or bankers (see the leading case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 3 WLR 101, [1964] AC 465).

Generally, it is easier to establish direct lines of relationship and liability between a therapist and their client, than it is between clients and their therapist's supervisor, when causal links have become more distant and possibly less clearly defined. In a claim, a number of different factors may intervene in the chain of causation of an alleged loss or damage, for example contributory negligence by one or more of the parties concerned (see 2.3).

2.2 Vicarious liability

An employer may be held liable for the actions of an employee when that employee is acting in the course of their duty as an employee. This is known as 'vicarious liability.' For example, an agency, company or organisation employing therapists or supervisors may be held liable for the actions of each employed therapist acting in the course of their employment. Similarly, although volunteers are not formally employed, they should have a volunteering agreement setting out what is expected of them, the terms of their voluntary service and their rights. Volunteers' actions are likely to be regarded in law as under the control and responsibility of the organisation using their services, for which the organisation will in law be vicariously liable.

The organisation needs to hold professional indemnity insurance and/or public indemnity insurance as necessary to cover this liability. The individual professional indemnity insurance of the employed or volunteer therapists may cover the practitioner, but it may not necessarily protect the organisation itself. It is important for all parties to check this with their respective insurers.

2.3 Contributory negligence and voluntary assumption of risk

A client who makes a claim against their therapist may, by their own actions, have exacerbated the loss that they allege may have resulted from the therapist's (and/or supervisor's) negligence. This is called in law the claimant's own 'contributory negligence'. In a claim for damages made against the therapist or supervisor, any proven contributory negligence on the part of the client may therefore significantly reduce any damages that might be awarded to a successful claimant.

Professional codes of practice (part of what is colloquially referred to as the 'soft law', which include government guidelines) not only create a protective environment for clients, but if practitioners have acted within these guidelines, they can also be supportive for practitioners in a court case. When clients' own actions are taken into account, and where practitioners have complied with relevant guidelines, there may be considerable legal difficulty for clients in holding therapists and possibly supervisors accountable for the outcome of events in their life.

This highlights the varying level and range of responsibility in therapy and supervision. Therapists will usually feel that they owe a duty of care to clients but that, at the same time, they cannot be considered fully responsible for the outcome of the independent actions of their clients, who remain in charge of their own lives.

In supervision, similar principles may apply. The supervisor of a qualified practitioner may offer space for discussion and perhaps may offer information or advice, but the weight of responsibility for the quality of the client work is likely to remain with the supervisee. *'When supervising qualified and/or experienced practitioners, the weight of responsibility for ensuring that the supervisee's work meets professional standards will primarily rest with the supervisee.'* (BACP 2018: Good Practice, point 67)

By contrast, a trainee in supervision may expect to rely more heavily on their supervisor to collaborate with the training organisation, placements, etc. and give appropriate advice and guidance to ensure that the trainee's work satisfies professional standards and the extent of this responsibility would require agreement with the supervisor (BACP 2018: Good Practice, point 66).

2.4 Measurement of the standard of care expected of a therapist

Standards of care are measured in part according to the 'reasonableness' of the actions taken in the circumstances of the case. Professional responsibilities will, of course, raise the standard of care expected.

Lawyers in the past traditionally defined the concept of an ordinary, reasonable person as 'the man on the Clapham omnibus' (thought first to have been used in court by Lord Bowen in the *Tichbourne v Lushington* case in 1871!). The concept was revisited by the Supreme Court with some entertaining comments about other possible bus season ticket holders, which might now also include officious bystanders, reasonable parents and landlords, fair-minded and informed observers, and additional passengers from abroad ...(see *Healthcare at Home Limited v. The Common Services Agency* [2014] UKSC 49, in paragraphs 1 to 4).

An ordinary, reasonable person needs to take an ordinary level of care in what they do in their daily life, for example, in driving. Therapists are regarded in law as 'ordinary people' in their daily lives but as 'professionals' in their therapeutic work.

