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Private Practice

Is therapy a vocation or is it really a business?

Does it matter when in the year I start up in private practice? Is there a best time to do this?

Can I say what I like in an advertisement for my new practice?

He lost his temper and shouted at our receptionist in the office twice last week, in front of all the others, and made her cry – is that harassment?

I work part of the time for myself at home and part of the time in a GP surgery, how can I tell if I am self-employed or employed?

Can I negotiate the terms of my professional indemnity insurance policy or do I have to take what I am offered? What should I be looking for it to cover?

If I work from home, do I have to make disabled access provisions, like a ramp?

Do I have to keep client records?

What can I do if my client does not pay their fees?

Therapy is regarded for tax and other legal purposes as a business enterprise, whether a therapist is a sole practitioner working part-time from home, or part of a large consortium. In private practice, therapists are free to run their business as they wish, provided that they act ethically and comply with local and national law. All the practical aspects of setting up in business – including, for example, advertising, premises, facilities, contracting, finance, employment, tax, data protection, equal opportunities and health and safety legislation – may apply. On top of all this are the guidance and ethics of professional organisations. Practitioners might like to look at *Freelance Counselling and Psychotherapy* (Clark 2002). This book originated from a conference for freelance therapists, at the University of East Anglia, with contributions from a wide variety of private practitioners exploring some of the advantages and challenges of private work. Useful BACP Information Sheets relevant to private practice are included in 1.1 below.

1.1 Legal features of private practice

Like any business, private therapeutic practice requires attention to setting up, marketing, premises, management and administration, insurance, tax and quality

assurance of the service provided. There are many complex specialist areas of law involved, so in this chapter we outline the relevant law, with references to other publications for those who need greater detail or wish to read further, but as all situations are different, if there are important legal issues, we recommend seeking specialist advice. Check with insurers – many of them will provide free legal assistance – after all, it is in their interests to do so!

1.1.1 Starting up in business

'Starting up' has both a colloquial meaning and also, in business terminology it means the official commencement of the business – otherwise referred to as the 'business start date' or the 'starting up date', i.e. the official date on which the business commences, for accounting, tax and other purposes. Accounts are usually produced annually for income and other tax purposes. The business financial year for accounting purposes (also known as the 'fiscal year') may not necessarily be a calendar year. The government fiscal or 'budget' year in the UK runs from 31 March to 1 April in the following year. Some universities have a fiscal year which coincides with the academic year, as they are less busy in the summer months. Many UK businesses, for convenience, choose to adopt the government fiscal year for their own financial accounts.

A careful choice of starting date may be important, especially where there are tax-allowance schemes in operation for new businesses. These schemes are often politically motivated and may vary with the prevailing government plans, so talk with a financial adviser about the choice of starting up date to utilise any possible tax advantage. As an example, a therapist who chooses a start-up date for their business on 1 July 2010 may then choose a business tax year which runs from 1 July 2010 to 30 June 2011, and render their tax accounts accordingly.

Finance is only one aspect of starting up in a therapy business. It all requires some organisation and advance planning, and the checklist below may be helpful.

Checklist: Starting up in business

- Start date
- Set up premises where business operates (and/or services provided)
- Check that premises are covered by appropriate insurance
- Professional indemnity insurance for therapist(s)
- Professional memberships for therapist(s)
- Bank – see advice and special offers for new businesses
- Local authority – training and networking opportunities
- Set up an administrative system for client records, appointments, standard letters, bills and receipts, invoices, etc.
- Staff, reception and administration – will help be needed?
- Computer data held? Data protection notification and registration
- Tax – registration as self-employed (if appropriate)
- VAT – registration (if appropriate)

- Services: business telephone/fax line
- Out-of-hours service arrangements (if appropriate)
- Local professional groups and organisations for marketing and support
- Advertising – local directory, Yellow Pages and websites

For government advice and assistance on business start-up, see www.hmrc.gov.uk/startingup/. Local councils may encourage business groups and offer training or start-up loans, banks often have special offers, including business advice and free banking for the first year.

Useful resources for further discussion of starting up in business are Mitchels and Bond (2010: 102–6) and Gabriel and Casemore (2009a). BACP Information Sheets are free to members, and other helpful titles when starting in private practice include: Anthony (2007); Bond and Jenkins (2009); Bond, Mitchels et al. (2010); Clark (2002); Dale (2009a); Dale (2009b); Jackson [C1Q2] (2009); Mearns [C1Q2A] (2008); Moore (2009).

1.1.2 Advertising and the law

Since therapy is a business, advertising is regulated in the same way as for other business enterprises. Therapists must be careful to avoid misleading descriptions of their experience, qualifications or work, and of making promises that they cannot fulfil.

Providing clients with adequate information

59. Practitioners are responsible for clarifying the terms on which their services are being offered in advance of the client incurring any financial obligation or other reasonably foreseeable costs or liabilities.

60. All information about services should be honest, accurate, avoid unjustifiable claims, and be consistent with maintaining the good standing of the profession.

61. Particular care should be taken over the integrity of presenting qualifications, accreditation and professional standing.

(BACP 2010: 9)

Under the Trade Descriptions Act 1968 and other regulations, including the Business Protection from Misleading Marketing Regulations 2008 and the Consumer Protection from Unfair Trading Regulations 2008, it is illegal to promote a business with false or misleading information, e.g. if a therapist claims experience or qualifications that they don't have, or makes extravagant claims for their therapy – e.g. promising that they can provide an absolute 'cure' for all their clients. As Cohen (1992) says, '... the wisest of them promise nothing at all!' (Bond 2010: 70).

It is also legally unwise to advertise by making unfavourable comparisons with others, see The Control of Misleading Advertisements (Amendment)

Regulations 2000 and 1998. An advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the person to whom it is addressed or whom it reaches and if by reason of its deceptive nature, it is likely to affect their economic behaviour, or for those reasons injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote. An 'advertisement' for the purposes of the regulations means any form of representation (including oral) which is made in connection with a trade, business, craft or profession, in order to promote the supply or transfer of goods or services, immovable property, rights or obligations. For further details, see www.offt.gov.uk.

Applying the advertising regulations to a dispute about dog food advertising, the Court of Appeal held in the case of *Boehringer Ingelheim Ltd and Others v. Vetplus Ltd* [2007] Times Law Reports 27 June, that comparative advertisements must not be misleading, but the judges gave their view that: 'Traders would have nothing to fear if they had sure foundations for claims they made about their products ... Traders who made claims for their products which they could not readily and firmly justify would have to live with the risk that their rivals could honestly and reasonably call those claims into question ...'

One particular case could be applied by analogy to therapy advertising. In 2006, the Office of Fair Trading (OFT) took action against Magna Jewellery Limited. Whilst not admitting that their advertising was misleading, the owners of the business gave certain specific undertakings, i.e.

'Not to give the impression that:

- the therapeutic effect of magnetic products is established or proven by scientific trials. This includes claims like, 'Only Magna Therapy Jewellery is clinically proven to relieve pain,' and that the idea magnetic fields improve circulation, 'has been reinforced by medical research studies'.
- products have a therapeutic effect due to their magnets (or magnetic fields) and/or will in all cases produce a therapeutic effect for those who wear them. This includes claims like, 'The pain relieving properties are derived from tiny but powerful magnets'; and, 'Magnetic pain relief bracelets really work'.

The undertakings also restrict the publication of advertisements using customer testimonials that repeat any of the above claims. Christine Wade, Director of Consumer Regulation Enforcement, said: 'Magna Jewellery Ltd targets its products at consumers who are looking for relief from pain. Where advertisements claim products have therapeutic effects it is important they do not mislead consumers. These undertakings given to the OFT will protect consumers' (OFT 2006).

If the undertakings given to the OFT are breached, a High Court injunction can be sought. Failure to comply with an injunction may result in proceedings for contempt of court. In 2007, the OFT committed to targeting health care as a priority area for the next three years.

BACP's *Ethical Framework* (BACP 2010a) lists practitioners' values as including respect for human rights and dignity, and integrity in practitioner–client relationships. The first ethical principle is:

Being trustworthy: honouring the trust placed in the practitioner (also referred to as fidelity)

Being trustworthy is regarded as fundamental to understanding and resolving ethical issues. Practitioners who adopt this principle: act in accordance with the trust placed in them; strive to ensure that clients' expectations are ones that have reasonable prospects of being met; honour their agreements and promises; regard confidentiality as an obligation arising from the client's trust; restrict any disclosure of confidential information about clients to furthering the purposes for which it was originally disclosed. (BACP 2010a: 3)

Clearly, deliberately misleading advertising would contravene these values and principles.

