



The Community Pharmacy Wales response
to
Department of Health Consultation

**A Code of Practice for the use of powers to
counter NHS fraud and security incidents**

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Part 1: Introduction

This response is submitted by Community Pharmacy Wales to the consultation *A Code of Practice for the use of powers to counter NHS fraud and security incidents*.

Community Pharmacy Wales (CPW) is the body whose function is to represent and negotiate NHS contractual matters on behalf of all pharmacy contractors in Wales.

Community pharmacies across Wales provide a valuable service to the majority of communities in Wales, including rural communities and communities in urban deprived areas.

Together they deliver a range of high quality professional services on behalf of the NHS in Wales and have done so over a number of years with integrity and without any undue concerns relating to fraud or inappropriate behaviour.

CPW are pleased to note the comment that 'the vast majority of patients and professionals would not dream of stealing or abusing NHS resources' and would wish to ensure that, at all times, the principles governing the work of the CFSMS are that: professionals act in the interests of patients and the NHS and should therefore be assumed not to be guilty of any fraud or maladministration unless there is sound evidence to the contrary.

Part 2: Draft Code of Practice (Wales)

Support for new powers

The new powers provided by the Health Act 2006 and in due course, the National Health Service (Wales) Act 2006, will allow the NHS Counter Fraud and Security Management Service to require production of documents that can assist with the prevention and detection of fraud against the National Health Service in Wales.

Community Pharmacy Wales agrees that there should be adequate powers to prevent fraud, so that the scarce resources of the NHS are not diverted away from patient care.

Powers to require production of documents must balance the need to prevent or detect fraud against the rights of individuals not to incriminate themselves as enshrined in Human Rights legislation. This balance has been tested at length, in a case involving pharmacy and self incriminating evidence, before the House of Lords and in the European Court of Human Rights. It is therefore important that the Code of Practice ensures that Authorised Officers are able to exercise their powers fully, but fairly.

We wish to make a number of comments on the draft Code, which we hope are useful in ensuring that the Code provides a robust framework, to protect both the Authorised Officer and the recipient of disclosure Notices.

Addressing of Notices

For pharmacy businesses we believe that the Notice should be issued in the name of the pharmacy contractor (i.e. the pharmacy owner whose name is included in the pharmaceutical list, and therefore who has the contractual relationship with the National Health Service). In each pharmacy that is open for the provision of pharmaceutical services, there must be 'a pharmacist in personal control' at all times that the pharmacy is open for the provision of pharmaceutical services. This pharmacist may be an employee of the pharmacy contractor, or may be a locum pharmacist engaged for a short period, either on a one – off or regular basis and are therefore often not the pharmacy contractor.

The employed or engaged pharmacist may be able to produce documents on behalf of the pharmacy contractor. The danger for the NHS CFSMS in placing the obligation on employed or engaged pharmacists, and not the pharmacy contractor, is that partial disclosure may take place if the pharmacist is not fully aware of the documents that are maintained by the business. In terms of the more commercially sensitive information, such as dispensing volume, contracts with care homes and other healthcare professionals, the pharmacy contractor may decide that the information will not be available to all pharmacists who work at the premises. **A notice requesting such information from the individual pharmacist could not be complied with.**

If the above suggestion is not successful, then we make the following points.

Pharmacy businesses may be under the day to day control of an employee pharmacist or a locum pharmacist engaged for a short period with little knowledge of the business. If this pharmacist is the person named on the notice, then we believe that they should be afforded reasonable opportunity to contact the owner of the pharmacy business before the disclosure takes place.

The reason this suggestion is made, is that employee pharmacists or locum pharmacists may not be aware of the needs of the business to take copies of important documents prior to their release to the Authorised Officer. Pharmacy owners have a legal duty to retain certain documents on the premises and in order to continue to provide pharmaceutical services, the pharmacy owner may require immediate access to documents or copies of documents, which would not be available if they had simply been produced to the Authorised Officer to take away. **As it is the pharmacy owner who is under a contractual duty to provide pharmaceutical services, the release of documents with or without copying, should be made with his knowledge.**

The employed or engaged pharmacist might also be unaware of documents that provide an explanation of the business that would allow the Authorised Officer to reach a speedy conclusion that there is nothing of a fraudulent character taking place. If the pharmacy contractor is unaware of the request, then the Authorised Officer may gain a false impression of the business and may commence protracted investigations that could have been avoided.

