

22 January 2019

## **Health and Care Professions Council response to the General Medical Council consultation on the draft 'Decision making and consent' guidance**

### **1. About us**

We welcome the opportunity to respond to this consultation.

The Health and Care Professions Council (HCPC) is a statutory regulator of health, social work and psychological professions governed by the Health and Social Work Professions Order 2001. We regulate the members of 16 professions, including chiropodists / podiatrists and physiotherapists. We maintain a register of professionals, set standards for entry to our register, approve education and training programmes for registration and deal with concerns where a professional may not be fit to practise. Our role is to protect the public.

### **2. Response to the consultation questions**

#### **About the guidance, scope and application**

##### **Q1. Comments on scope and application of the legal annex.**

We have not had access to the legal annex so we are unable to comment on its content, however the HCPC is supportive of the approach the GMC has taken of including a supplementary legal annex for doctors' reference. We believe that it is important that doctors understand the law regarding consent and decision-making, and acknowledge the benefits of separating the legal annex from the guidance itself. We agree that this approach is clear and makes it easier for doctors to find the information they need.

This aligns with our requirements for our registrants, as we expect them to know and be able to follow the legal framework regarding consent and decision-making. This is set out in our Standards of Conduct, Performance and Ethics (3.4), which states:

*'You must keep up to date with and follow the law, our guidance and other requirements relevant to your practice.'*

As a regulator of doctors across the UK, it is also important that doctors understand the law regarding consent and decision-making as it applies in their country. We would therefore expect the legal annex to make sufficiently clear any differences in principles or legal requirements between the four countries.

#### **Main principles of the guidance**

## Q2. Is the summary helpful?

Yes.

We support the inclusion of clear principles that doctors can follow.

Broadly the principles outlined correspond with our standards. For reference, we have copied the standards we believe are relevant to each principle below and made clear where there is any divergence.

### Support patient decision making

Our Standards of Conduct, Performance and Ethics state:

*‘1.2 You must work in partnership with service users and carers, involving them, where appropriate, in decisions about the care, treatment or other services to be provided.*

*1.3 You must encourage and help service users, where appropriate, to maintain their own health and well-being, and support them so they can make informed decisions.*

*2.3 You must give service users and carers the information they want or need, in a way they can understand.*

*2.4 You must make sure that, where possible, arrangements are made to meet service users’ and carers’ language and communication needs.’*

Additionally, our standards require registrants specifically to consider the language and communication needs of service users in order to communicate appropriately and effectively.

### Listen to your patient and those close to them

Our Standards of Conduct, Performance and Ethics state:

*‘2.2 You must listen to service users and carers and take account of their needs and wishes.’*

### Share information that is relevant to your patient

Our Standards of Conduct, Performance and Ethics state:

*'1.1 You must treat service users and carers as individuals, respecting their privacy and dignity.'*

*1.2 You must work in partnership with service users and carers, involving them, where appropriate, in decisions about the care, treatment or other services to be provided.*

*2.2 You must listen to service users and carers and take account of their needs and wishes.*

*2.3 You must give service users and carers the information they want or need, in a way they can understand.'*

Although the HCPC is supportive of the principles outlined in this section, it is not clear how this is a different principle to 'support patient decision making' and 'involve your patient as much as possible in discussions and decisions about their care'.

#### Recognise the importance of the decision-making process

Our Standards of Conduct, Performance and Ethics state:

*'10.1 You must keep full, clear, and accurate records for everyone you care for, treat, or provide other services to.'*

*10.2 You must complete all records promptly and as soon as possible after providing care, treatment or other services.'*

We are supportive of the significance placed on the quality and importance of the service-users consent. However, we would expect our registrants to complete full, clear and accurate records as promptly as possible after providing care, treatment or services.

#### Presume, assess, maximise and review capacity

Our Standards of Conduct, Performance and Ethics state:

*'3.4 You must keep up to date with and follow the law, our guidance and other requirements relevant to your practice.'*

We would therefore expect our registrants to adhere to the principles of the Mental Capacity Act 2005 and to follow all other relevant law and guidance.

#### Involve your patient as much as possible in discussions and decisions about their care, even where they cannot make a decision

Our Standards of Conduct, Performance and Ethics state:

*'1.3 You must encourage and help service users, where appropriate, to maintain their own health and well-being, and support them so they can make informed decisions.'*

### Involve others when making decisions where patients are unable to do so

Our Standards of Conduct, Performance and Ethics state:

*'2.5 You must work in partnership with colleagues, sharing your skills, knowledge and experience where appropriate, for the benefit of service users and carers.'*

*2.6 You must share relevant information, where appropriate, with colleagues involved in the care, treatment or other services provided to a service user.*

*5.2 You must only disclose confidential information if:*

- you have permission;*
- the law allows this;*
- it is in the service user's best interests; or*
- it is in the public interest, such as if it is necessary to protect public safety or prevent harm to other people.'*

We would expect our registrants to work in partnership and to share information with colleagues, where appropriate, for the benefit of services users. This applies whether the service users are able to make their own decisions or not.