1.1.3 Employing others

Therapists may be self-employed in their own business, but also need to employ others, for secretarial, administration or reception services, cleaning, etc. See the section on Finance and Tax below for details of PAYE and national insurance contributions. See the section on Equal Opportunities below for the rights of minority groups and those with disability. For an explanation of current employment rights, see the various headings in the government website www.direct.gov.uk, and www.berr.gov.uk or www.lra.org.uk in Northern Ireland from which information can be downloaded. To search for relevant guidance to the Employment Act 2008, go to www.legislation.gov.uk.

Employed/self-employed/or a bit of both?

The difference between employment status and 'self-employed' status is a legal minefield. Be careful not to get caught in the trap of taking on someone to help, perhaps for reception duties, or another therapist who describes themselves as 'self-employed' without checking this out carefully. You may find out later that actually, in the eyes of the law, you are employing them – this can be expensive for the employer in terms of possible liability for payment of accumulated tax, national insurance contributions etc., and there may be legal fines.

The distinction is also important for therapists in private practice. Many of us undertake part-time work for GP surgeries, voluntary agencies, and other organisations. We may think that we are self-employed because we work part-time, or work with more than one agency, but we could discover that we are not. For help in making

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the distinction between self-employment and employment, contact your local branch of HM Revenue and Customs (HMRC) or visit HMRC's website at www.hmrc.gov.uk, which has information about starting up in business, leaflet IR 56, showing how to discover if you should be classified as 'self-employed' for tax purposes. See also the HMRC *Employment Status Indicator (ESI) Tool* at www.hmrc.gov.uk/employment-status/index.htm and the HMRC *Employment Status Manual* at www.hmrc.gov.uk/manuals/esmanual/index.htm, with links to a helpline for the newly self-employed.

Therapists who are employers will have to comply with all the relevant parts of a wide range of employment legislation, including the Employment Acts 2002 and 2008, Employer's Liability (Compulsory Insurance) Act 1969, Equal Pay Act 1970, Redundancy Payments Act 1965, and the Rehabilitation of Offenders Act 1974.

In Northern Ireland, whilst the Employment Acts 2002 and 2008 apply, the remaining Acts do not extend to Northern Ireland. In this jurisdiction the relevant legislation is as follows: Employer's Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972, Equal Pay Act (Northern Ireland) 1970, Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965 and the Rehabilitation of Offenders (Northern Ireland) Order 1978. Amongst other legislation, the Employment (Northern Ireland) Order 2003 and the Employment Act Northern Ireland 2010 also apply.

In particular, note the Safeguarding Vulnerable Groups Act 2006 (the Northern Ireland equivalent being the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007) which regulates employment in work with children or vulnerable adults, barring any person who is on the 'Child First' or 'Adult First' lists. The Act creates requirements when taking on new employees in specified fields of work; failure to comply will be an offence, but its provisions may be changed by new governments. In England, Wales and Northern Ireland, the Vetting and Barring Scheme is implemented by the Independent Safeguarding Authority (ISA) so watch the website www.isa-gov.org.uk for details of the progress of the legislation. Details can also be found with an explanatory note at www.legislation.gov.uk. See also the Safeguarding Vulnerable Groups Act 2006 (Commencement No 1) Order 2007 and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007, and www.dhsspsni.gov.uk/child_protection_guidance. Watch these websites for changes.

In Scotland, a similar Protecting Vulnerable Groups (PVG) Scheme is created by the Protection of Vulnerable Groups (Scotland) Act 2007, with implementation being phased in to minimise the administrative burden on individual organisations. At present, it is anticipated that this scheme will begin to operate from February 2011. For a copy of the Protection of Vulnerable Groups (Scotland) Act 2007 see www.legislation.gov.uk.

In addition, there are a myriad of regulations, which there is insufficient space to explore in detail here, but of which it is helpful to be aware (see Box 1.1).

Box 1.1 Checklist: Employment regulations

- Employment Act 2002 (Dispute Resolution) Regulations 2004 (in Northern Ireland, Employment (Northern Ireland) 2003 (Dispute Resolution) Regulations 2004)
- Employment Equality (Age) Regulations 2006 (in Northern Ireland, Employment Equality (Age) Regulations (Northern Ireland) 2006)
- Employment Equality (Religion or Belief) Regulations 2003 (in Northern Ireland, Fair Employment Treatment Order (Amendment) Regulations 2003)
- Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005/2467) (in Northern Ireland, Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005)
- Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) (in Northern Ireland, Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003)
- Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2004 (SI 2004/2519)
- Employers Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573)
- Maternity and Parental Leave, etc, Regulations 1999 (SI 1999/3312) (in Northern Ireland, Maternity and Parental Leave etc. Regulations (Northern Ireland) 1999)
- Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) (in Northern Ireland, Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000)
- Paternity and Adoption Leave Regulations 2002 (SI 2002/2788) (in Northern Ireland, Paternity and Adoption Leave Regulations (Northern Ireland) 2002)
- Unfair Terms in Consumer Contract Regulations 1999 (SI 1999 No 2083)
- Working Time Regulations 1998 SI 1998 No 1833 and the Working Time (Amendment) Regulations 2001 (*SI 2001 No 325) (in Northern Ireland, Working Time Regulations (Northern Ireland) 1998 and the Working Time (Amendment) Regulations (Northern Ireland) 2002)

For further discussion of these regulations, employment issues generally, PAYE, national insurance etc, see Mitchells and Bond (2010: Chapters 8, 9).

1.1.4 Equal opportunities, non-discriminatory practice and prevention of harassment

The Human Rights Act 1998 establishes general principles of equality and makes certain rights generally enforceable in UK law. This is reinforced by other legislation against specific forms of discrimination, see Box 1.2. Therapists running their own business, even those working alone or working from their own home, must

make sure that both employees and clients have equal opportunities and that their practice is non-discriminatory. The *Ethical Framework* (BACP 2010a: 3) requires 'justice: the fair and impartial treatment of all clients and the provision of adequate services'. Therapists are also required to consider conscientiously any legal requirements and obligations and remain alert to potential conflicts between legal and ethical obligations.

Discrimination can take many forms, and Box 1.2 indicates some of the main legislative provisions.

Box 1.2 Legislation against forms of discrimination

- **Discrimination on the grounds of sex, sexual orientation or gender reassignment** (see the Sex Discrimination Act 1975, (in Northern Ireland, the Sex Discrimination (Northern Ireland) Order 1976), the Equal Treatment Directive (76/207/EEC) and The Equal Opportunities Directive 2006/54/EC implementing equal opportunities, e.g. equal pay. See also the provisions relating to sexual orientation and sexual discrimination in the Employment Equality (Sex Discrimination) Regulations 2005, Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2004 (the Northern Ireland equivalents of these regulations are provided in section 1.1.3).
- **Age discrimination** (see the Employment Equality (Age) Regulations 2006, which have been in force since 1 October 2006) (the Northern Ireland equivalents of these regulations are provided in section 1.1.3).
- **Discrimination on the grounds of religion or belief** (see the Employment Equality (Religion or Belief) Regulations 2003). (the Northern Ireland equivalents of these regulations are provided in section 1.1.3).
- **Discrimination on the grounds of race** (see the Race Relations Act 1976 or in Northern Ireland, the Race Relations (Northern Ireland) Order 1997).
- **Discrimination on the grounds of Disability** (see the Disability Discrimination Acts 1995 and 2005, and website www.direct.gov.uk. Braille, Audio, BSL and Easy read versions are available from The Stationery Office www.tsoshop.co.uk. In the context of employment, see the *Disability Discrimination Act 1995 Code of Practice: Employment and Occupation* (the Code), issued on 1 October 2004, setting out the rights of disabled workers and duties of their employers.

The Code provides that employers should not discriminate against disabled workers, but this is now limited by the House of Lords' decision in *London Borough of Lewisham v Malcolm* [2008] UKHL 43, overruling earlier decisions, which may influence future employment cases. It is now not enough for a disabled person to show that there was some connection between her disability and the reason for the treatment that she challenges. She also needs to show that her disability played some motivating part in the alleged discrimination.

In addition, it is unlawful to discriminate on the grounds of:

- Pregnancy, maternity leave or paternity leave
- Marital or civil partnership status: see the Sex Discrimination Act 1975, Sex Discrimination (Northern Ireland) Order 1976, as amended by the Civil Partnership Act 2004, s. 251 (1)–(2).

Part-time workers are protected in relation to pay and other potential detriments by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000. The Equal Pay Act 1970 and its Northern Ireland counterpart, as amended by subsequent legislation, expects that women employed in an establishment in Great Britain (whether they are British or not) should receive 'equal pay for equal work' in comparison with men, see s. 1(13) and the *Code of Practice on Equal Pay* issued by the Equal Opportunities Commission in 2003.

