



Law Society
of Scotland

Consultation Response

Health and Care Professions Council-Consultation on
revised guidance on Confidentiality

20 January 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's legal profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

The Health and Medical Law Sub-committee of the Law Society of Scotland, welcomes the opportunity to consider and respond to the Health and Care Professions Council Consultation on Revised Guidance on Confidentiality.

General Comments

We note that in section 4 of the Consultation Document that the current version of the guidance¹ is used as the basis for the proposed revision and that there will be no major amendments in terms of its general structure or the main topics it addresses. We will therefore first make some general comments.

We believe it useful to note as any background for review in this area what is generally referred to as the Caldicott Review². This was published in April 2013 and made 26 recommendations based around 7 principles to guide information governance:

1. Justify the purpose of every proposed use or transfer of personal confidential data
2. Do not use personal confidential data unless it is absolutely necessary
3. Use the minimum necessary personal confidential data
4. Access to personal confidential data should be on a strict need-to-know basis
5. Everyone with access to personal confidential data should be aware of their responsibilities
6. Comply with the law in relation to any use of personal confidential data

¹ <http://www.hcpc-uk.org/assets/documents/100023F1GuidanceonconfidentialityFINAL.pdf>

² Information: To share or not to share? The Information Governance Review

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192572/2900774_InfoGovernance_accv2.pdf

7. The duty to share information can be as important as the duty to protect patient confidentiality.

It is considered useful at this stage to observe that, unlike the position in England and Wales where the English Court Civil Procedure Rules (Part 31) apply, in Scotland there is no requirement on the other party to automatically disclose all relevant documents beyond the specific documents which they plan to rely on. This is in contrast to court procedure in England and Wales which require, in general, disclosure of all documents even those which may adversely affect that party's claim.

In general terms in Scotland, a party needs to ask the court for an order for production of any documents the party wants. The Scottish Court will require the party seeking an order for production of any documents to specify or describe the documents which are sought. The Court can order the other party to the action, or indeed someone who is not a party to the action, to produce documents.

There are also rules about what kinds of document can be admitted as evidence in a case. In Scotland where medical records are sought, for instance in relation to a personal injury claim, a request for the records will be qualified restricting those records relating to the injury (a process known as excerpting) and if required would be carried out by Court appointed Commissioner.

The existence and reassurance of independent Court based assessment of the balance of competing interests is considered important in ensuring that patients', and indeed potential patients', interests are considered – see *General Dental Council v Rimmer*³ where a dentist was ordered to hand over his patients' medical records to a court in order to help his regulator prosecute him for misconduct . This case demonstrates that the Courts will balance the issue of patient confidentiality which would otherwise be protected by the Human Rights Act. It is widely understood across the EU, and indeed expected by patients', that there is a fundamental principle that a patient's dental or clinical records are protected by doctor-patient confidentiality, under health legislation as well as Article 8 of the European Convention on Human Rights (the right to privacy). In the case of *Z v Finland*:⁴

'Respecting the confidentiality of health data is a vital principle in the legal system of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of the patient but also to preserve his or her confidence in the medical profession and in the health services in general.'

³ [2010] EWHC 1049 (Admin) (15 April 2010)

⁴ 1997) 25 EHRR 371, para 95:

It is recognised that across the EU disclosure of medical data has created concern. In the UK it is understood that the Information Commissioner has been considering the emerging practice of insurance companies obtaining medical records by using patients' subject access rights.

In Sweden, an evaluation in 2006⁵ on access to electronic records highlighted the need to consider with more attention the special needs of vulnerable patients such as children, patients with trustees or victims of domestic violence. In France, as part of the implementation of the controversial Dossier Medical Personnel (DMP), the health professional needs the consent of the patient who can also choose to deny access to certain health professionals.

Specific comments on the proposals

Clarity and ease of understanding the guidance

We are supportive of the Reviews aim to provide clarity and to ensure that the information given is easy to understand. On the assumption that the situation in which most professionals will access this document is one where something out of the ordinary has arisen, it may be confusing that the first mention of exemptions to the requirement for express consent comes on page 11 and the first substantive example is not given until page 14. There also appears to be an apparent contradiction between the statement in the introduction, "... **make sure** you have the service user's consent ..." ⁶, and page 15 which acknowledges, "... there are a small number of circumstances where you might need to pass on information without consent ..."

Further to this we suggest that the following may be misleading. There is an indication on page 14 that notes, 'Sometimes you may be asked for information by a third party who is not a health and care professional. This might be a request to send information to an insurance company, government agency or a solicitor. You should take steps to make sure you have express consent to provide any information'. ⁷ It is not, necessary to obtain explicit consent to disclose in a situation where other schedule 2 or 3 conditions for processing are met. So if you take as an example the situation where the professional is accused of negligence and requires providing their legal team with copies of the case notes, then express consent will not be required as other conditions for processing will engage. The current review may provide an opportunity to revise.

⁵ See 4.16: http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=5169

⁶ Page 4- :<http://www.hcpc-uk.org/assets/documents/100023F1GuidanceonconfidentialityFINAL.pdf>

⁷ Page 14 <http://www.hcpc-uk.org/assets/documents/100023F1GuidanceonconfidentialityFINAL.pdf>

'Best interests' of the service user

On page 5,⁸ reference is made to the 'best interests of the service user. We would suggest that this is fundamentally incorrect. 'Best interests' is a relevant consideration in child law. It is not a relevant consideration, or a basis for any decision-making on behalf of others, in the case of adults. That includes 16 and 17-year olds.

In relation to adults with impairments of relevant capacity, 'best interests' was explicitly rejected as a relevant test: see *Scottish Law Commission Report on Incapable Adults (Report No 151)*⁹, published September 1995, paragraph 2.50. Moreover, any 'best interests' test, in the view of the UN Committee on the Rights of Persons with Disabilities, amounts to unacceptable discrimination contrary to the terms of the UN Convention on the Rights of Persons with Disabilities. That Convention has been ratified without reservation in respect of the United Kingdom. Scots law contains no general statutory authority to make decisions for another person on a 'best interests' or any other basis.

Public Interest

At p.13 it is noted that 'You can disclose confidential information without consent if it is in the public interest to do so.'¹⁰ We would suggest that it is clarified to explain it is information which is in the interests of the public and not information **of interest to the public**. We also note that that examples are provided of when information may be disclosed, such as to prevent serious harm and serious crime. We would suggest that to ensure consistency and avoid uncertainty, further guidance should be provided in defining these.

Applicability of relevant legislation

As a general comment, we note that the draft current guidance fails throughout to fully take into account and recognise the distinctive and differing Scottish position. Perhaps the guidance should include an acknowledgement that current legislation does not always apply to all jurisdictions within the UK.

Related to this, we suggest, that as professionals will be practicing in different jurisdictions, such a registrant not only needs to be aware of current legislation but also whether existing legislation actually has jurisdiction in the country they are practicing in, for example, section 251 of *the National Health Service Act*

⁸ Page 5, point no 1 at <http://www.hcpc-uk.org/assets/documents/100023F1GuidanceonconfidentialityFINAL.pdf>

⁹ http://www.scotlawcom.gov.uk/files/5013/2758/0994/rep151_1.pdf

¹⁰ <http://www.hcpc-uk.org/assets/documents/100023F1GuidanceonconfidentialityFINAL.pdf> at p.13



2006, which allows disclosure of a patient's personal information without consent, does not apply to Scotland.



For further information, please contact:

Brian Simpson

Solicitor

Policy Team, External Relations

Law Society of Scotland

DD: 0131 476 8184

briansimpson@lawscot.org.uk