

Consultation on revised guidance on confidentiality

Analysis of responses to the consultation on ‘Confidentiality’ and our decisions resulting from responses received

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1. Introduction

About the consultation

- 1.1 We consulted between 3 October 2016 and 13 January 2017 on proposals to revise the guidance on confidentiality.
- 1.2 The guidance document, entitled 'Confidentiality – guidance for registrants' was first published in June 2008. We have recently reviewed the guidance in order to make sure that it remains up to date and useful for our registrants and other stakeholders. We also want to make sure that the guidance takes account of recent changes to the HCPC standards of conduct, performance and ethics
- 1.3 We informed a range of stakeholders about the consultation including professional bodies, employers, and education and training providers, advertised the consultation on our website, and issued a press release.
- 1.4 We would like to thank all those who took the time to respond to the consultation document. You can download the consultation document and a copy of this responses document from our website:
www.hcpc-uk.org/aboutus/consultations/closed.

About us

- 1.5 We are a regulator and were set up to protect the public. To do this, we keep a Register of health and care professionals who meet our standards for their professional skills and behaviour. Individuals on our register are called 'registrants'.

About this document

- 1.6 To protect the public, we set standards that professionals must meet. Our standards cover the professionals' education and training, behaviour, professional skills, and their health. We publish a Register of professionals who meet our standards. Professionals on our Register are called 'registrants'. If registrants do not meet our standards, we can take action against them which may include removing them from the Register so that they can no longer practise.
- 1.7 This document summarises the responses we received to the consultation.
- 1.8 The document starts by explaining how we handled and analysed the responses we received, providing some overall statistics from the responses. Section three provides a summary of the general comments we received, while section four is structured around the responses we received to specific questions. Our responses and decisions as a result of the comments we received are set out in section five.

1.9 In this document, 'you' or 'your' is a reference to respondents to the consultation, 'we, 'us' and 'our' are references to the HCPC.

2. Analysing your responses

2.1 Now that the consultation has ended, we have analysed all the responses we received.

Method of recording and analysis

2.2 The majority of respondents used our online survey tool to respond to the consultation. This invited them to indicate whether they were responding as an individual or on behalf of an organisation. For each question they answered, respondents were able to select from four options: yes; no, partly; and don't know. They were also able to give us their comments on each question in a free text box.

2.3 During the consultation period we held five workshops to seek the views of our education partners about the standards. We recorded the feedback we received and have included it alongside the responses to the consultation.

2.4 Where we received responses by email or by letter, we recorded each response in a similar format.

2.5 When deciding what information to include in this document, we assessed the frequency of the comments made and identified themes. This document summarises the common themes across all responses, and indicates the frequency of arguments and comments made by respondents.

Quantitative analysis

2.6 We received 43 responses to the consultation document. 20 responses (47%) were made by individuals of which 17 (85%) were HCPC registered professionals and 23 (53%) were made on behalf of organisations.

2.7 The table below provides some indicative statistics for the answers to the consultation questions. Responses to question seven, which asked for any other comments on the standards are summarised in section three of this paper.