The Protection from Harassment Act 1997 and Protection from Harassment (Northern Ireland) Order 1997 were designed to protect victims of harassment, whatever form the harassment takes, wherever it occurs, and whatever its motivation. In the workplace, harassment may involve the violation of self-respect, dignity, or a hostile working environment. Harassment (defined in s. 1 of the Act as pursuing a course of conduct which amounts to harassment of another and which the alleged offender knows or ought to know amounts to harassment of the other) is unlawful and may generate civil liability and/or constitute a criminal offence where the victim is caused 'alarm' or 'distress' (s. 7.2). A 'course of conduct' implies an action on at least two occasions, s. 7(2),(3) and 'conduct' includes speech, s. 7(1),(2). Establishing a 'course of conduct' is more difficult when the actions are separated in time than when actions are close together, e.g. within three months of each other, see *Pratt v DPP* [2001] EWHC 483.

In the case of *Kelly v DPP* [2002] EWHC Admin 1428 166 JP 621, three threatening or abusive phone calls were held to constitute harassment. It is our view that threatening email and Internet communications may also be harassment if they cause alarm and distress to the recipient, see *S v DPP* [2008] EWHC (Admin) 438.

It is possible that a therapist or staff member working in private practice, e.g. as part of a consortium, may experience workplace harassment. Such behaviour is contrary to the *Ethical Framework* (BACP 2010a) and potentially grounds for complaint against a therapist colleague. A therapist employing a member of staff who harasses others may be vicariously liable for the actions of their employee. In *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, a clinical auditor hospital employee was subjected to criticism and bullying by his departmental manager, who was rude, abusive and critical to him in front of other staff, imposing unrealistic targets and threatening disciplinary action if these were not met. In this case, the court supported the concept of the 'vicarious liability' of employers for acts of their employees in the course of their employment, and reiterated

that imposing this strict liability on employers encourages them to maintain standards of good practice by their employees. For those reasons, where one employee harasses another, the employer may be held liable. Employers can cover their potential liability with appropriate insurance. For a detailed discussion of the relevant law, see the judgment in the *Majrowski* case and Slade (2008: Chapter 12) Their Lordships' opinions in this leading case about employer's liability for the actions of employees are also reported online at www.publications.parliament.uk.

Careful consideration should be given to providing accessibility and resources in therapy premises for those with disability. See the section on premises below.

In Northern Ireland, additional legislation exists in relation to religious belief and/or political opinion (Fair Employment and Treatment (Northern Ireland) Order 1998).

1.1.5 Finance and tax

Many counsellors are employed part-time and also run their own private self-employed business for another part of the working week. The therapist would be taxed under the PAYE system in respect of their employment and also have to register for self-employed taxation for the business. For employment/self-employment distinctions, see above at 1.1.3.

Business expenditure can be set against profits for tax purposes. Keep receipts for all equipment and bills used for the business. Sometimes only a proportion of the cost of equipment or expenditure can be allowed against income for taxation purposes (e.g. if a therapist uses the car for business, a proportion of the whole car insurance, repair and petrol cost may be allowable; or a proportion of the telephone or heating costs if a therapist works from home).

All self-employed therapists must declare their income (business profits) for tax purposes. HMRC may require to see business records of income and expenditure, created from and supported by all the relevant business documents, including invoices, cheque books, bank statements, paying-in books, and income and expenditure receipts. These records do not necessarily have to be written or audited by an accountant or a book-keeper, but the help of an accountant or book-keeper may be well worth the cost. See www.hmrc.gov.uk/startingup/ for links to sources of advice and help. Data and supporting documents should be kept for seven years. Advice on business record keeping and resources can be found at website: www.hmrc.gov.uk/startingup/keeprecs.htm.

The government website www.hmrc.gov.uk/startingup/taxgate.htm has a good deal of useful information about how National Insurance and taxation might affect the business. VAT limits and the levels of VAT taxation may vary from year to year. Details of the impact of VAT registration, how and where to register, and accounting schemes to simplify VAT accounting are all to be found at the government website www.hmrc.gov.uk/vat/start/register/index.htm.

1.1.6 Health and safety

Under the Health Act 1999 and the Health and Safety at Work Act 1974 (in Northern Ireland the Health and Safety at Work (Northern Ireland) Order 1978), Occupiers' Liability Acts 1957 and 1984, Occupiers' Liability (Northern Ireland) Act 1957, Occupiers' Liability (Northern Ireland) Order 1987 and various asbestos and fire safety regulations, there is a responsibility for employers and those who are in control of work premises to provide a safe environment for workers, clients and visitors. This also applies to therapists who work from home, who should consider safety issues, and therapists who are self-employed must take similar care of themselves and clients under the legislation. Detailed information can be found in the legislation and in resource books such as *The Health and Safety at Work Handbook* (Bamber et al. 2008). Most local authorities have a Health and Safety Officer who may be willing to advise.

Checklist: Health and safety risks

- fire
- asbestos and other dangerous substances in the building
- access to premises
- equipment
- activities
- accidents and emergencies

Checklist: Action to minimise health and safety risks

- assessment of client (customer) needs and abilities
- maintenance of safe access
- fire prevention and control
- first aid facilities and training
- information, training and instruction
- supervision and control
- monitoring
- emergency arrangements.

Therapists working from home may use a room in their house for therapy and also for other purposes. If they do not have a part of the house designated solely for their work and they have no employees, they may not be required to comply with the Health and Safety at Work legislation, but they should be aware of (and insure against) possible risks to clients and themselves. They should also bear in mind the general duty of care to clients (and visitors) and take reasonable safety measures, e.g. adequate household fire safety precautions, removal of dangerous substances and keeping a first aid kit available. There is always a possibility in any of our lives that family, clients or visitors may need first aid, and basic first aid training is always useful! Insurance for public and professional liability is considered in the next section.

1.1.7 Insurance

There are considerable numbers of complaints about therapists to their professional bodies each year, and responding to complaints may require legal assistance and prove expensive. Government regulation of the profession is probably imminent and will almost certainly require compulsory insurance cover. Professional bodies (e.g. BACP, UKCP and BPC) recommend insurance in their practice guidance and some, including BACP, require cover as a precondition of accreditation. Insurance is a means of providing a level of protection for the profession, clients and the public interest, and it is our firm view that adequate professional insurance cover is essential for all those in therapeutic practice.

Insurers may be able to provide advice and help on the appropriate levels of cover in relation to workload, place of work and identified risks. Insurance proves its worth when you need it to pay out. Inexpensive insurers may offer cheap deals, but provide only minimum cover.

Checklist: Insurance cover

- ensure premises are covered for repairs etc.
- obtain cover for occupier's liability
- if working from home, ensure this does not invalidate your usual home insurance cover
- obtain cover for life, health, income
- obtain cover for professional indemnity and public liability

Checklist: Checking an insurance policy

Ask whether insurers provide:

- advice and assistance in dealing with professional complaints
- legal assistance in responding to complaints and legal claims
- a telephone helpline for advice and assistance or access to other help and resources

Do the insurers provide cover for:

- claims for negligence
- dealing with allegations of professional misconduct
- claims for libel and slander
- claims for breach of the therapeutic contract
- public liability
- legal fees in dealing with complaints and claims

Additional cover may include:

- directors' and officers' liability
- public relations assistance to mitigate damage to reputation
- assistance with criminal defence

Watch out for limits on indemnity cover and exclusion clauses in the insurance policy. Most insurance companies set a *limit of indemnity*, i.e. a limit on the total amount of money they would pay out on each policy. This will usually be expressed as indemnity 'for any one claim' or indemnity 'in the aggregate' or similar words to this effect. There is a vast difference. Response to even one claim may take a good deal of money, for example, cover of £1 million might soon be used up. Cover for 'any one claim' is best, in that the stated limit applies to each separate claim on the policy in one insurance year. Cover 'in the aggregate' means that the limit applies to all claims in that year, taken together, so if more than one claim arose in a year, there is a risk that the total of all the claims might exceed the limit.

Some insurers impose an 'excess' and usually, the higher the excess, the lower the insurance premium. In other words, the insurer will only pay out on claims that exceed a certain level, the insured having to foot the bill for the 'excess' amount. An excess of £500 would mean that the insurer pays out on claims that exceed this amount, with the insured therapist paying the first £500 themselves.

Ask for a copy of the terms and conditions of the policy before taking it on, and read all the exclusion clauses, particularly those that appear in 'small print' and in less obvious parts of the policy documents. Make sure that the exclusions set out do not compromise the cover that you want to achieve.

When changing insurers, watch out for the exclusion of claims arising from past events that happened when you were covered by another insurer. Look for retroactive cover, under a 'claims made' policy, or, sometimes, as an extension to an occurrence-based policy.

