Consultation on religion, personal values and beliefs

General Pharmaceutical Council

Response of The Christian Institute

Introduction

The Christian Institute is a non-denominational charity established for the promotion of the Christian faith in the UK and elsewhere, and the advancement of education. We are supported by around 4,000 churches and church ministers from almost all the Christian denominations, with a total of over 55,000 supporters throughout the United Kingdom.

We have previously taken action to defend the rights of conscience of Christians and others in many different areas. We are responding to this consultation because we believe that the proposed amended standards make inadequate provision for those with conscientious objections to certain treatments.

Summary of key points

- The change to the standards dilutes the rights of conscience for pharmacists, effectively replacing the current duty to refer with a duty to dispense. Many pharmacists with conscientious objections to certain treatments will be forced to act against their conscience or leave the profession.
- The approach to discrimination taken in the guidance has little basis in the law and the proposals themselves have the potential to be discriminatory.
- The draft standards and guidance are unclear and will leave pharmacists unsure what their rights and responsibilities are.
- No real evidence has been given to justify the change of approach.
- The General Medical Council's *Good Medical Practice* is far more explicit about the rights of conscience, without compromising patient care. It sets out clearer and more objective considerations for the practitioner to take into account in exercising his conscientious objection. This provides a well-established model for the General Pharmaceutical Council to follow.
- We consider that the proposals being consulted on, if enacted, are open to legal challenge.

Consultation

The consultation relates to the professional standards set by the General Pharmaceutical Council ("GPhC") as the regulator for pharmacy professionals in Great Britain.

The proposals being consulted on are central to pharmacy practice because a failure to comply with those standards "may be taken into account" by the GPhC's Fitness to Practise Committee in determining whether a registrant's fitness to practise is impaired.[1] It is therefore essential that the rules are fair, clear and accessible.

The GPhC is under a statutory duty to consult on any changes to the standards.[2] This means that the consultation must be conducted properly, having proper regard to the full range of other legal duties to which the GPhC is subject.

Proposals

The proposals in the consultation would, in effect, remove the current right of conscientious objection contained within *Standards of conduct, ethics and performance*. We would rather see the protections for conscientious objection strengthened.

The issue of conscience may arise for a pharmacy professional in relation to different services, including in relation to contraception, sexual health services or hormonal therapies. The issue which would most commonly raise concerns for pharmacy professionals is the supply of Emergency Hormonal Contraception, such as the Morning After Pill. Many people believe, in good conscience, that this is an abortifacient which terminates human life.

Standard 1

New standards are due to come into effect on 1 May 2017. Under standard 1 as drafted, a pharmacy professional is required to tell relevant professionals, employers or others if their own values or beliefs prevent them from providing care, and refer people to other providers. This duty to 'sign-post' to other providers is effectively a right to sign-post and this wording is reflected in the existing standards.[3] Although the current clause is not perfect, it does implicitly enshrine a right of conscience, which is respected in custom and practice. Pharmacists and their employers are generally able to come to an arrangement of reasonable accommodation which works for the employee, dispensary and service users.

Proposed changes to new standard 1

The GPhC is proposing to change the wording of new standard 1 before it even comes into effect. The proposed changes will remove the duty to sign-post and replace it with a duty to "take responsibility for ensuring that person-centred care is not compromised because of personal values and beliefs". This is a much more vague and subjective requirement and,

[1] The General Pharmaceutical Council (Fitness to Practise and Disqualification etc) Rules 2010 as contained in the schedule to The General Pharmaceutical Council (Fitness to Practise and Disqualification etc. Rules) Order of Council 2010 (SI 2010/1615), Rule 24(11)

[2] The Pharmacy Order 2010 (SI 2010/231), Article 5(1)

[3] *Standards of conduct, ethics and performance*, General Pharmaceutical Council, July 2012, para. 3.4

together with the proposed revised guidance, creates a multitude of potential obstacles for the pharmacy professional to negotiate. The proposed change to standard 1 will, in effect, replace the current duty to refer with a duty to dispense.

The consultation accepts that the proposals are "a significant change". They would change expectations and "shift the balance in favour of the needs and rights of the person in their care". The consultation admits that under the new proposals a referral to another service provider might not be enough to ensure that person-centred care is not compromised.[4]

The proposed revised guidance on religion, personal values and beliefs sets out an array of factors which a pharmacy professional must consider when applying his or her duty under the proposed new standard 1.

Many of the factors are subjective and open to interpretation and misinterpretation. For example, how can a pharmacy professional explain to a service user that he does not supply emergency contraception and must ask a colleague to deal with them without that being taken to *imply* disapproval of the treatment being sought? And there will always be a risk that a service user may feel uncomfortable or embarrassed even where a pharmacist behaves in a wholly professional and polite way.

The guidance applies a very elastic concept of discrimination. Providers of goods or services must not discriminate on the grounds of a service user's legally protected characteristics.[5] However, the right to certain treatments is not protected under the Equality Act 2010, for example the right to access emergency contraception. The proposed guidance instead refers to discrimination on grounds of a pharmacy professional's *own* religious beliefs. But the effect of this is that any instance of a pharmacist with religious convictions politely declining to dispense will necessarily be deemed to be an act of discrimination. This goes beyond the scope of the current standards[6] and the requirements of the Equality Act. Indeed, this concept of discrimination actually itself discriminates against pharmacy professionals on grounds of their religion or belief.

