GMC response to the Scottish Mental Health Law Review consultation – additional proposals

General comments

We welcome the opportunity to review the additional proposals on independent advocacy and advance statements.

We have not commented on the proposals relating to forensic orders as these are primarily legal and procedural matters that do not fall within our regulatory remit and expertise.

We hope you will find these comments helpful but do please let us know if you have any queries.

Independent advocacy

We support the objective of improving advocacy service provision to help patients navigate complex healthcare systems, and the ambition to improve patients' awareness, access to and uptake of these services. The Review makes a persuasive case for implementing an 'opt-out' approach with a view to driving this forward while not losing sight of patients' rights to decide whether or not they want to use the service.

We would like to highlight three points relating to this topic.

First, in our guidance on supporting patients' decision making, we say that doctors should:

- accommodate a patient's wish for an independent advocate to be involved in discussions or help them make decisions (*Decision making and consent* paragraph 27d)
- consider, where there are time or other resource constraints, what other sources of information and support are available to the patient, including advocacy services (paragraph 60b)
- think about involving an independent advocate in discussions if there is a disagreement about what would be of overall benefit to a patient who lacks capacity (paragraph 92).

If implemented, the Review's proposals seem likely to place a broader and more positive duty on doctors in Scotland to be aware of a range of advocacy services and to actively address the potential benefits with patients. We will keep this in mind and once the direction of travel is confirmed, will look at whether any updates to the guidance are indicated. We will also consider how our Outreach function can support doctors to understand the range of advocacy services available to them.

Secondly, the Review acknowledges that there is confusion amongst professionals about the role of advocacy in decision making. This seems particularly acute in the case of non-instructed advocacy, in Scotland and elsewhere. For example, we are aware that Independent Mental Capacity Advocates (IMCAs) provided for by the *Mental Capacity Act 2005* have not been used to their full potential in England and Wales.

Non-instructed advocacy offers a valuable safeguard for individuals who lack capacity to make their own decisions and whose interests are not otherwise represented. Training and process planning will be key to the effective implementation of the proposed policy, to ensure that doctors understand the nature and scope of the advocate's role, their contribution to good decision making and the potential benefits for their patients.

Finally, an approved qualification and/or national register for paid and volunteer advocates would provide doctors with some assurance about advocates' training and standing. While we do not have a strong view on these proposals, they seem worth considering if the independent advocate role is set to become more prominent in making decisions about treatment and care.

Advance statements

As noted in our original response, we support the wider use of advance statements and their integration with other aspects of care planning. Information about a patient's wishes and preferences can be valuable to those charged with making decisions about a patient's treatment and care.

We understand that, in light of the deficiencies identified in the current Advance Statement provisions, the Review is considering a Statement of Will and Preferences (SWAP) process that would be widely applicable to medical and welfare issues, not just to treatment under Mental Health law. In principle this would support the Review's aims in relation to fair and consistent decision making. In practice much will depend on the detail of how, when and by whom SWAPS should be made and the factors that will determine their legal status, scope, validity and if/when/by whom they can be overruled. We are concerned about creating uncertainty for doctors about their legal and ethical responsibilities, and would stress the importance of clear, comprehensive practice guidance in this area.

The suggested criteria for overruling a SWAP seem reasonable and takes account of the reality that records may not keep up with patient's changing wishes. Overall, though, we have struggled to understand the extent to which it is envisaged that a SWAP would be determinative of a patient's care.

The consultation document suggests that a SWAP could not require a treatment to be offered if it is not available or clinically justified. This is consistent with our understanding of the Montgomery vs Lanarkshire Health Board judgement and is reflected in our subsequent guidance for doctors on *Decision making and consent.*

However, the consultation also indicates that SWAPs “should be given significant weight as failure to make a treatment available could constitute a breach of human rights”. It would be helpful to have more detail about what giving ‘significant weight’ would mean in practical terms, in the context of the Review’s human rights-based approach to mental health and capacity issues.