Therapists who are employers must comply with the Employers' Liability (Compulsory Insurance) Act 1969, s. 1(1) or its Northern Ireland equivalent, and arrange cover 'for bodily injury or disease sustained by his employees, and arising out of or in the course of that employment'. The minimum cover required is £5m for any one or more of the employees arising out of any one occurrence, under regulation 3(1) of the Employers' Liability (Compulsory Insurance) Regulations 1998. A certificate of insurance must be displayed in the workplace (or can now be made electronically). Failure to do so is a criminal offence, with a £1,000 fine. Under the Employers' Liability (Compulsory Insurance) Act 1969, s. 2(2)(a) or Employers' Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972, art. 6(a), certain employees are exempt, including family members: spouse, father, mother, son daughter or other close relatives. An exemption now also applies for Limited Liability Companies that have only one employee where that employee is the owner of the business.

The most important thing when arranging insurance cover is to be completely open and honest with the insurance company. Under contract law and the policy terms of most insurers, a policy may be invalidated if it is found that information

has been deliberately withheld or is incorrect, e.g. failing to declare a previous conviction, or a professional complaint.

1.1.8 Premises

This is a complex area of law, and we cannot go into great detail here, but we can give some pointers to more detailed sources of information. We also focus on some of the main issues raised by therapists in workshops.

Issues to consider:

- The contract needs to be in writing, signed and witnessed by both parties, and it should set out clearly the terms of the sale or lease.
- When buying or leasing premises, it is advisable to take legal advice because there are many issues that might otherwise catch you out. These include title (e.g. you cannot sell or lease land that you do not own), restrictive covenants (e.g. not to carry on a business from that address), rights of way (e.g. the right of a neighbour to use a stairway, or to go through a passageway to get to their dustbin or a shared back gate), planning consents (e.g. an extension built without any necessary planning consent could be subject to an order for demolition), and the respective responsibilities and liabilities of the landlord/tenant; lessor/lessee (e.g. maintenance, decoration, management fees etc.).
- Premises must comply with disability legislation. See the glossary for definition of disability, see also the Disability Discrimination Act 1995 (DDA) and the Disability Discrimination Act 2005 (DDA). Therapists, whether providing paid or free-of-charge therapy, are providing services in the context of a 'profession or trade'. Part III of the DDA 1995 makes it unlawful to discriminate against a disabled person by unjustifiably providing less favourable treatment (s. 20) or failing to take reasonable steps to provide access or facilities (s. 21). The Equality and Human Rights Commission runs a dedicated disability helpline (see Useful Resources at the end of this book), and the Acts and guidance are available on their website www.direct.gov.uk. There is also a useful booklet *Making Access to Goods and Services Easier for the Disabled: a Practical Guide for Small Business and Service Providers* by the Disability Rights Commission, available from the Equality and Human Rights Commission or at www.direct.gov.uk.
- Health and safety issues must be addressed. Employers and/or those who are in total or partial control of work premises must provide a safe environment for employees, staff and volunteers, clients, customers and those who use the facilities, visitors, neighbours, the public, and even (in some cases) trespassers. The local authority has a Health and Safety Officer who may be willing to advise.
- Therapists working from home, who use a room in their house from time to time for therapy (and therefore do not have a part of the house designated solely for their work) and who have no employees, although perhaps not required to comply with the Health and Safety at Work Act or Health and Safety at Work (Northern Ireland) Order 1978, should be aware of (and insure against) the possible risks to clients and themselves, and bear in mind the general duty of care to clients (and visitors) and take reasonable safety measures, e.g. adequate household fire safety precautions, removal of dangerous substances and keeping a first aid kit available. See the Health and Safety at Work Act 1974 (or, if relevant, the Northern Ireland equivalent), the Regulatory Reform (Fire Safety) Order 2005, Occupiers' Liability Acts 1957 and 1984 and Occupiers' Liability

(Northern Ireland Order 1987) and the Control of Asbestos Regulations 2006 (or the Control of Asbestos Regulations (Northern Ireland) 2007).

- Public liability and professional indemnity insurance is essential.
- Accidents or unforeseen events can happen, e.g. an attack by a client on another person, or a client falling over a carpet or stairs. Public liability insurance cover is necessary to protect therapists, clients and the public in the event of an accident in which a member of the public suffers personal injury. Also consider the matter of insurance cover for buildings and contents, so check the terms of the building and contents insurance policy, and arrange insurance that covers all the necessary aspects of the therapy business at home. Ensure that present policies are not adversely affected by working from home.
- Therapists who own or are in control of premises for work purposes must comply with the Occupiers' Liability Acts 1957 and 1984, the Occupiers' Liability (Northern Ireland) Act 1957, and the Occupiers' Liability (Scotland) Act 1960, which create liability for safety and security of premises, see (Mitchells and Bond 2010, Chapter 7).

Premises must also comply with the Disability Discrimination Act 1995 (DDA 1995) and the Disability Discrimination Act 2005 (DDA 2005). Part III of the DDA 1995 makes it unlawful to discriminate against a disabled person by unjustifiably providing less favourable treatment (s. 20) or failing to take reasonable steps to provide access or facilities (s. 21). Government agencies and large businesses have strict rules for compliance. For smaller agencies and businesses, see *Making Access to Goods and Services Easier for the Disabled: a Practical Guide for Small Business and Service Providers*, by the Disability Rights Commission, which is available from the Equality and Human Rights Commission or at www.direct.gov.uk. The Equality and Human Rights Commission also currently runs a dedicated disability helpline to assist businesses to assess what changes they should be reasonably required to make in their premises, e.g. widening doors, ramps, adapted desks, lavatories and washing facilities, etc. (see Useful Resources at the end of this book), and the Acts and guidance are available at www.direct.gov.uk. Braille, Audio, BSL and Easy read versions are available from The Stationery Office, at www.tsoshop.co.uk. An audit of business premises and the feasibility of making disability provisions can be obtained from the *Centre for Accessible Environment* (www.cae.org.uk) or the *National Register of Access Consultants* (www.nrac.org.uk).

Ensure that working from home or other premises does not put you in breach of a mortgage agreement, or planning regulations. A useful resource is the Planning Portal, a UK government online planning and building regulations resource, available at www.planningportal.gov.uk. It was designed to help enquirers to find out whether their proposed action requires planning consent, the relevant building regulations that apply, and to make any necessary application.

Restrictions may be placed on the use of buildings and land for the benefit of neighbours and the community, and they are set out in title deeds and leases. In titles that are registered with the Land Registry, restrictive covenants are entered on the register along with the title to the land, and a copy can be obtained for the payment of a fee from the local Land Registry. For example, many dwelling houses and flats have restrictive covenants forbidding certain uses of the

premises (a covenant against business use may prohibit 'any business', or prohibit specific sorts of business, e.g. use of the building as a shop or garage etc.). A covenant against business use may mean that neighbours could object if the therapist begins to work from home, and action could be taken in the local county court to enforce the restrictive covenant. If there are restrictive covenants, seek advice from a conveyancing lawyer. In Scotland, premises may be subject to a 'burden' in the title deeds which restricts their use. The Registers of Scotland will provide details of the burdens pertaining to a particular property in exchange for the payment of a small fee. Further information is available at www.ros.gov.uk.

Working from home can be very convenient, but it has its potential problems, e.g. the use of the premises may be shared with family, pets and general bric-a-brac, any of which may provide unexpected difficulties for clients who may object to being licked enthusiastically by an excited dog as they come through the gate, meeting granny or children in the hall, or simply being faced with family pictures, religious objects, or other things that may constitute unwelcome self-disclosure. The insurance companies report complaints and claims based on issues just such as these.

1.1.9 Records, data protection and freedom of information

The *Ethical Framework* (BACP 2010a: 3) refers to trustworthiness, expecting therapists to 'regard confidentiality as an obligation arising from the client's trust; restrict any disclosure of confidential information about clients to furthering the purposes for which it was originally disclosed'.

Therapists are not legally obliged to keep notes, but are increasingly expected by the courts and others to keep appropriate and accurate notes as a routine part of professional practice. Government services and those regulated by the Health Professions Council are expected to keep notes. There are some situations where notes are required, e.g. the Crown Prosecution Service (England and Wales) requires that, when providing therapy for a witness, 'Records of therapy (which includes videos and tapes as well as notes) and other contacts with the witness must be maintained so that they can be produced if required by the court' (CPS, 2005b: section 11.4) and there are comparable provisions for therapists working with child witnesses (CPS, 2005a: ss. 3.7–3.14). This CPS guidance is currently being revised and updated, so watch out for new versions. The Scottish Government has also issued guidance for therapists in Scotland: *Interviewing Child Witnesses in Scotland* and *Code of Practice to Facilitate the Provision of Therapeutic Support to Child Witnesses in Court Proceedings*. Both of these publications are available on the Scottish Government's website at www.scotland.gov.uk.

