General
Medical
Council

Scottish Government consultation on Adult Support and Protection: Guidance for General Practitioners and Primary Care Teams - GMC Response

23 August 2021

1 We welcome the opportunity to respond to the Scottish Government's consultation on revised adult support and protection guidance for GPs and Primary Care Teams.

2 Some of the questions in the consultation fall outside our regulatory remit or areas of expertise. We have therefore restricted our comments to a specific number of areas. Additionally, our responses do not lend themselves to the 'Not at all-Completely' format used in the consultation questions. For these reasons, as well as for ease of reading, we are responding to the consultation in the form of a submission.

The GMC's role and remit

3 The General Medical Council (GMC) is an independent regulator that helps to protect patients and improve medical education and practice across the UK.

- We decide which doctors are qualified to work here and we oversee UK medical education and training.
- We set the professional standards that doctors need to follow, and work to make sure that they continue to meet these standards throughout their careers.
- We take action to prevent a doctor from putting the safety of patients, or the public's confidence in doctors, at risk.

4 Every patient should receive a high standard of care. Our role is to help achieve that by working closely with doctors, their employers, and patients to make sure that the trust patients have in their doctors is fully justified. We expect doctors to be familiar with and follow our ethical guidance and be willing and able to justify any departure from it.

5 The GMC is not responsible for planning or delivering health or adult social care services, but the professional standards we set for doctors are expected to shape the way they practise within their working environment. This includes our expectation that doctors play a role in shaping the services they provide, and take prompt action

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if they think that patient safety, dignity or patient rights are being put at risk or may be seriously compromised.

6 Our professional standards, as set out in published guidance, are consistent with laws across the UK and any specific legal duties that the law requires of doctors.

General points

7 We agree with the Scottish Government that GPs and Primary Care Staff are well placed to identify adults at risk of harm, and play an important role in working collaboratively with others to appropriately respond. We support the aim of the revised guidance, which is to help GPs and Primary Care Staff when dealing with these often very challenging situations.

8 Nevertheless, we have some concerns that the areas of the full Guidance booklet, which relate to disclosing information about patients at risk of harm, do not reflect important considerations for doctors, as highlighted in our guidance.

9 We have set out these areas below, with suggestions for how our concerns can be addressed.

10 Given that it is a summary of the full Guidance booklet, many of our comments will be directly relevant to the 'Quick Guide', which the Scottish Government is also consulting on.

11 We are currently considering the Scottish Government's related consultation on the Adult Support and Protection (Scotland) Act 2007 updated Code of Practice. While we are not yet in a position to respond to this, our initial view is that some of our comments in this submission may be relevant to the updated Code. This includes our comments about reflecting the need for doctors to meet their obligations under the common law duty of confidentiality.

12 Beyond these consultation responses, we would be pleased to engage with the Scottish Government to help ensure that national guidance and our professional standards are consistent and provide clarity about our shared expectations of doctors.

Specific points

Question 3: Is the guidance straightforward and easy to understand?

Question 4: Does the guidance effectively address the question of sharing information with and without patient consent?

<u>The role of the common law duty of confidentiality</u>

13 The draft guidance, including the 'Consent' section (pages 7-8), addresses requirements under data protection legislation. But it does not acknowledge the need for doctors to meet their obligations under the common law duty of confidentiality. We recognise that the common law, data protection, human rights, safeguarding and other laws that permit or require the disclosure of confidential patient information interact in complex ways. We think it is important, therefore, that any guidance for professionals acknowledges the range of legal and other duties that they must consider, in deciding whether using or disclosing confidential information is justifiable.

14 UK data protection law recognises the common law duty of confidentiality as owed, for example, by doctors to patients. Doctors must satisfy the requirements of both data protection law and their common law duty, where they hold confidential information. We set out how the requirements of the common law duty and data protection law apply to doctors in our guidance, Confidentiality: good practice in handling patient information (updated 2018).

15 Our chief concern is that the guidance as drafted may mislead doctors as to the lawful basis for disclosing confidential information when consent has not been sought or has been refused. The guidance appears to suggest that doctors can rely on 'public task' as a lawful basis for disclosing confidential information without consent in circumstances where there is no statutory requirement to do so. We are unsure that this is sufficient justification for breaching duties of confidentiality (see paragraph 21 below for an outline of our advice on this point). If a disclosure is an unlawful breach of the common law duty of confidentiality, our understanding is that nothing in data protection legislation could make it lawful.