Quantitative results

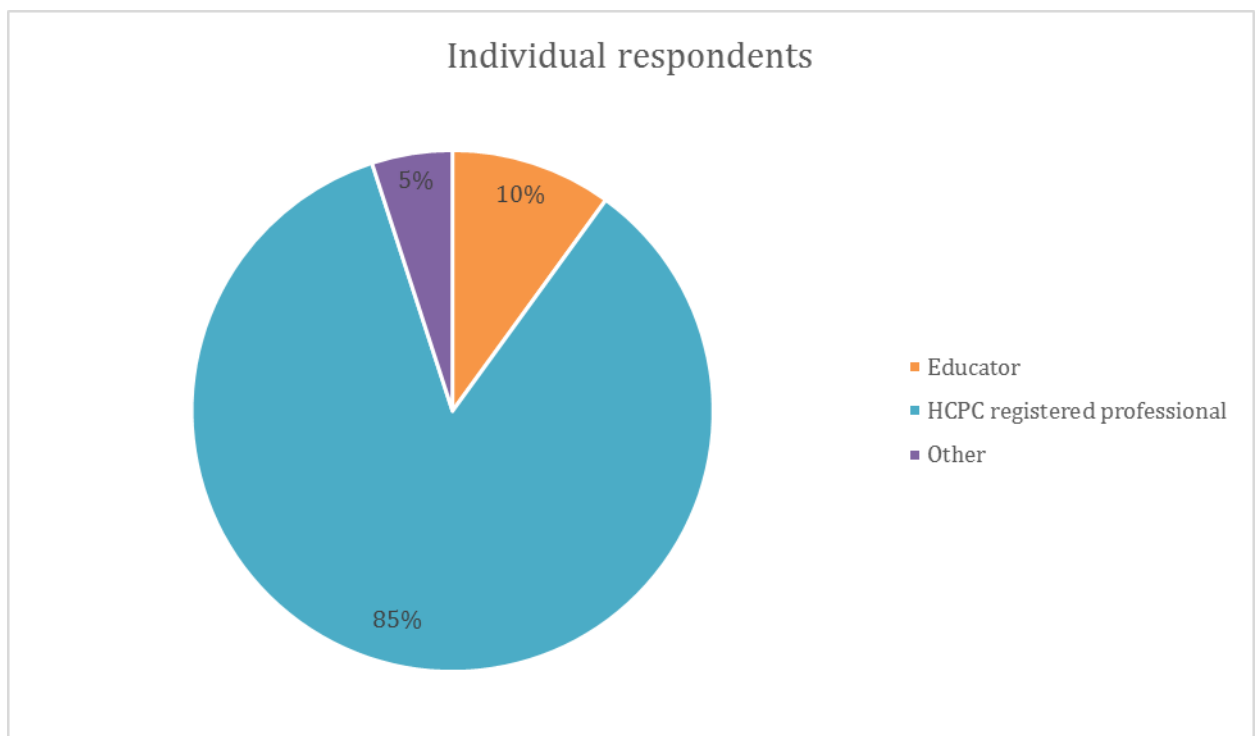
Questions	Yes	No	Partly	Don't know	No answer
Is the revised guidance clear and easy to understand? If not, how could we improve it?	34 (79%)	0 (0%)	6 (14%)	0 (0%)	3 (7%)

Could any parts of the guidance be reworded or removed?	16 (37%)	21 (49%)	2 (5%)	1 (2%)	3 (7%)
Is there any additional guidance needed?	17 (40%)	19 (44%)	0 (0%)	5 (12%)	2 (5%)
Do you have any other comments on the draft guidance?	18 (42%)	23 (53%)	0 (0%)	0 (0%)	2 (5%)

- Percentages in the tables above have been rounded to the nearest whole number and therefore may not add up to 100 per cent.

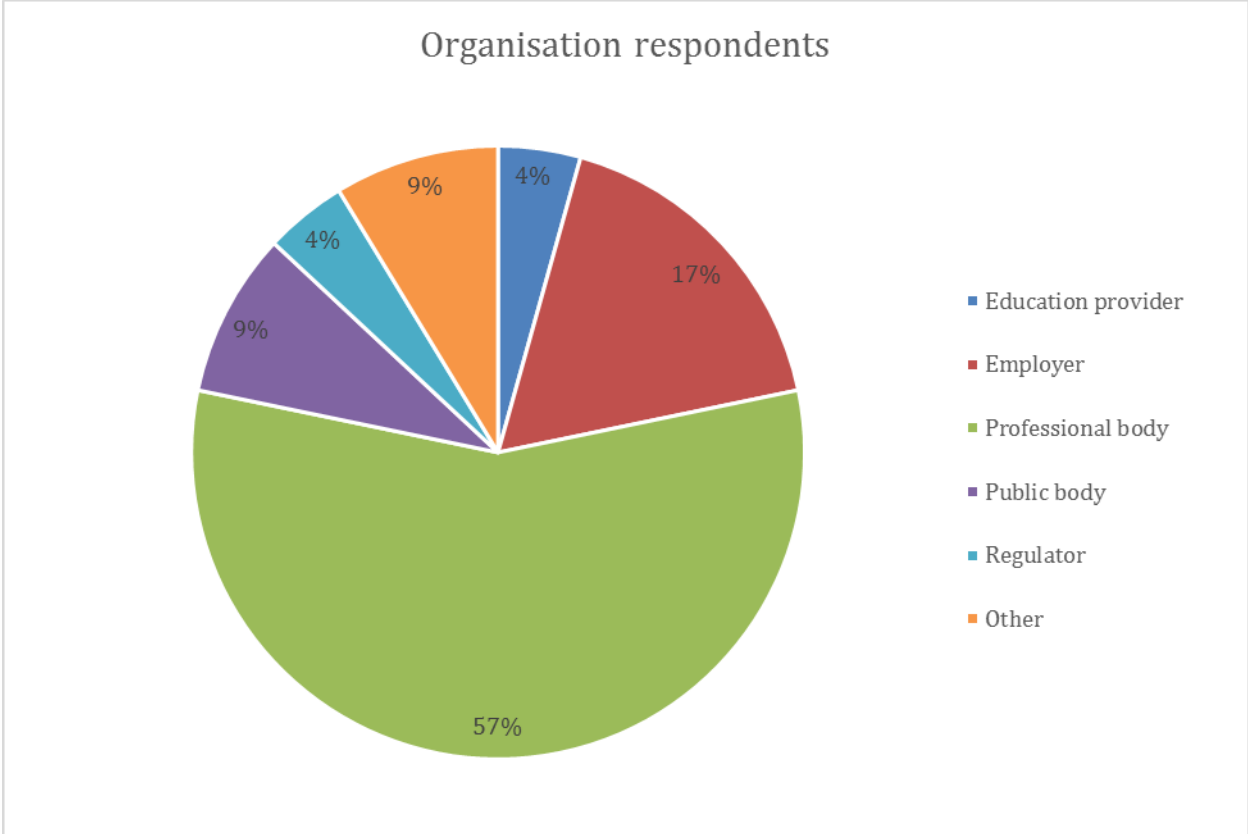
Graph 1 – Breakdown of individual respondents