The Northern Ireland office has issued guidance in *Achieving Best Evidence in Criminal Proceedings (Northern Ireland): Guidance for Vulnerable Witnesses, including Children*. This is available on the Northern Ireland office website at www.nio.gov.uk.

The *Ethical Framework* (BACP 2010a: 5): states

Practitioners are advised to keep appropriate records of their work with clients unless there are good and sufficient reasons for not keeping any records. All records should be accurate, respectful of clients and colleagues and protected from unauthorised disclosure. Any records should be kept securely and adequately protected from unauthorised intrusion or disclosure. Practitioners should take into account their responsibilities and their clients' rights under data protection legislation and any other legal requirements.

A therapist who is either under a legal obligation to keep records or is ethically committed to doing so may decline to work with a client who refuses to permit the keeping of records.

Some therapists may wish to see clients without keeping any records. The ethical reasons that they may have for doing so might include the deterrent effect of record keeping on some potential clients, for example young people or others who live at the margins of society and mistrust the authorities. In some circumstances, the therapist may have no secure way of protecting records from unauthorised access where they are known to be vulnerable to burglary. In some cases, this may be an exceptional arrangement for a particular client who will accept therapy only on the basis that records are not kept. These may amount to 'good and sufficient reasons not to keep records' within the context of the *Ethical Framework*.

Box 1.3 Data protection legislation

- Data Protection Act 1998
- Freedom of Information Act 2000
- The Data Protection Act 1998 (Commencement) Order 2000
- The Data Protection Act 1998 (Commencement No. 2) Order 2008
- The Data Protection Act 1998 (Commencement No. 3) Order 2011
- The Data Protection (Monetary Penalties) Order 2010
- The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010
- Data Protection (Processing of Sensitive Personal Data) Order 2000
- The Data Protection (Processing of Sensitive Personal Data) Order 2006
- The Data Protection (Processing of Sensitive Personal Data) Order 2009
- The Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) (Amendment) Order 2010
- The Data Protection (Notification and Notification Fees) (Amendment) Regulations 2009
- Data Protection (Subjects Access Modification) (Health) Order 2000
- Data Protection (Subjects Access Modification) (Education) Order 2000
- Data Protection (Subjects Access Modification) (Social Work) Order 2000
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Manner and Place for the Taking of Fingerprints and Prescribed Personal Data Holders) Regulations 2010

The Data Protection Act 1998 and Freedom of Information Act 2000 govern a client's access to personal records. Under these statutes, all personal data held by public bodies, whether held electronically or handwritten, can be accessed by the client (the data subject), with certain statutory safeguards. These include health, education and social services records, irrespective of when or how they were made and stored.

Client records held by therapists working privately are not subject to the Freedom of Information Act 2000, but if the records are stored electronically (i.e. if notes are held on a computer, video or tape recordings, etc), then therapists must register under the Data Protection Act.

There is often some confusion about two separate concepts:

- **Registration** under the Data Protection Act is compulsory for all electronically held personal records.
- Irrespective of registration, the Data Protection Act provisions still apply not only to all records held electronically (i.e. those which have been registered) and under the Freedom of Information Act to all government departments, but they also apply to **all manual records** held in a 'relevant system'.

The term 'relevant system' means handwritten records kept in a way that would enable a temp to find a file or a piece of information easily. This means that if therapists in any kind of private practice have neat, tidy records in a 'relevant system', although that therapist might not have to register under the Data Protection Act, the Data Protection Act provisions would still apply to those records.

So the advice we give to therapists is simple: If you keep records on computer or electronically in recordings, etc., register under the Data Protection Act with the Information Commissioner's Office. If your records are handwritten, then keep neat, tidy records, and comply with the Data Protection Act provisions anyway (storage, client right of access etc.). That way, you cannot go wrong!

Clients will have the right to see their notes if the Data Protection Act applies, or if this is agreed in their therapeutic contract.

For further details of how the data protection legislation works, see Bond and Mitchels (2008, Chapter 6), Bond, Brewer et al. (2010) and Bond and Jenkins (2009), and the website of the Information Commissioner, www.ico.gov.uk. It is always wise to check with the Information Commissioner's office if in any doubt about whether to register. Registration involves completion of a fairly straightforward form, and there is an annual fee to pay.

For discussion and some examples of records of information sharing see 1.4 below.

Record storage

One of the issues for therapists, especially those working from home is the storage of client records and notes. For a full discussion of this see *Confidentiality and*

Record Keeping for Counsellors and Psychotherapists (Bond and Mitchells 2008). We recommend keeping records safely and securely in a locked cabinet or other secure locked filing system (note that some insurers and organisations now require therapists to use metal cabinets for record storage), and ensuring adequate security of any papers, electronic data storage and the premises as a whole, with appropriate insurance cover both for the premises and for professional liability.

1.1.10 Out of hours cover

Therapists are strongly advised to make provision for cover by a trusted colleague or supervisor in the event of death, illness, disability or any other inability of the therapist to work, plus 'out-of-hours' arrangements. Ensure that clients are aware of the therapist's boundaries and arrangements around out-of-hours contact, and negotiate these issues as part of the therapeutic contract where necessary. Protect the duty of confidentiality to clients by ensuring that if there is a telephone line or Internet connection at home, business messages and emails remain confidential. If there is an answer-phone, ensure that clients' messages are confidential, and checked regularly.

1.2 Contractual issues

1.2.1 Contract terms

Therapists in private practice may enter into many different types of contracts in the course of their working life, for example buying, leasing or renting premises from which to work, contracts for insurance, loans and mortgages, telephone, Internet or fuel supply, and perhaps for services, e.g. secretarial help or cleaning. Many of these contracts will apply also to therapists working from their own home. There are also therapeutic contracts with clients. In Scotland, the courts recognise a further requirement for the formation of a binding contract: *consensus in idem*. This requires that parties have reached a mutual understanding and agreement about the terms of the contract. In England and Wales, this concept also underpins contract law, and emphasises the need for mutual clarity and understanding of expectations and promises when making any kind of contract.

For fairness of terms in contracts, see the Misrepresentation Act 1967 (in Northern Ireland, the Misrepresentation Act (Northern Ireland) 1967) and the Unfair Contract Terms Act 1977. Goods purchased must be fit for the purpose for which they were intended, see the Sale of Goods Act 1979, which provides a legal remedy over and above commercial guarantees and manufacturers' warranties.

1.2.2 Therapeutic contracts

In counselling, expectations may not be clearly expressed or understood by both parties. Clients arriving for the first time do not always have a clear idea of what they expect or want from therapy, they may be anxious and forget to ask about the rates

charged or whether they have to pay for missed sessions, how long therapy may take, or what to do if they are dissatisfied with their therapy. The therapist may not have a clear policy about missed sessions or late payments. Client and therapist may have different expectations about confidentiality. Contractual terms can be clarified by discussion with new clients at their intake assessment or first session, or by the provision of a leaflet setting out the basic terms of the therapy offered. Verbal contracts made at the first therapeutic session may not be remembered clearly, so it is better, wherever possible, to have a written therapeutic contract for clarity and as an aide-mémoire. See the guidance in Mitchels and Bond (2010: Chapter 4) and BACP Information Sheet P.11: *Making the Contract for Counselling and Psychotherapy* (Dale 2009c).

Discussion of the terms on which therapy is offered does not have to be protracted, difficult or legalistic. Sometimes negotiation of the therapeutic contract can be a helpful part of the therapeutic process, providing an opportunity to build trust, explore relevant issues, create mutual understanding and develop a therapeutic alliance. If a client is anxious or their mental state is not conducive to concentration on details or remembering terms, the contract can always be revisited as therapy progresses.

It is helpful to provide advance information about therapy, and the terms on which it is offered. This can be in various forms, for example leaflets, posters, entries in directories or web pages, and advertisements. Advance information may shorten and facilitate the initial discussion about the terms of the therapeutic contract. If that discussion is then supported by a written or other record of the agreement (e.g. a tape recording or Braille note for clients with visual impairment), clients are helped to assimilate information and to refer to and recall what was agreed. If clients are also made aware that they (or the therapist) can raise issues about their contract again during the course of therapy if they wish to do so, then client autonomy is respected and the contract may be renegotiated at a later date.

Should therapeutic contracts be in writing?

There is no requirement in law that a therapeutic contract should be written down, and in some circumstances verbal therapeutic contracts might not present difficulties. However, a written record is helpful as an aide-mémoire for therapist and client, and without a contract in writing, the absence of any evidence of what was actually agreed might become problematic if a client considers that they have been misled or harmed in any way. In the event of a dispute it would be difficult to establish satisfactorily what had been agreed, as it would be just one person's word against that of another.