Professionals are expected to exercise the appropriate ethical and professional standards of skills in their field when undertaking their professional activities; for example, a counselling practitioner should take ordinary care when driving home from work but a professional level of care when working therapeutically with clients or supervisees, writing reports, making referrals and so on. The courts will assess professional standards from the published standards and guidance currently available and in use in the profession. For this reason, in assessing the level required, the courts may look at the standards set by particular modalities, the guidance issued by professional associations, and government guidance, which may include that of NICE (see 2.5).

2.5 The National Institute for Health and Care Excellence (NICE) guidelines

In the November 2003 issue of *MedEconomics* (page 2), Sir Michael Rawlins (Chairman of NICE) said, 'NICE guidelines are likely to constitute a responsible body of medical opinion for the purposes of litigation... Doctors are advised to record their reasons for deviating from the guidelines.'

NICE also provides guidelines for counselling and psychotherapy, such as recommendations for the treatment of specified mental conditions (e.g. post-traumatic stress disorder, depression and anxiety), which influence referrals and treatment programmes offered within the NHS.

These are constantly under review, and so it is advisable for practitioners to keep a watch on the parts of the NICE guidance relevant to their practice.

Although, of course, many therapists work independently of the NHS, should a legal action be brought against a therapist or supervisor for negligence or breach of a duty of care to the client, and if the case is based on the specific techniques or modality used by the therapist, any failure to comply with the guidelines appropriate for that modality or the NICE guidelines is likely to need explanation and/or justification. This could possibly create issues for any therapists involved whose therapeutic approach is not one of the NICE-recommended treatment modalities for a specific issue (see, for example, the NICE guidelines for anxiety, depression and PTSD).

2.6 Management of risk and the standard of care expected of a supervisor

2.6.1 Duty of care to the supervisee

A supervisor owes a duty of care to the supervisee both in contract and in tort.

A professional complaint may be made about a supervisee by a client. In that situation, the professional organisation concerned might enquire whether the supervisee brought the matter to supervision, and if so, what discussion followed, or what advice was given by the supervisor, and whether any advice given was followed. The supervisor might then potentially be brought into any disciplinary procedure brought by the therapist's professional organisation.

In a legal case, there is a potential issue of vicarious liability on the part of the therapist's employer, or possibly their supervisor, especially in the case of a supervisee who is a trainee or an inexperienced practitioner (see section 2.2 of this resource).

In assessing responsibility for a failure of the duty of care in legal cases or professional complaints, the court or professional organisation may need to ascertain the precise nature of information shared, advice given and actions taken, and may also discuss respective ethical responsibilities.

Supervision notes are therefore an essential part of good practice. Under the *Ethical Framework* (BACP 2018) , a supervisor is now required to keep 'accurate records of key points discussed in supervision' (BACP 2018: Good Practice, point 71).

As we have seen, both contract and tort law are complex, and if a legal case that alleges any form of liability in relation to professional negligence is brought against a supervisor, it would be wise to seek legal advice on the specific circumstances of that case.

2.6.2 Duty of care to the supervisee's clients

As seen in the discussion of tort earlier in this section, the supervisor of a student or trainee practitioner has a professional responsibility and duty of care to ensure that the supervisee's work satisfies professional standards (BACP 2018: Good Practice, point 66). The level of responsibility is different for the clients of a qualified and experienced practitioner, where the 'weight of responsibility for ensuring that the supervisee's work meets professional standards rests primarily with the supervisee.' (BACP 2018: Good Practice, point 67).

Impliedly, therefore, when the supervisee is inexperienced and/or a trainee, the weight of responsibility will fall proportionately more heavily on the supervisor. For the respective responsibilities of supervisor and supervisee, please refer to Part 1.

As seen in the discussion on the law of tort above, both supervisor and supervisee are expected to work to professional standards. In theory, in the law of tort, as we have seen in 2.1 to 2.3, a supervisor could potentially be held liable in the context of their role in relation to a client who has been brought to supervision and in respect of whom the supervisor has provided defective advice and guidance, which was then acted upon by the supervisee to the detriment of the client.