Respondents were asked to select the category that best described them. The respondent who selected 'other' identified themselves as a joint educator and HCPC registrant.



Graph 2 – Breakdown of organisation respondents

Respondents were asked to select the category that best described their organisation. The organisations who selected 'other' identified themselves as a national association of representatives and a law firm.



3. Summary of responses

- 3.1 There was strong support from the majority of respondents for the revised guidance on 'Confidentiality', although some qualified their response by suggesting further improvements.
- 3.2 Many respondents welcomed the clear and simple language in the revised guidance.
- 3.3 A number of comments were made about the differences between consent for confidentiality purposes and consent under the Data Protection Act 1998 (DPA). Respondents stated that further clarification was required in the guidance.
- 3.4 Respondents also made comments regarding the considerations to be taken ahead of any disclosure of information, requesting further clarification in this area.
- 3.5 Informed consent and capacity was an area raised by a number of respondents who welcomed further information, particularly in relation to children and young people, and individuals with disabilities. In addition, some respondents requested further guidance on the considerations to be taken when disclosing information without consent.
- 3.6 Several respondents requested additional information about data protection principles.
- 3.7 Some respondents felt there should be an explicit reference to safeguarding in the guidance.
- 3.8 One organisation raised concerns about a perceived lack of information relating to the position in Scotland, and requested further consideration be given to this in the guidance.

4. Responses to the consultation

- 4.1 There was overall support from respondents for the revised guidance on 'Confidentiality', with some comments for further amendments to improve the content and accessibility of the document.
- 4.2 The comments we received are summarised below, structured around the common themes we have identified.

Language and style

- 4.3 The majority of respondents (79%) considered that the revised guidance was clear and easy to understand. Of those respondents who provided additional comments, 52% specifically welcomed the changes to the language and style of the document.
- 4.4 A number of suggestions were made regarding the language and style of the document to improve ease of reading, these included:
- numbering the section headings for ease of reference;
 - providing some broad reference to key pieces of legislation, for example, referring to 'data protection and freedom of information legislation'; and
 - replacing the term 'service user' with 'patient'.

Consent and disclosure

- 4.5 Two organisations raised concern that the differences between consent for confidentiality purposes, and consent under the Data Protection Act 1998 (DPA) weren't sufficiently covered in the draft guidance. Specifically that, for consent to be valid under the DPA, it must be equivalent to express consent for confidentiality purposes. Furthermore that where an HCPC registrant needs to share information with others who are involved in a service user's care and treatment under the DPA, this is covered by condition 8 of schedule 3 rather than implied consent.
- 4.6 One organisation commented that the principle requiring registrants to 'only disclose identifiable information if it is necessary, and, when it is, only disclose the minimum amount necessary' is too narrow, as registrants are under an obligation to protect the confidentiality of all service user data.
- 4.7 Another organisation stated that it would be helpful to clarify that regulators may have statutory powers to request information, and where they don't, registrants will need to consider whether disclosure is necessary in the public interest.
- 4.8 One respondent raised concern about the appropriateness of gaining express consent verbally, whilst another asked for clarity in the guidance on how consent should be documented.