Implied terms in therapeutic contracts

If a legal dispute arose over confidentiality, case law operates in ways that will generally favour a client claiming a right to confidentiality (see Bond and Mitchels 2008: 127–31). The legal presumption in favour of regarding therapy as a confidential activity is so strong that in the absence of any evidence to the contrary, a court

may imply a term of confidentiality and then hold a therapist liable for a breach of the terms implied by the court. Similarly, any claims for breach of confidence in common law and under data protection law will start with an assumption of a commitment to confidentiality unless the therapist can establish a legal exception based on the client's consent, a statutory duty or the balance of public interest. This means that clients should be informed of (and agree to) any exceptions to confidentiality, in advance of therapy commencing. For implied terms regarding fees, see 1.2.4 below.

1.2.3 Enforceability of contracts

Legally enforceable contracts embody a number of essential ingredients that may be explicit or implied:

- a promise (for example to do or supply something)
- an agreement, and
- an exchange (for example money given in return for goods or services, in law referred to as the 'consideration').

Consideration is 'the price of a promise' per Lord Dunedin in *Dunlop v Selfridge* [1915] AC 847 at 855. In therapy, consideration is the money paid by the client for their sessions. The therapist in return promises to provide therapy in accordance with their modality, training and experience. The ingredients of contracts are regulated by statute, subordinate legislation and by case law. Some promises are made with no consideration expected in return, for example voluntary gifts of money or land, and wills. These are not contracts (although they may be legally enforceable) and may be recorded in legal deeds, signed and witnessed.

There are time limits for suing for breach of contract, usually six years for commercial contracts (five years in Scotland), see Limitation Act 1980, Limitation (Northern Ireland) Order 1989, Prescription and Limitation (Scotland) Act 1973 and *Mitchels and Bond* (2008:72–8).

1.2.4 Fees for therapy, and issues of non-payment

If the fees are not agreed before therapy starts, the parties may have no clear legally enforceable contract. There are also potential ethical issues here, for example failure to support client autonomy and possibly a lack of self-respect for the therapist (BACP 2010a). If the client then receives therapy but refuses to pay any fee, the therapist may have difficulty in enforcing payment. If this should happen, once a therapist realises their mistake and wishes to continue working with that client, they should discuss and negotiate the terms of the therapy as soon as possible for an effective contract to be established, at least for their future work.

There is an old-established rule that if A does work for B, at B's request, in circumstances where *both* parties would reasonably expect A to be paid for it, and

B promises to pay a particular sum for that work, then B's promise would be enforceable see *Lampleigh v Braithwait* [1615] Hob 105. In Scotland a similar rule, *quantum meruit* (Latin: meaning 'for what it is worth') applies. These rules might rescue the situation if the client is willing to pay a reasonable fee, but prevention is far better than cure. Most therapists would not want to have to take a client to court to obtain payment for past sessions.

Interest for late payment of debts: How to encourage prompt payment!

Some client agencies and commercial organisations (including solicitors!) who commission therapy, will eventually pay up, but seem to keep you waiting for ever. In private practice, working often on a tight budget, this is at the least, frustrating. Constant reminders to pay up are tiring to produce and do not enhance business relationships. Recognising this, parliament passed the Late Payment of Commercial Debts (Interest) Act 1998, which, as amended by subsequent legislation, allows interest to be charged for the late payment of contracts for goods or services where both parties are acting in the course of a business. Interest (currently set by the rules at the generous rate of 8% over the base rate) is payable from either an agreed date in the contract or within 30 days after delivery or invoice, whichever is the later. In Scotland interest at the judicial rate of 8% is usually payable only from the date when court proceedings are served on the Defender, although interest may be payable from an earlier date if it is provided for in the contract between the parties.

Therapists (and other professionals) have told us that they have successfully avoided problems of late payment by simply adding at the end of each invoice a sentence reminding clients of this law, e.g. *'Payment for this invoice should be remitted within 30 working days, after which interest will be charged in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.'*

1.2.5 Mental capacity

A client's ability to give legally valid consent to any medical, psychiatric or therapeutic assessment or treatment, or to enter into either a valid therapeutic contract or a legally binding contract for services, will depend upon their mental capacity to make an informed decision.

Mental capacity is a legal concept, according to which a person's ability to make rational, informed decisions is assessed, and for adults, this is now governed by the Mental Capacity Act 2005, the Mental Health Act 2007 and the Mental Capacity Act 2005 (Appropriate Body) (England) Regulations 2006. Relevant publications and websites are listed at the end of this book. For the relevant provisions in Scotland, see the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

Northern Ireland does not have mental capacity legislation although a Mental Capacity Bill has been proposed, which will be ready for introduction to the Assembly

in 2011. Mental capacity issues are dealt with under common law. Please see the Northern Ireland Executive website (www.northernireland.gov.uk) for further details.

There is no single test for mental capacity to consent. Assessment of mental capacity is not on a theoretical ability to make decisions generally, but is situation-specific and depends upon the ability of the person to:

- take in and understand information, including the risks and benefits of the decision to be made, and
- retain the information long enough to weigh up the factors, make the decision and
- communicate their wishes.

Part 1 of the Mental Capacity Act 2005 (MCA) defines ‘persons who lack capacity’ and sets out relevant principles to be applied, including a checklist to be used to ascertain their best interests. In particular, it requires that a person is not to be treated as lacking capacity simply because they may be making an unwise decision.

Note that a person may be mentally incapacitated on a temporary basis (i.e. following an accident or illness), or on a longer-term or permanent basis (i.e. those who suffer from severe long-term mental illness or other impairment of mental functioning) and in their case capacity to make medical decisions is likely to be assessed by a medical doctor or psychiatrist. The assessment of a person’s mental capacity for other tasks may be made by others. For example, the decision on a client’s mental capacity to make a will may be made by their lawyer. The decision whether they are able to engage in therapy may be made by their therapist. If there is any doubt, advice from an appropriate registered medical practitioner, psychiatrist or psychologist should be sought. If there is a dispute about a person’s mental capacity to make an important medical decision, the matter should be referred to the High Court or Court of Session, which will then assist and, if necessary, make a ruling. A person’s capacity is relevant in therapy when considering whether someone can give a valid consent to receive therapy or agree to the contractual terms on which therapy is being provided.

In relation to entering into contracts, for minors, the relevant law is s. 1 of the Family Law Reform Act 1969 and s. 1 of the Age of Majority Act (Northern Ireland) 1969, which lowered the age of majority from 21 to 18, the Minors’ Contracts Act 1987, and Minors’ Contracts (Northern Ireland) Order 1988, which allows minors (children and young people under the age of 18) to go back on contracts, with some exceptions. In Scotland, young people under the age of 16 cannot usually enter into contracts. From 16–18 years, contracts may be challenged in the Sheriff’s court if they are ‘prejudicial’ to the young person. For further discussion of mental capacity and the ability of minors and vulnerable adults to enter into contracts, see (Mitchels and Bond 2010: 63–8).

1.2.6 Contracts that must be in writing

Some contracts, for example for the sale or lease of land, must be ‘evidenced in writing’ to be legally enforceable (Law of Property Act 1925, s. 52 or, in Northern

Ireland, Statute of Frauds (Ireland) Act 1695, s. 2). It is therefore advisable to ensure that all agreements for a lease or tenancy of premises and sales of land are in writing. It is advisable to obtain legal advice for sales of land and purchasing leases and tenancies, because there are often complex legal and financial issues involved and pitfalls to be avoided, particularly in this current climate of rapid changes in property values.

There are some specific statutory requirements for certain types of contract to be written or evidenced in writing, including insurance (Mitchels and Bond 2010: 87–93), guarantees, hire, consumer credit, and for the sale of certain specified goods and services. Terms of employment, if not provided at the outset, should be confirmed in writing after 1 month of starting in a statement giving certain specified details, even though other terms of the employment may be verbal. Employment is deduced from the contract and the surrounding circumstances. For discussion of this, and an explanation of the distinction between a ‘contract of service’ (i.e. employment) and ‘a contract for services’ or ‘contract for the provision of services’ (i.e. self-employment) see (Mitchels and Bond 2010:107–11).

In Scotland the statutory provisions relating to which type of contracts require to be evidenced by writing differ from the provisions in England and Northern Ireland. Section 1 of the Requirements of Writing (Scotland) Act 1995 lists some of the situations in which writing is required to make a contract legally enforceable. Examples of such situations include contracts which vary rights in land. There is no requirement for a contract for the provision of therapy to be written down. However, as with the position in England and Northern Ireland, therapists should always ensure that there is adequate written evidence of any contract they enter into, in order to protect themselves in the event of a future dispute.