16 We are also concerned that the relevant conditions set out in Schedule 1 of the Data Protection Act 2018 for disclosing special category data under Article 9(2)(g) of the General Data Protection Regulation (GDPR) may not be met if consent has not been sought when it could have been, or if consent has been refused. We are assuming that condition 18 would be the one relied on. While this condition works for disclosing information about data subjects who are unable to consent (for example, for reasons of capacity), or where seeking consent would undermine the purpose of the disclosure, we cannot see that the condition works for data subjects who could give consent but who haven't been asked or have refused.

17 GPs are aware of their common law duty of confidentiality. Based on the questions we are often asked by concerned doctors, providing clarity about how this duty intersects with their other legal and professional responsibilities can be key to doctors taking confident action in support of adult protection. We would strongly recommend that the draft guidance is updated to explicitly recognise both the requirements of the common law duty, as well as the duties and requirements under data protection legislation. We make some suggestions at paragraphs 21-27 on how this might be approached.

18 Our guidance contains a Legal annex, which may be particularly helpful for understanding and explaining how the common law and UK data protection law relate to each other.

Making explicit the circumstances for disclosing information

19 We feel that it could be made clearer which circumstances for disclosing patient information the 'Consent' section of the draft guidance is dealing with. This section follows a previous one ('Information Requests and Responses'), which explains the powers of Council Officers under the Adult Support and Protection (Scotland) Act 2007 to request health records relating to adults known, or believed, to be at risk. The 'Consent' section appears to be addressing how GPs disclose patient information where there is not a specific legal requirement for them do so (for instance, under Section 10 of the 2007 Act).

20 However, it would be helpful to make explicitly clear which circumstances for disclosing information the 'Consent' section is and is not addressing. (This could include adding an introductory sentence to this effect). This would help remove any risk that GPs understand the advice in this section to apply when they are disclosing information in response to a legal requirement, and potentially act in a way that is inconsistent with the law. For instance, the first sentence of this section advises that: 'When considering whether to share concerns, if possible, the individual's consent should be attained prior to sharing information'. But if a doctor is required by law to disclose information, it would be inappropriate and misleading to ask for the patient's consent.

Reflecting the common law duty of confidentiality in the adult support and protection guidance

21 Paragraph 9 of our *Confidentiality* guidance contains a useful overview of the different circumstances in which doctors may disclose personal information without breaching duties of confidentiality. The specific circumstances we list include where:

- The patient consents, whether implicitly or explicitly for the sake of their own care or for local clinical audit, or explicitly for other purposes (see paragraphs 13 - 15).

- The patient has given their explicit consent to disclosure for other purposes (see paragraphs 13 - 15).

- The disclosure is of overall benefit to a patient who lacks the capacity to consent (see paragraphs 41 - 49).

- The disclosure is required by law (see paragraphs 17 - 19), or the disclosure is permitted or has been approved under a statutory process that sets aside the common law duty of confidentiality (see paragraphs 20 - 21).

- The disclosure can be justified in the public interest (see paragraphs 22 - 23).

22 Our *Confidentiality* guidance also contains a specific section on 'Disclosures for the protection of patients and others' (see paragraphs 50-76). This section may be particularly useful for the purposes of reflecting doctors' common law responsibilities within the draft guidance.

23 We know from doctors' feedback on the challenges of working with guidance that the advice provided by the Scottish Government will need to be easy to navigate for GPs when practically responding to different adult protection scenarios. They need to quickly find the most relevant advice they need to consider, matching as closely as possible the specific situation or scenario they are dealing with.

24 We have taken this approach in our *Confidentiality* guidance, which is structured around the common circumstances in which doctors may need to disclose information about patients (including the categories set out in paragraph 21 of this response). Respondents to our consultation on the guidance before its publication welcomed this.

25 It may be helpful to consider a similar structure when reflecting doctors' common law responsibilities within the draft guidance.

26 The draft guidance does not appear to address disclosing information to protect adults who lack the capacity to consent. It may be helpful to reflect this. Our *Confidentiality* guidance includes relevant guidance on this subject at paragraphs 55 and 56.

27 Finally, it would be helpful to signpost to our *Confidentiality* guidance in the 'Resources' section on page 8. The 'Capacity' section on page 10 could also usefully signpost to our guidance on *Decision making and consent*, as we provide substantive advice on assessing, and making decisions, when patients lack capacity.

28 We hope these comments are helpful. We would be happy to explore or clarify any aspect of our response with you further.