Informed consent and capacity

- 4.9 Several respondents commented that the draft guidance would benefit from more detail around informed consent and capacity, particularly for service users with disabilities. One individual suggested including a simple list of criteria.
- 4.10 One respondent suggested that it would be helpful for the document to provide further guidance in relation to children and young people, particularly for sole or self-employed practitioners who aren't able to reply on employer policies.
- 4.11 A number of respondents raised concern about the reference to 'best interest' in the guidance. One individual suggested that the Mental Capacity Act 2005 should be referenced alongside any reference to best interest as an individual reading the guidance could infer that they could make the decision with no discussion or involvement from others. There was concern this could negatively impact those who don't have capacity. One organisation raised concern that best interests is not a relevant consideration, or basis for decision-making on behalf of others for adults in Scotland, and has been explicitly rejected as a relevant test in the *Scottish Law Commission Report on Incapable adults (Report No 151)*.

Disclosing information without consent

- 4.12 A number of respondents commented on the need for additional guidance in relation to the disclosure of information without consent. One organisation stated that, under the DPA, if the disclosure has a legal basis anyway consent may not be required. Instead, they stated that the service user should be notified that the disclosure will take place and given details about who it would be disclosed to and why.

Data protection

- 4.13 There were a number of comments from respondents requesting further clarification on the approach they should take to data protection, in particular::
- how to manage shared records – how to decide when information should be locked to one professional and when it should be available to the whole team managing the care;
 - how self-employed professionals should approach data protection; and
 - how professionals should approach accessing information about themselves and their family and friends.

Safeguarding

- 4.14 A number of respondents commented on the absence of an explicit reference to safeguarding within the guidance, particularly given the final Caldicott principle which outlines that the 'duty to share information can be as important as the duty to protect patient confidentiality'.

Four country considerations

4.15 One organisation raised concerns about the distinctive and differing Scottish position in relation to consent and disclosure and opined that this should be reflected more thoroughly in the draft guidance.

General comments

4.16 A number of other suggestions were made by respondents about the structure and content of the guidance, including:

- bringing the information about professionals making autonomous decisions about confidentiality and disclosure forward to the front of the document;
- incorporating case studies of different scenarios professionals might face;
- including a reference to the importance of confidentiality in the context of social media.

5. Our comments and decisions

5.1 We have considered carefully all the comments we received to the consultation and have used them to revise the draft guidance. The following explains our decisions in some key areas.

Language and style

5.2 The majority of respondents to the consultation considered that the guidance was clear and easy to understand. However, we did receive some comments on how it could be improved and we have made a number of small changes in response, for example, numbering the section headings for ease of reference.

Consent and disclosure

5.3 Whilst the primary purpose of the guidance is to provide advice on how health and care professionals handle information about service users, in considering the feedback from the consultation it is clear that registrants would benefit from some further high-level guidance in other related areas. With this in mind we have:

- provided additional guidance on issues relating to capacity;
- expanded our guidance on issues relating to children and young people; and
- outlined the factors the Mental Capacity Act 2005 details must be considered when determining best interests.

Data protection

5.4 Some respondents requested further clarification for self-employed professionals around data protection principles, so we have made explicit reference to the need for self-employed professionals to contact the Information Commissioner if they are unsure how to proceed.

Safeguarding

5.5 A number of respondents requested further information on issues relating to safeguarding concerns. In the new guidance we have outlined the need to follow local procedures, or, where there aren't any, we have signposted the appropriate bodies a registrant should refer their concerns to.

Four country considerations

5.6 One organisation raised concerns about the distinctive and differing Scottish position in relation to consent and disclosure. We have, where possible, indicated where registrants in Scotland should take a different approach.

6. List of respondents

Below is a list of all the organisations that responded to the consultation.

Academy for Healthcare Science
Association of Educational Psychologists
Berkshire Healthcare NHS Foundation Trust
BLM (law firm)
British Academy Audiology - Service Quality Committee
British Chiropractic & Podiatry Association
British Society of Hearing Aid Audiologists
Canterbury Christ Church University
Centre for Advancement of Interprofessional Education (CAIPE)
College of Occupational Therapists
College of Paramedics
Greater Glasgow and Clyde Health Board - Area Psychology Committee
Information Commissioner's Office
National Community Hearing Association
Northern Ireland Ambulance Service Health and Social Care Trust
Professional Standards Authority for Health and Social Care
Scottish Ambulance Service
The British Dietetic Association
The Law Society of Scotland
The National Association of Educators in Practice (NAEP)
The Society of Chiropractors and Podiatrists
UNISON
Unite the Union