Scottish Government consultation on the Adult Support and Protection (Scotland) Act 2007 updated Code of Practice - GMC Response
28 September 2021

1 We welcome the opportunity to respond to the Scottish Government’s consultation on the Adult Support and Protection (Scotland) Act 2007 updated Code of Practice.

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.
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 supporting and protecting adults at risk of harm is ‘everyone’s business’, including doctors’. We support the aim of the Code of Practice, which is to give professionals and others practical guidance about fulfilling their roles and duties under the Adult Support and Protection (Scotland) Act 2007. We appreciate that this often involves very challenging situations.

8 In this submission we make similar points to those in our response to the Scottish Government’s earlier consultation on revised adult support and protection guidance for GPs and Primary Care Teams. We also note that the Code references this guidance.

9 We appreciate that, compared to Scottish Government’s guidance for GPs and Primary Care Teams, the Code is aimed at a considerably wider range of professionals involved in adult protection. Nevertheless, as with our recent comments on the guidance for GPs, we have concerns that the areas of the Code, which relate to disclosing information about adults at risk of harm, do not reflect important considerations for doctors, as highlighted in our guidance.

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

11 As stated in our earlier consultation response, 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**

The role of the common law duty of confidentiality

12 The Code of Practice, particularly Chapter 3 (including the Section on 'Information sharing') and Chapter 10, primarily addresses requirements under data protection legislation for disclosing information. However, the guidance does not explicitly acknowledge and reflect the need for doctors and other professionals to meet their obligations under the common law duty of confidentiality.

13 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 If a disclosure of information is an unlawful breach of the common law duty of confidentiality, our understanding is that nothing in data protection legislation can make it lawful. This highlights the risk of not reflecting the common law duty in guidance that relates to the disclosure of patient information.

16 We also appreciate, based on the questions we are often asked by concerned doctors, that providing clarity about how their common law duty intersects with their other legal and professional responsibilities can be key to doctors taking confident action in support of adult protection.

17 For the above reasons we therefore strongly recommend that the relevant sections of the Code are updated to explicitly recognise both the requirements of the common law duty of confidentiality, as well as the duties and requirements under data protection legislation. We make some suggestions at paragraphs 23-27 of this response 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.

Comments on specific paragraphs

19 In addition, to our overall point that the Code should reflect the common law duty of confidentiality, we would like to comment on three specific paragraphs within the Code that relate to disclosing information.

20 Paragraph 39 of Chapter 3 says the following:

‘When considering whether to share concerns, if possible, the individual’s consent should be attained prior to sharing information but, for the avoidance of doubt, where disclosing information to the appropriate authorities seeks to address a perceived risk of harm to that individual, it is in the public interest to do so and a referral should be made. This legal duty applies to all employees and officers of the relevant public bodies and overrides any general duty of confidentiality [emphasis original].’
20.1 We are unsure whether the Code suggests here that, if there is a perceived risk of harm to an individual, this is sufficient to argue that it is in the ‘public interest’ to disclose information about them. Our Confidentiality guidance explains that, under the common law duty, disclosing information can be justified where this is in the public interest. However, it is important to note that we set out (please see paragraphs 63-70) specific and complex issues that doctors must consider before deciding whether such a disclosure can be justified. We cannot see that these specific points are currently reflected within the Code, and are concerned that its current reference to the ‘public interest’ may cause confusion for doctors. It could also mislead them into thinking that, where a disclosure addresses a perceived risk of harm to an individual, this is sufficient to argue that this can be justified in the public interest.

20.2 We are also unsure whether paragraph 39 suggests that there is legal duty that professionals can rely on to disclose concerns about any adult at perceived risk of harm (and which means that consent from the adult is not required). The provision referred to may be the statutory duty for public bodies or office holders to refer relevant cases under Section 5(3) of the 2007 Act, as outlined earlier in Chapter 3 of the Code. However, to avoid any confusion, we would recommend making explicitly clear what the legal duty refers to.

20.3 If, as mentioned, there is such a legal duty, our understanding of data protection law is that consent should not be sought from a person where their refusal would be overridden. In light of this, as the earlier part of paragraph 39 says that ‘[…] if possible, the individual’s consent should be attained prior to sharing information […]’ we would suggest considering whether there is a conflict between this advice, and a statutory duty to share information as implied later in the same paragraph.

21 Our comments above in relation to paragraph 39 may also be relevant to Paragraph 7 of Chapter 10 (in relation to the examination of records by Council officers), which contains identical wording.

22 Paragraph 6 of Chapter 5 says that ‘the adult’s consent is not required for a referral to be made [to a council].’ To avoid any misinterpretation or unintended consequences it may be more helpful to say that an adult’s consent is not necessarily required for a referral to be made. As our Confidentiality guidance sets out, doctors must have a lawful basis for disclosing information about their patients. While gaining the patient’s explicit consent is not the only basis for disclosing information about a patient via a referral, it is one of the main circumstances (please see paragraph 23 below for an overview of the limited circumstances in which doctors may disclose personal information).
Reflecting the common law duty of confidentiality in the Code of Practice

23 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).

24 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 updated Code.

25 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 professionals 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.

26 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 23 of this response). Respondents to our consultation on the guidance before its publication welcomed this.

27 While we appreciate that the Code of Practice is aimed at a wider range of professionals, and more limited circumstances for disclosing information, than our *Confidentiality* guidance, it may be helpful to consider a similar structure when reflecting doctors’ common law responsibilities.

28 Finally, the Code does not appear to specifically 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.

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