1.2.7 Electronic signatures, Internet contracts, etc.

In modern times, the use of the Internet for commerce is developing. Electronic communication via emails and documents sent as attachments, and digital signatures have resulted in specific legislation (in the UK, see the Electronic Communications Act 2000, Electronic Commerce (EC Directive) Regulations 2002 and Electronic Signatures Regulations 2002). The general rule is that computer-generated communications, which provide a visible representation or record (which could if necessary be printed out as hard copies), are generally deemed to be ‘in writing’ as defined in the Interpretation Act 1978. If stored on the computer, documents must be retrievable in visible form. There is an unresolved issue about text and pager messages, which could be seen, but not printed out as hard copies.

1.2.8 Ethical issues and ‘soft law’ on contracts

Therapists need to consider ethical and professional issues, legal requirements, and any relevant agency policies and procedures. For helpful information from

the BACP website, see Information Sheets P.11: *Making the Contract for Counselling and Psychotherapy* (Dale 2009c), P.2: *Charging for Therapy in Private Practice: Pitfalls and Ethical Issues* (Dale 2009a) and the *Ethical Framework* (BACP 2010a). We explore some of these issues in (Bond and Mitchels 2008: Chapter 12), using examples of existing contracts in use by colleagues. However, we would encourage therapists to keep an eye on developments in law and practice, and to create their own contracts, compliant with current law and the public interest, and meeting the needs of the therapist, agency and client.

1.2.9 Contracts of employment, contracts for volunteer workers and contracts for services.

We have discussed the situation of the therapist as a self-employed business person. Therapists who are self-employed may also be commissioned to undertake pieces of work for businesses, agencies and organisations in a 'contract for services' or 'contract to provide services'.

Therapists may be the employees of a business or organisation. Volunteer therapists are also potentially subject to binding contracts with the agency for which they work, and have many of the legal rights of employees, e.g. health and safety, equality of opportunities, etc. Volunteers will not, of course, have a right to employment pension, maternity/paternity pay or other financial remuneration, as they are unpaid. A contract of service (employment contract) should set out the terms and conditions upon which the worker is employed. Volunteers should also have a clear contract with their terms of work. These terms are legally binding on both parties unless varied by mutual agreement. Contracts of employment ideally should be written, or at least the main terms of employment should be evidenced in a written statement, so that the terms are readily available for reference if a dispute arises (Mitchels and Bond 2010: 107–8).

Therapists may also themselves be employers, e.g. of reception or cleaning staff, or may have other therapists working for them.

1.2.10 Dealing with legal claims

Wherever there is a contracted service, there may be a potential legal claim. There is excellent guidance about making legal claims, and dealing with claims made against therapists on the government website, www.hmcourts-service.gov.uk. For claims in Northern Ireland, see www.courtnti.gov.uk, and for claims in Scotland, see www.scotcourts.gov.uk, but if the amount concerned is significant to the therapist, then it is advisable to seek legal advice before taking action. The Citizens Advice Bureau locally usually has free legal advice sessions, and professional insurance may cover free legal advice provided or paid for by the insurer. See also (Mitchels and Bond 2010: 120–32).

For advice about claiming payment of unpaid fees, and how to go some way towards avoiding problems with unpaid invoices, see 1.2.4 above.

1.3 Practice issues

1.3.1. Currency of information, continuing professional development and training

One of the main challenges in private practice is the work involved in keeping up to date with ethics, current law, government policy and continuing education in topics relevant to therapeutic practice. It is here that the role of professional organisations, such as BACP, are important in gathering and disseminating information for practitioners. Even though the information is provided, some busy practitioners find it difficult to make the time for catching up by reading journals and newsletters. The *Ethical Framework* (BACP 2010a: 6, paras 7–10) requires therapists to maintain competent practice by regular supervision and consultative support, monitoring and reviewing practice, keeping up to date with knowledge with continuing professional development and educational activities and being aware of and understanding any legal requirements concerning their work.

1.3.2 Assessment of what to charge for therapy services

In private practice a common theme seems to be fees. How much to charge clients and arrangement of fees raises emotional and practical issues. The amount of any fees payable, and terms (e.g. whether payment is required for missed sessions etc.) should be made clear to a client before starting therapy, and form part of the therapeutic contract. In financial arrangements, practitioners are required to be honest, straightforward and accountable in all financial matters concerning their clients and other professional relationships (BACP 2010a: 10, para. 62). If finances are clear, there is less likelihood of this being a cause of difficulty between therapist and client, although it may still trigger issues in the therapy about valuing self and others, reflect aspects of financial struggles, etc. which can be worked through. Fees are difficult to negotiate for some practitioners. In our workshops, therapists sometimes say that, particularly when they started work after training, it was difficult to assess an appropriate fee for their work and also to know how and when to apply a variable fee structure. Equally, practitioners may feel resentful that clients who have asked for reduced fees subsequently talk in therapy about spending money on luxury items that the therapist could not afford. We have to be careful of making assumptions: a client who has therapy for a low £5 weekly fee and then comes in to say joyfully that they have spent £50 on an expensive hairdo may do this for many reasons – varying from the cold-blooded exploitation of a kind-hearted therapist to a real sign of recovery from depression – and so finances can raise important therapeutic issues with which supervision and mentoring by experienced practitioners could help! It is best to be open about finances in therapy and deal with any emotional or process issues that may surround it, and avoid the necessity of having to issue fee reminders or even to take legal proceedings against clients for unpaid fees. For contracting for fees and legal enforcement of non-payment of fees see 1.2.4 above.

1.3.3 Missed appointments

Many therapists seem to struggle with finding the right approach to missed appointments. Some of that struggle may be about self-respect and valuing ourselves and our time. A hard and fast rule is simple to operate, but may cause feelings of resentment or unfairness where the client was unavoidably detained, e.g. through serious illness. For many therapists, therefore, a hard and fast rule does not seem the best approach, preferring to have some flexibility in situations where the client is unavoidably prevented from coming to therapy. Where there is flexibility, a problem may occur in defining what constitutes a 'reasonable excuse' for not coming and to justify waiver of the counselling fee. This in itself may become a matter of friction between therapist and client. How can one decide? What principles might apply? For example, would you consider any of the following client's reasons for non-attendance (all real examples from practice) to constitute sufficient justification for non-attendance and therefore justify a waiver of the counselling fee?

- Sorry, I forgot
- The dog ate the letter with the appointment in it
- I had a cold
- I was ill with the 'flu
- I was in hospital
- My mum/dad/grannie/auntie was in hospital
- I was going to come, but then did not feel like it today
- I decided I was not coming any more but did not know how to tell you
- The voices said I should stay in today
- My boiler broke this morning
- My cat was ill
- My partner did not want me to come
- It was such a lovely day, I went for a picnic instead

The list is endless, but from these examples one can see that, rather than making definite 'rules', it might be easier to have certain principles on which a decision of 'reasonableness' is made. Some therapists might involve the client in the decision making process, e.g. asking them whether they think that their decision not to come was reasonable, or whether they feel that they should pay for the missed session. That kind of involvement would need a good established relationship of trust with the client. Issues such as the strength and quality of the client/therapist relationship, patterns of behaviour, frequency of missed sessions, and the general attitude of the client towards commitment to the process are all relevant.

1.3.4 The illness, or death of the therapist and 'counselling wills'

Therapists have a duty of care to clients and this includes making a contingency plan for times when the therapist is unexpectedly ill or dies. Clients' needs must

be taken into account in dealing with cancellation of appointments and/or informing clients of the situation and dealing with the impact for the clients of the illness/death of the therapist. This news may be traumatic for clients and would need to be imparted carefully, and the therapist's supervisor or an appointed colleague might be asked to take care of clients' needs in this situation. Supervisors are well placed to undertake this role since they are likely to know the clients cases through their supervision work with the therapist, even though the clients may not be specifically identified in supervision. The role would require trust, tact and confidentiality and should be carried out by an experienced practitioner.

Counsellors are well advised to consider the possibility of their own illness/unavailability/death and to make what is colloquially referred to as a 'counselling will' i.e. provision for their own illness or death. They might also perhaps take into account the possibility of arranging suitable payment (from their estate or from funds set aside for the purpose) for the person taking on that role. Before making the arrangements, therapists should always ask the person whether they are willing to accept this role, as it may be burdensome in time and energy. Supervisors with many supervisees might also need to consider whether they can handle the additional potential workload, before accepting the role.

1.3.5 Summary checklist: Starting up in business working from home or in other premises

We have discussed each of these topics individually earlier in this chapter, but this checklist may prove useful as a reminder.