Such a claim would be difficult to bring, because it would depend upon proof of a chain of legal causation directly linking the supervisor's advice with any relevant subsequent actions by the supervisee, then directly linking the actions of the supervisee with any resulting damage to the client.

A complicating factor is that somewhere along this chain of events may lie the actions of the client (claimant) or other individuals, which may have contributed in varying degrees to the cause of the damage, or exacerbated the damage or loss suffered. The chain of causation is, for all these reasons, likely to be tenuous and may be difficult to establish in law. However, it might also be possible for the supervisee to bring a claim against the supervisor for breach of the supervisor's duty of care to the supervisee (see later in this resource).

In situations such as group supervision, any advice, or guidance given (and therefore the legal responsibility for it) may be collectively shared in different ways, which may vary according to the nature of the group.

The responsibilities of group supervision may, for example, differ according to how the group is run – for example peer groups may have no specific facilitator or leader, in contrast to those groups that are formally led or facilitated; especially if the facilitator has any form of management role. For these reasons, the legal responsibility of a specific individual in the group could be quite complicated to establish.

2.6.3 Ethical dilemmas in supervision

In supervision, discussion of ethical dilemmas should be founded on solid ethical principles e.g. reference should be made to the current *Ethical Framework* and to other professional guidance and resources relevant to the case. Where appropriate, the considerations should also include the ethical problem-solving guidelines. (BACP 2018: Good Practice, points 92-94).

2.6.4 Maintaining professional boundaries

Supervisors need to maintain appropriate ethical boundaries, for example in confidentiality and relationship. Breaches of these professional boundaries may result in grounds for claims and complaints. The *Ethical Framework* gives clear guidance on boundaries: see (BACP 2018: Good Practice, points 33-37). See also GPiA 014 LR: *Managing confidentiality* for more information.

2.6.5 Advice-giving

We have seen that supervision may involve giving advice, guidance and support. A supervisor should be aware that a supervisee may accept and then implement any guidance given in supervision. If implementation of the advice given by a supervisor has resulted in clear and quantifiable detriment to a client, it is possible that a case for legal action, for example, in tort for breach of a duty of care, could arise if direct links can be proved between the advice given, the actions of the supervisee as a result of that advice, and those actions as the direct cause of the damage to the client. The case would have to be proved in court on a balance of probabilities, and proof is subject to the nexus of causation, (see 2.1). Damages awarded may also be affected by the client's actions. i.e. contributory negligence, (see 2.3).

2.6.6 References

Supervisors may be asked to provide references for supervisees.

In the spirit of openness and transparency embodied in the *Ethical Framework*, it is ethically and legally wrong to knowingly provide a reference that is untrue, or deliberately misleading (for example by hiding or failing to provide negative or awkward information which impacts on the supervisee's therapeutic practice), or is in any other way deliberately (or even carelessly) inaccurate.

If the therapist subsequently benefits on the basis of an inaccurate reference (e.g. through the award of work, an academic position, etc), it is possible that legal liability for therapist and the provider of the reference may also ensue.

Supervisors should therefore be very careful about the provision of job or other references for supervisees. Particular care should be taken to ensure that the reference covers only those areas of the supervisee's skills, work experience, or qualities that are within the supervisor's direct knowledge. Questions which may lie outside the supervisor's direct knowledge, for example facts which may be applicable to the supervisee's workplace such as financial honesty and integrity, time keeping, being a good team member, compliance with workplace policies, etc, may be more appropriately answered by a former employer, manager or a work colleague with direct knowledge of the supervisee in the workplace.

See 2.6.7 for an example of reporting observed facts compared with venturing opinions or reported statements.

- We have to remember that, often, we can only know about the life of our supervisees from their own reported actions and perspectives, unless we have additional direct knowledge of them, e.g. from a workplace or elsewhere. A reference might require a very clear proviso that the supervisor's direct knowledge of the supervisee's work and character is limited to the specific nature and scope of the supervisory relationship.