We do not suggest that release of documents should be subject to the consent of the pharmacy owner, or that there should be an unreasonable delay in release, but any furnishing of information should be with the knowledge of the owner.

Copying documents

Paragraph 39 of the Draft Code confirms that the Authorised Officer may take away originals or copies. Clearly, for some investigations the evidential chain will require the original documents to be taken away, but **in all cases, copies should be made of documents which are likely to be critical to the business or to the provision of pharmaceutical services, before the original leaves the premises.** Examples would include outstanding repeat prescriptions and batch issues, or other uncollected prescriptions. For documents that do not have the same status, the Authorised Officer should be required to produce promptly copies of any documents taken away, if requested to do so by the pharmacy contractor.

Notice – availability of recipient

The Authorised Officer should be satisfied that the person named in the Notice is going to be at the premises or will be within a reasonable time. If for example, the Authorised Officer establishes the name of the pharmacist present, and then sends a Notice to the pharmacy by post, the original pharmacist may no longer be present and may not be intending to work at the pharmacy again. An envelope addressed to a named individual pharmacist would probably not be opened by anybody else, and attempts may be made to forward it, so delaying compliance.

Self incrimination

Paragraph 40 would benefit from expansion. In the opening to this response reference was made to the Human Rights legislation and the rights of an individual not to be required to incriminate himself. A simple question about colour coding of a document may not be self-incriminating, but where Authorised Officers seek any explanation of the documents being produced in compliance with a Notice, there should be an appropriate caution given under the Police and Criminal Evidence Act to avoid an impression being given that the powers of the Authorised Officer extend to requiring what might be self incriminating evidence.

Computer data

It is not clear from the text of paragraph 43 whether it is proposed that computer systems themselves would be taken away from the premises. We suggest that they should not. **If computer data is required, then this should be extracted onto removable media, since the computer itself will be absolutely vital to the continued functioning of the pharmacy.**

Confidentiality

We note that the Authorised Officer will be able to demand production of almost any document. He will be specially trained and certified and he will have an understanding of the confidentiality of the materials that he takes into his possession. Paragraph 43 of the Code then allows the Authorised Officer to place materials in a secure store from where other individuals may access it. There is no guarantee within the Code, that the other individuals that have access to the materials will have been similarly trained, accredited and bound by a duty of confidentiality. A system built on specialist officials being able to demand production of documents which may

be highly sensitive, should be bolstered by adequate safeguards as to who may access the documents once removed by the official.

Evidence of credentials

The Authorised Officer must produce a Notice in order to demand production of any materials. He is also required to produce evidence of his authority and identity; otherwise the recipient of the Notice is not bound to provide it. We suggest that the Notice has a prominent statement to this effect, so that there is no uncertainty on the part of the recipient. For Notices sent by post, the Authorised Officer should produce a copy of his credentials along with the Notice. To guard against fraudulent requests for disclosure, there should be a national register available at all times, so that recipients can make suitable checks to confirm the identity of Authorised Officers, the powers under which they operate and the addresses they use.

Designated Officers

It is stated in paragraph 50 that the Designated Officer will be defined in regulations. The person who holds this position will have the duty of safeguarding personal data, by scrutinising requests. We believe that in order for there to be adequate safeguards the Designated Officer must occupy a position within the NHS CFSMS superior to the Authorised Officers. When a request is made for disclosure of personal records, the Notice should state, in addition to the standard requirements, the name of the Designated Officer who authorised the request and the date on which the authorisation was given. It would be appropriate for the Code of Practice to state explicitly that approval from a Designated Officer cannot be given retrospectively. It also follows that the records maintained by the Designated Officer of approvals or rejections should be available to the pharmacy contractor connected with the request.

Security of Transport

Paragraph 54 confirms that documents taken into possession by the Authorised Officer will be stored securely. As these documents may be highly sensitive, the Code should also state that the transport of documents will be carried out securely.

CPW is content for this response to be made freely available.