Registrants are also expected to respect confidentiality at all times, including when working with those close to the patient, other healthcare professionals and people with a legal role in advocating for service users.

### **How decisions are made (paragraphs 1 – 8)**

#### **Q3. Is it helpful to include these frameworks?**

Yes.

We agree that it is helpful to outline the different legal authorities that apply in different circumstances.

#### **Q4. Is the guidance on delegation helpful?**

Yes.

We are supportive of the level of detail provided regarding when and how to delegate appropriately.

**Part 1: Supporting patient decision making (paragraphs 9 -38)**

**Q5. Is the guidance on sharing information helpful?**

Yes.

We are supportive of the level of detail provided and the principles correspond with our standards.

Our standards state:

*‘2.3 You must give service users and carers the information they want or need, in a way they can understand.*

*2.4 You must make sure that, where possible, arrangements are made to meet service users’ and carers’ language and communication needs.’*

We would therefore expect registrants to share information with service users in a way which meets the service user’s language and communication needs.

**Q6. Do you agree with this approach?**

Yes.

Our standards require registrants to keep up to date with and follow the law relevant to their practice. We would therefore agree with the approach taken to move reference to the therapeutic exception to the footnote as this enables registrants to be aware of the therapeutic exception and keep up to date with and follow the law in this area.

**Q7. Is the guidance at paragraphs 20 – 24 helpful?**

Yes.

We welcome the detail provided; the steps outlined align with our standards.

**Q8. Is the guidance on benefits and harms helpful?**

Yes.

We welcome the detail provided and consider that the language used and the explanation given are clear. The principles outlined in the guidance align with HCPC's standards.

**Q9. Are paragraphs 33 – 35 helpful?**

Yes.

The guidance provided corresponds with our standards.

However, if one of our registrants was concerned about a service-user's safety or wellbeing we would expect them to raise and report their concerns and take appropriate action where necessary.

**Part 2: Making a decision (paragraphs 39 – 102)**

**Q10. Is the guidance on expressions of consent helpful?**

Yes.

We are supportive of the significance placed on the quality and importance of the service-users consent, and the ways in which consent can be expressed. However, we would expect our registrants to complete full, clear and accurate records as promptly as possible after providing care, treatment or services.

**Q11. Is the guidance on planning future care helpful?**

Yes.

We are supportive of the inclusion of examples of successful future planning. The guidance corresponds with our standards.

**Q12. Is the guidance at paragraphs 61 – 65 helpful?**

Not sure.

We are supportive of the guidance provided to help doctors to determine if patients are unable to make a decision freely, as well as how doctors may mitigate against this and maximise a patient's ability to make the decision themselves.

However, if a registrant on our Register was concerned that a service user was under undue pressure or that their safety or wellbeing was at risk we would expect them to take appropriate action beyond seeking legal advice.

The guidance in paragraphs 61 – 65 does not include any references to safeguarding, or require doctors to raise concerns with their line managers, CQC or other appropriate authorities.

**Q13. Is the guidance on assessing capacity helpful?**

Yes.

The guidance corresponds with our standards and supports good decision making.

**Q14. Should we use the term ‘overall benefit’?**

Not sure.

We note the approach taken to ensure that the guidance remains applicable to doctors working in different countries. However, the guidance itself does not explain the rationale for using the term ‘overall benefit’ and it is therefore possible that a doctor misinterprets the usage of this word and is confused that the terminology they are used to and were anticipating (eg. ‘best interests’) is missing.

**Q15. Is the guidance on emergencies clear?**

Yes.

We consider that the guidance provided in this section is clear.

We expect our registrants to be able to justify their decision-making if required.

**Q16. Are paragraphs 92 – 95 helpful?**

Yes.

**Overall comments**

**Q17. Overall comments**

Our standards state that:

*‘3.1 You must keep within your scope of practice by only practising in the areas you have appropriate knowledge, skills and experience for.*

*3.2 You must refer a service user to another practitioner if the care, treatment or other services they need are beyond your scope of practice.’*

Therefore, if a registrant was unsure how to appropriately assess capacity or how to proceed in treating a service user who lacked capacity we would expect them to keep within their scope of practice by seeking further training or delegating the decision to another practitioner capable of undertaking the decision.

The guidance does not address this point for doctors. It may be helpful for doctors to understand what is expected of them if they are concerned that they do not have the appropriate knowledge, skills and experience regarding decision-making and capacity. If this information is outlined elsewhere, it may be useful for the guidance to reproduce it or signpost to it here.

### **Putting the principles into practice**

#### **Q18. Comments**

None.

### **Equality and diversity**

#### **Q19. E&D comments**

Many service users require the support of carers and/or those important to them to make decisions, or take account of their views or needs in their decision-making process. Sometimes a service user's carer or the person/people important to the service user may not immediately be obvious to the doctor treating the service user, or may not correspond with the doctor's expectation of who might fulfil that role.

When communicating with others (as referred to in paragraph 14 of the proposed guidance), doctors should be careful not to make assumptions about who the patient would like to be involved in decisions.