Checklist: Issues to consider when setting up a business

- Business start-up advice
- Start date (take financial advice on best date to choose)
- Loans, mortgages and capital (check special offers for new businesses)
- Accounting, book keeping and tax liability
- New bank accounts for the business
- Record keeping and storage, data protection legislation compliance where relevant
- Suitability of the premises/facilities/environment for therapeutic work?
- Do I need to make adaptations/changes? If so, do I need planning consent for any change of use, conversions or extensions?
- Admin and services, e.g. telephone line, Internet access, reception, correspondence, out of hours arrangements, etc.
- If renting or leasing, do I need the landlord's consent?
- Are there any restrictive covenants against running a business from home?
- Insurance (professional and public liability, the premises and contents)
- Health and safety
- Disability legislation compliance

- Ethical and, in particular, boundary issues, e.g. confidentiality for the client on arrival and leaving or waiting, use of therapy room, storage of client records, facilities, inadvertent self-disclosure by the therapist through their possessions in the home, etc.
- Marketing: business cards, advertising, e.g. Yellow pages, local papers and shops, websites, etc.
- Check Internet and local resources for support and help, e.g. www.businesslink.gov.uk, a very useful website

1.4 Interface and managing movement between private practice and other contexts

1.4.1 Information sharing and disclosures

Sharing information between professionals is often fraught with difficulties, often because there may be different expectations and obligations in branches of the professions, e.g. health professionals may be used to routine information sharing within a team, and private therapists may be used to keeping one to one confidentiality for their clients.

If in any doubt, first clarify why the information is required, and the basis on which you are being asked to disclose something. Consider whether this is compatible with your professional ethics, the law and the context of your practice. We have developed a checklist of issues for consideration which may help therapists in the decision making process about sharing information, see below and also (Bond and Mitchels 2008, Chapter 9).

Checklist: Disclosure

- Is this information regulated by the Data Protection Act 1998 (for example, do the records comprise client-identifiable sensitive personal data held on computer or in a relevant filing system)?
- Is this information regulated by the Freedom of Information Act 2000; for example, were the notes made by a professional working for a public body in health, education or social care?
- What are the relevant rights of the person concerned under the Human Rights Act 1998?
- If working in the health community, is disclosure compliant with the Caldicott Principles and guidance (see 1.4.3 below)?
- Is there a legitimate requirement to share this information; e.g. a statutory duty or a court order?
- What is the purpose of sharing the information?
- If the information concerns a child, young person, or a vulnerable adult, is it in their best interests to share the information?
- Is the information confidential? If so, do you have consent to share it?
- If consent is refused, or there are good reasons not to seek consent, does the public interest necessitate or justify sharing the information?
- Is the decision and rationale for sharing the information recorded?
- What is the most appropriate way to share this information?

Recording any breaches of confidentiality

Recording any breaches of confidentiality is a requirement in some agencies and a wise precaution when working in private practice or as a volunteer. Such a record should include:

- Whether or not the client has consented to disclosure
- Evidence of the client's consent
- What information has been disclosed, to whom, and when
- The justification for the disclosure if it has not been authorised by the client (i.e. in the public interest, required by law, etc.).

Examples of brief records of disclosures/referrals

- 1 Re Client [name]. Letter sent (attached) dated 18 May 2010 to Dr X, at client's request and with client's written consent (attached). Client reports severe depressive feelings and would like to explore the possibility of medication
- 2 Re Client [name]. Tel. call made at 2.15pm on 18 May 2010 to Ms X at Lyndale Hospital, Social Care Department. Information given: Mrs Z, now aged 89, has been recently feeling very anxious and fearful at home, and she has become afraid that she cannot cope at home alone. She was admitted to hospital today suffering from bruising and scalds resulting from a fall when cooking. Disclosure made without client consent, as client too unwell today to speak. Please explore possibility of appropriate support or residential care for client on discharge from hospital.

1.4.2 Inter-agency working and policy making

In (Bond and Mitchels 2008, Chapter 10), we considered the development of agency policies that address the interface between therapy practice and other contexts, for example inter-agency co-operation in child protection, mental health care, crime prevention, care of vulnerable adults, etc. Policies should address any requirements of the courts and comply with the law – for example the Data Protection Act 1988 and Freedom of Information Act 2000.

The issues in the disclosure checklist also apply in this situation, but here we have the added complexity of inter-agency working. Each professional in the team will have their respective professional rules and guidance which may be different from (or even conflict with) those of others in the team. In addition, some professionals may only come together as a team for specific purposes, and individuals may have separate work roles outside the team.

Personal considerations:

- Is the team fully aware of and operating within the requirements of the law?
- What is required by the applicable professional disciplinary organisations?
- If there are more than one professional disciplinary organisation involved, how compatible are their requirements?

- Does my role in the team conflict at any point with my other roles outside the team?
- Does the team have a clear policy and procedures, e.g. for making and keeping records, protection of client confidentiality, and referrals?
- Can I work comfortably within the team policy and procedures?
- Are the clients of the team fully aware of and in agreement with the team policies and procedures?
- If difficulties arise and my perception of the best interests of a client conflicts with team policy/procedures, how can we address and resolve this potential conflict?
- What professional guidance is relevant to me and helpful to the team as a whole?

1.4.3 Developments in inter-agency collaboration – the Caldicott Principles

Increasing attention has been given to standards for confidentiality and protection of information, resulting in a plethora of guidance, departmental circulars, codes of practice, charters, and recommendations in departmental and inter-departmental reports. In 1997, the Caldicott Committee delivered the Report on the Review of Patient-Identifiable Information (available from the Department of Health website www.dh.gov.uk). That report included recommendations on information sharing within the NHS and between the NHS and non-NHS organisations, embodied in six principles (the 'Caldicott Principles'):

- Principle 1 – Justify the purpose(s) for using confidential information
- Principle 2 – Only use it when absolutely necessary
- Principle 3 – Use the minimum that is required
- Principle 4 – Access should be on a strict need-to-know basis
- Principle 5 – Everyone must understand his or her responsibilities
- Principle 6 – Understand and comply with the law

The Department of Health has produced the *Caldicott Guardian Manual* (DH 2010b) for the guidance of 'Caldicott Guardians', who are people appointed to protect patient information in health and social care. They are usually existing members of the management board or senior management team, senior professionals, or hold responsibility for promoting clinical governance or equivalent functions within organisations providing health or social care. This manual can be obtained by post or at the websites listed at the end of this book. Following the Caldicott Report, the Department of Health made a commitment to develop protocols for information sharing between agencies and organisations, for example in investigations into abuse, professional misconduct, etc.

1.4.4 Guidance on information sharing regarding the welfare of children

The Department for Education website (www.education.gov.uk) provides detailed online child protection guidance documents, some of which are listed in the 'Government Guidance' section at the end of this book, including when and how

information should be shared legally and professionally. See *Working Together to Safeguard Children: A Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children* (DCSF 2010) and its supporting materials. Other useful resources are *Information Sharing: Guidance for Practitioners and Managers* (DCSF 2008) and *What to Do If You're Worried a Child Is Being Abused* (DfES 2006). Also see *Confidentiality: NHS Code of Practice* (DH 2003 and the supplementary guidance, DH 2010a). The DfE website site informs visitors that as a new UK government took office on 11 May 2010, the content on this website may not reflect current government policy, but all statutory guidance and legislation published continues to reflect the current legal position unless indicated otherwise.

In England, the guidance in Part 1 of *Working Together to Safeguard Children* (DCSF 2010) carries the force of statute under s. 7 of the Local Authorities Social Services Act 1970. It sets out the standards and procedures with which local authorities are to comply. The Children Act 1989 (CA 1989) places a statutory duty on health, education and other services to help the local authority in carrying out its functions under the CA 1989 (similar provisions exist in the Children (Scotland) Act 1995 and *Protecting Children – A Shared Responsibility: Guidance on Inter-Agency Co-operation* (The Scottish Office, 1998; www.scotland.gov.uk). See this website for other useful information. There is a statutory duty to work together, including information sharing, in conducting initial investigations of children who may be in need or subject to abuse and in the more detailed core assessments carried out under s. 47 of the CA 1989. For details of the assessment process see also the Department of Health publication *Framework for Assessment of Children in Need and their Families* (2000). Adults and children over 16 or children under 16 but 'Gillick competent' may refuse to co-operate with assessments. In these cases, practitioners concerned for the welfare of the child should refer the matter to the family court under the relevant provisions of the CA 1989. The legal department of the local authority may be approached for advice and assistance. See the glossary for an explanation of 'Gillick competence' and also Bond and Mitchells (2008: Chapter 11) for a detailed discussion of capacity and consent.