If a reference contains information provided in supervision by the supervisee, or obtained from others, the supervisor should clearly acknowledge that the information is from reported material, and not from their own observation.

Equally, a supervisor should not get drawn into an assessment of the suitability of a supervisee for a particular role, unless the supervisor is fully aware of the requirements of the role, and both qualified and confident to give that specific assessment.

2.6.7 Reports

Many professional organisations, for example BACP and UKCP, sometimes may require reports from a supervisor for accreditation, registration, fellowship or possibly for disciplinary purposes.

In all these situations, the supervisor is legally responsible to the supervisee and to the organisation concerned for the accuracy and professional competency of their reports.

In a report, as a supervisor, be careful to clarify which of the facts reported are derived from your direct observation, experience or knowledge. For example, if a supervisor has no knowledge of how a supervisee acts in their workplace, in a reference asking a general question about the supervisee's reliability on timekeeping, a factual response might be: 'The supervisee has never arrived late for an appointment with me and has always paid my fees on time'.

Distinguish facts that are personally observed in supervision sessions or otherwise proved, (for example by documents), from opinions and comments that are derived from information given by the supervisee or others. Where appropriate, it helps to clarify the source rather than presenting reported facts as your own. An example of a questionable statement might be: 'The supervisee is an excellent timekeeper.' This looks at first like a fact, but it could just be an opinion based on the supervisee's own statement to you in a supervision session 'I am an excellent timekeeper and never late for work'. A more accurate statement might be: 'The supervisee reported to me that she is an excellent timekeeper. I can confirm that she has never been late for an appointment with me'. For reports for courts, see Bond and Sandhu (2005), Mitchels and Bond (2010, Chapter 10) and Bond and Mitchels (2021, Chapter 8 at 8.2).

2.6.8 As a supervisor, how do I protect myself against a claim?

No supervisor (or therapist) can ever be totally 'bullet proof' against complaints and legal claims for breach of their duty of care or negligence, since clients may at any time decide to complain or litigate, with or without justification, about any aspect of their therapy.

However, when the disciplinary procedures of professional organisations operate fairly, they provide a substantial measure of protection for therapists and supervisors against unjustified and spurious complaints. The legal system and court procedures also provide defendants with some protection against erroneous claims or those claims which are maliciously brought. If a professional complaint or claim is made, insurers should be informed immediately; also, in the event of a legal claim, it is wise to seek legal advice quickly. Many insurers will provide legal advice and assistance for practitioners as part of their policy cover. Remember that negotiation between the parties may take place alongside the court proceedings, and that most claims are settled out of court.

Mediation is also a great way forward in many situations, if the parties can accept the principles of a mutually acceptable negotiated solution.

The *Professional Conduct Procedure* of BACP ((BACP 2018a) available at www.bacp.co.uk) allows for 'consensual disposal' of a complaint with the agreement of the parties and the consent of the Investigation and Assessment Committee (IAC).

3 Insurance

The *Ethical Framework* requires that all members and registrants have and maintain appropriate professional indemnity and liability insurance. This implies adequate cover for the services we provide, including working online and cross-border in all countries in which our professional services are delivered and in which we and the people using our services live, see (BACP 2018: Good Practice, point 19).

The reason for this requirement is that therapists and supervisors cannot exclude liability for negligence or breach of their duty of care in therapy or supervision (which would be an unfair contract term) and for the protection of practitioners and clients, it is vital that all supervisors and therapists providing a therapeutic service must be covered by appropriate insurance with a reputable professional insurance provider.

Our professional liability insurance should be designed to cover these areas of liability specifically, in addition to a possible wider range of cover. It always pays to check your insurance cover to see exactly what is (or is not) covered in your practice.

It is well worth checking with your insurer whether, in the event of a legal dilemma or possible complaint, etc., they will cover free legal advice and assistance under their policy.

