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FITNESS TO PRACTISE AND LEGAL
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Ref: G0309AAA.doc
12 January 2005

Dear Mr Phillips

Re: Consultation Paper: Access to relevant documents, records and data to counter NHS Fraud

Thank you for consulting us on the above document. The Royal Pharmaceutical Society of Great Britain is a professional and regulatory body for the pharmacy profession in Great Britain and maintains the statutory register for pharmacists and premises. As part of its regulatory function, the Society has a responsibility for setting standards as governed by a Code of Ethics, to ensure that pharmacists do not engage in any behaviour or activity likely to bring the profession into disrepute or undermine public confidence in the profession. In addition, the Society has statutory enforcement duties under the Pharmacy and Poisons Acts and the Medicine Act 1968.

In view of our professional and regulatory role, the Society broadly supports the proposals within the consultation paper and is committed to working with CFSMS in reducing the potential for NHS Fraud. To this effect the two organisations are in the process of drafting a Memorandum of Understanding, which seeks to cover, amongst other things, our joint working and information sharing.

There are a few points in relation to the consultation document that we would like to make in response to the summary of questions at Annex B:

Q1. Do you agree that as part of their investigation trained and accredited NHS counter fraud specialists should have access to relevant documents, records and data that assist in that investigation? If not, why?

Agreed, provided such documentation relates to an investigation within their enforcement authority. Consideration should be given to providing a schedule of any documentation, records or data seized by NHS Counter Fraud specialists to the person from whom they have been taken.

Q2. Are there any particular types of documents which NHS counter fraud specialists should not have access to? If there are, what types of documents?

Access to those documents, which are subject to legal professional privilege should not be permitted.

In addition, there is some documentation within pharmacies, which is required, by law, to be present on the premises in a certain format e.g. a bound register for Controlled Drugs. Access to some of these records is currently only permitted for authorised persons e.g. Society inspectors. There would need to be robust arguments as to why access to such documents should be permitted for NHS Counter Fraud Specialists as it is likely that information could be obtained from alternative sources.

Should access to such documents be sought and obtained then copies only should be taken, where to take the original would mean that the individual/corporate body could then be guilty of a criminal offence under other legislation for failing to retain documents in an appropriate format at their premises.

Q3. Do you think that a clinical specialist should accompany the Counter Fraud Specialist where the document are (sic) required to be made available immediately?

The Society has no specific comments in relation to this question, although this would seem unnecessarily restrictive.

Q4. Do you agree that punishment for the proposed offence is set at an appropriate level? If not, what would you propose?

Agree.

Q5. Do you agree that the use of the proposed new powers should be authorised by a senior manager (not below Deputy Director) and documentary evidence retained giving the reasons for the authorisation?

It is suggested that the chain of command between the investigator and the authorising officer should not be too short to ensure that appropriate objectivity is maintained. Concepts of necessity and proportionality in relation to authorisation should be enshrined in either Codes of Practice or Standard Operating Procedures to ensure that consistent decision making processes are employed.

Q6. Is it reasonable that only accredited Counter Fraud and Security Management Specialists should exercise this power?

It is agreed that only those Specialists who meet a certain competency level should be allowed to exercise these powers. Such Specialists should be appropriately trained in the powers available to them, the need for authorisation for certain activities and the limitation of the powers and authorisations, amongst other things.

Q7. Do you agree that the use of the powers is reasonable?

It is not clear from the consultation document whether the use of the powers in relation to attending the relevant premises in person and requiring immediate production of a document or access to documents relates to a right of entry 'at any reasonable time' or whether this is intended to give CFSMS extensive powers in relation to 'dawn raids'. If this extensive power is intended then these should also be subject to the concept of proportionality and necessity. If the information sought can be obtained from other means then consideration should be given to using alternative methods. (See also under 'general comment').

Q8. Do you agree that enforcement action should be concerned (sic) if documents are not provided within 7 days of the request being made?

Agree in principle, although consideration should be given to some form of defence e.g. enforcement action may be considered where, without reasonable excuse, documents have not been produced. See response to Q2 above.

Q9. Do you agree that safeguards should be included in any new powers for counter fraud specialists? If you agree, what type of safeguards? If you disagree, why?

Agree. Safeguards in relation to disclosure of information are extremely important. However, the proposed conditions for disclosure fail to take into account disclosure of information, obtained within the course of investigation, to professional regulatory bodies like the Society.

Both the Society and the CFSMS hold and use sensitive information about organisations and individuals in order to perform their core functions. It is vital that such information and documentation held is on occasion shared between the organisations if they are to perform their functions effectively. The Society recognises that this exchange of information needs to be carried out responsibly and within guidelines and a proposed MoU between the organisations will set out these guidelines. Each organisation is subject to the duty of confidentiality owed to those providing them with confidential information and the confidentiality and security of this information would need to be respected.

Statutory and other constraints on the exchange of information would need to be fully respected, including the requirements of the Data Protection Act, Freedom of Information Act and the Human Rights Act.

In order to successfully undertake our duties as a regulator it is vital that information sharing takes place between the two organisations. The following principles are proposed grounds for disclosure.

Where CFSMS is aware that during or following an investigation, evidence exists that a pharmacist or registered pharmacy technician has been involved in fraud, corruption or theft, the Society will be informed of such matters. The Society will consider whether any further investigation needs to be carried out and/or whether the matter should be referred to the Fitness to Practise Committees.

In cases where CFSMS staff are in doubt as to whether a case should be disclosed to the Society, they will make contact with the Society in order to discuss the matter. Any discussions at this stage will be anonymised. CFSMS staff will be able to rely on the fact that if the

specified Society staff indicate that they wish to receive full disclosure, this will be on the basis that this is essential for the **Society's core purpose or is in the public interest**. The Society has, in place, referral criteria against which cases are judged.

In cases where an investigation has concluded that there has been no fraudulent activity, but there may be concerns about the activities of a pharmacist or a registered pharmacy technician, information should be permitted to be passed to the Society to enable the Society's Fitness to Practise Committees to decide on the seriousness of the allegations and their relevance to the Society's core function. Subsequent disclosure of documents may be requested if relevant to the Society's role as a regulator.

General comment

In relation to exercising a right of entry into premises, consideration should be given to whether notice of intended entry should be given together with the subject matter and purpose of the investigation. This could be subject to exemptions where there were grounds to suspect that documents relevant to the investigation would be concealed, moved, tampered with or destroyed. This would seek to protect those who are not under investigation, but have access to or documents in their possession that are relevant to an investigation.

I hope that these comments are of use to you. I am happy to discuss them further if necessary.

Yours sincerely

J T Giltrow (Mrs)
Chief Inspector