4 Confidentiality, supervision records and data protection

Confidentiality is a responsibility based both on contract (see section 1 of this resource) and on the law of tort (see section 2). For more detail on the law relating to confidentiality, see Good Practice in Action 014 Legal Resource: *Managing confidentiality within the counselling professions*, and (Mitchels and Bond 2021).

A supervisor owes a duty of confidentiality to the supervisee and also to the supervisee's clients. The UK General Data Protection Regulation (UK-GDPR) and the Data Protection Act 2018 apply to all sensitive personal data held by counselling practitioners electronically or manually in a 'relevant filing system,' including supervision records.

For details of the application of data protection, see the Good Practice in Action 105 Legal Resource: *The UK General Data Protection Regulation (UK-GDPR) legal principles and practice notes* for the counselling professions. Supervision practice should be in harmony with the confidentiality agreement reached by the supervisee therapist with their clients. Clients will need to know that a therapist has supervision, and they also need to know the boundaries of confidentiality within which they are working.

Sometimes a conflict of interest can arise in therapy practice, e.g. where, in a community, the client may know the supervisor privately or professionally in some way that generates a potential conflict of interest.

We do not usually identify our clients to a supervisor, but a supervisor may come to know the identity of a client through local knowledge, or through their practice. An example might be where a counselling trainee is working with a therapist in personal therapy, and then the trainee starts in a practice placement and chooses a supervisor who they later discover also supervises his or her personal therapist.

Where a practitioner or their supervisor discover that the supervisee has inadvertently chosen a supervisor who also supervises their personal therapist, etc., the ethical dilemma and the possible options available should be addressed by the supervisor and the supervisee practitioner together in discussion, with attention to the current *Ethical Framework*.

5 Avoiding potential problems from identification in supervision

There is a potential risk that a client may for any reason know (or come to know) the supervisor socially or professionally and/or that the client's identity might become known by a supervisor whether directly or from circumstances (for example this may be occur if the therapist, client and supervisor are all working within a small community or share a workplace).

Some situations that have occurred include:

- The supervisee's client is a counsellor in training. Later on that client seeks a supervisor when they start their own therapy practice, then the client finds that their personal counsellor's supervisor is the same one that they have chosen for themselves when they start their own practice;

- A supervisor guesses the identity of a supervisee's client and realises that they know the client socially, or at work

To avoid these potential difficulties, it might be helpful, with the permission of their supervisor, for a supervisee to tell all their new clients not only that they have supervision, but also to provide the name of their supervisor before starting the therapy work. The client can then decide for themselves whether they may know the supervisor, or whether there is any possible conflict of interests, or whether, if there is any risk of identification that risk is acceptable, and how this situation, if it occurs, might be managed.

6 Ethical and legal issues in supervision where the supervisor holds information about a supervisee's client which is not known to the supervisee

Ethical dilemmas can occur when a supervisor knows or correctly guesses the identity of a supervisee's client (perhaps from circumstances that are described in supervision) and the supervisor then realises that they hold important relevant information about that client, which is derived from other sources (i.e. the supervisor has information which the therapist does not have). If that information is highly relevant to the therapeutic work, or if for example it involves any safeguarding issues, this might potentially create an ethical dilemma regarding disclosure of that information by the supervisor, either to the therapist, or to an appropriate agency or organisation if there is a clear and imminent risk of serious harm. To assist the consideration of ethical dilemmas, please see the disclosure checklists in BACP 2018b; Mitchels and Bond (2021); and for ethical problem-solving, see Reeves, A. and Bond, T. (2021). BACP has an active ethics hub for practitioner members who are experiencing an ethical dilemma and a consultation service for supervisors, for details, see www.bacp.co.uk/events-and-resources/ethics-and-standards/ethics-hub.

For references in the *Ethical Framework* relevant to supervision of trainee and qualified practitioners, see (BACP 2018: Good Practice, points 60-73).

Also see the Good Practice in Action resources in respect of supervision. Both the *Ethical Framework* and the Good Practice in Action resources can be found on the BACP website at: www.bacp.co.uk.

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The Department for Education (www.education.gov.uk), formerly Department for Children Schools and Families, publishes policy regarding children's services in England.

The Ministry of Justice (www.justice.gov.uk) publishes policy regarding the courts and tribunals in England and Wales.

Northern Ireland Government publications are available from the Department of Health, Social Services and Public Safety (www.dhsspsni.gov.uk).

Welsh Government publications, see (www.wales.gov.uk).

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Statutes

United Kingdom General Data Protection Regulation

Data Protection Act 2018

Unfair Contract Terms Act 1977 (UCTA 1977)

Statutory instruments

Unfair Terms in Consumer Contract Regulations 1999 (UTCCR 1999)

Conventions and protocols

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

Useful contacts and resources

British and Irish Legal Information Institute (BAILII, www.bailii.org).

Publishes all High Court, Court of Appeal and Supreme Court judgments

Care Council for Wales (www.ccwales.org.uk/child-law).

Publishes Child law for social workers in Wales in English and Welsh, with regular updates Justis (www.justis.com). Online resource UK statute law (www.legislation.gov.uk)

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

Regional legal contacts

England

For a list of the courts and links to regional courts' contact details, see www.justice.gov.uk/contacts/hmcts/courts.

For CAFCASS see www.cafcass.gov.uk National Office 3rd Floor 21 Bloomsbury Street London WC1B 3HF Tel: 0300 456 4000

Fax: 0175 323 5249 (local offices are listed on the website or available from National Office).

NAGALRO (The Professional Association for Children's Guardians, Family Court Advisers and Independent Social Workers) see www.nagalro.com Nagalro PO Box 264 Esher Surrey KT10 0WA Tel: 01372 818504; Fax: 01372 818505 Email: nagalro@globalnet.co.uk.

Northern Ireland

See www.courtsni.gov.uk for contact details of all courts, publications, judicial decisions, tribunals and services.

The Northern Ireland Guardian Ad Litem Agency (Email: admin@nigala.hscni.net).

Wales

Children and Family Court Advisory and Support Service (CAFCASS) Cymru: (www.gov.wales/cafcass-cymru). National Office, Llys y Delyn, 107-111 Cowbridge Road East, Cardiff, CF11 9AG. Tel: 02920 647979; Fax: 02920 398540; Email: Cafcasscymru@Wales.gsi.gov.uk;Email for children and young people: MyVoiceCafcassCymru@Wales.gsi.gov.uk.

EIRE: Republic of Ireland

An Roinn Slainte Dublin
Republic of Ireland Department of Health, Hawkins House, Hawkins Street, Dublin 2, Ireland. The main switchboard for the Department is 01 6354000. You will need to dial +353 1 6354000 if ringing from outside Ireland.

Ombudsman for Children's Office Dublin
Millennium House, 52-56 Great Strand Street, Dublin 1, Ireland Complaints free-phone 1800 20 20 40. Otherwise call on 01 865 6800. Email: oco@oco.ie Fax: 01 874 7333. www.oco.ie.

Disclosure and barring services (DBS) England and Wales
Disclosure and Barring Service (DBS) customer services, PO Box 110, Liverpool, L69 3JD; Tel: 0870 90 90 811; Minicom: 0870 90 90 344; Email: customerservices@dbs.gsi.gov.uk; Transgender applications: sensitive@dbs.gsi.gov.uk; www.gov.uk/dbs-update-service;

Welsh language scheme: www.gov.uk/government/organisations/disclosure-and-barring-service/about/welsh-language-scheme

Northern Ireland

Information on the application process:
www.nidirect.gov.uk/accessni

Information on the disclosure and barring programme in Northern Ireland: www.dojni.gov.uk/accessni

NICE
www.nice.org.uk
www.nice.org.uk/guidance

Royal College of Psychiatrists Publications
www.rcpsych.ac.uk

Samaritans
www.samaritans.org
www.samaritans.org/how-we-can-help-you/contact-us