Further, the various factors cited in the guidance – particularly under the heading of effective communication – could easily draw pharmacy professionals into potentially difficult discussions with service users which involve them advising on the very treatment to which they have a conscientious objection. There is clearly a risk that during such discussions service users will pick up on what they perceive to be negative vibes.

The proposed changes to standard 1 and the proposed revised guidance will thus create a minefield for pharmacy professionals to navigate. The fear of how service users could react and what complaints might arise will have a chilling effect on pharmacists, many of whom will feel compelled to act against their conscience or leave the profession. It will also profoundly discourage Christians, those of other faiths or simply those with conscientiously-held beliefs from entering the pharmacy profession in the first place.

[4] *Consultation on religion, personal values and beliefs*, General Pharmaceutical Council, December 2016, page 11

[5] The relevant protected characteristics are disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation (see Equality Act 2010, Sections 4, 28(1), and 29).

[6] *Standards of conduct, ethics and performance*, para. 3.3

Statutory duties

The consultation states that the proposed changes make "person-centred care" the overriding objective. However, the consultation then makes a startling claim which seems incompatible with *any* right of conscience for pharmacy professionals:

> *"We want to ensure people can access the advice, care and services they need from a pharmacy professional in whatever setting, and when they need them".*[7]

This stated objective risks being seen as giving a right to a service user to require particular services from a *particular* pharmacy professional *wherever* and *whenever* they want it.

Furthermore, this objective has no place within the general statutory duties of the GPhC. Although the GPhC is under a general duty that "the over-arching objective of the Council in exercising its functions is the *protection* of the public",[8] this is stated to be in terms of the protection, promotion and maintenance of the "health, safety and well-being of the public".[9] It is not about protecting the public from embarrassment or marginal discomfort, however much that should be avoided. Indeed, the statutory duties of the GPhC further provide that:

> *"In exercising its functions, the Council (including its staff and committees) must –*
>
> *(a) have proper regard to –*
>
> *i. the interests of persons using or needing the services of registrants in Great Britain, [and]*
>
> *ii. the interests of all registrants and prospective registrants, and any differing interests of registered pharmacists and registered pharmacy technicians or groups within those professions".*[10] [emphasis added]

However, the proposals being consulted on do not give proper weight to the balance of all these interests.

Freedom of conscience

The GPhC exercises public functions.[11] This means the GPhC would be acting unlawfully if it acts in any way which is incompatible with any of the rights contained within the European Convention on Human Rights ("ECHR")[12]. This includes article 9, which states:

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[7] *Consultation on religion, personal values and beliefs,* page 16

[8] The Pharmacy Order 2010 (SI 2010/231), Article 6(1)

[9] *Ibid*, Article 6(1A)

[10] *Ibid*, Article 6(2)

[11] The GPhC was established by article 4 of The Pharmacy Order 2010 (SI 2010/231). Article 4(3) provides that its principal functions include *"(b) to set and promote standards for the safe and effective practice of pharmacy at registered pharmacies; (c) to set requirements by reference to which registrants must demonstrate that their fitness to practise is not impaired"*.

[12] Section 6(1) of the Human Rights Act 1998 provides that: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

(1) *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

(2) *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.* [emphasis added]

The European Court of Human Rights has held that freedom of thought, conscience and religion is one of the foundations of a 'democratic society' and that in its religious dimension is "one of the most vital elements that go to make up the identity of believers and their conception of life".[13]

The GPhC is also under a duty to not discriminate against its members on the basis of their religion contrary to article 14 of the ECHR.[14] Therefore, where a pharmacy professional has rights which fall within the ambit of article 9, the GPhC must not discriminate against him on grounds of his religion. Significantly, several elements of the proposals being consulted on would have the effect of placing pharmacists with conscientiously-held beliefs at a particular disadvantage because of their beliefs.

There was a time when a pharmacist taking a case to the European Court of Human Rights could not successfully rely upon article 9.[15] However, the Court has since developed its case law. It has moved to assert a right of conscientious objection within the Convention, so maintaining "religious pluralism, which is vital to the survival of a democratic society".[16] And in a case against the United Kingdom, the Court overruled its previous approach that it does not infringe article 9 if a person can simply resign from their job and change employment, preferring instead to weigh that possibility in the overall balance when considering whether or not a restriction is *proportionate*.[17] The Court also made clear that "the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed".[18,19]

This increasing emphasis on freedom of conscience is reflected in the medical sphere in Resolution 1763 (2010) of the Parliamentary Assembly of the Council of Europe, which explicitly affirms a right of "conscientious objection".[20]

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[13] *Kokkinakis v Greece* [1993] 17 EHRR 397, at para. 31

[14] Article 14 provides: *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion...."*

[15] *Pichon and Sajous v France* [2001] ECHR 898 (02 October 2001 – Admissibility Decision)

[16] *Bayatyan v. Armenia* [2012] 54 EHRR 15, at para. 122

[17] *Eweida and others v. United Kingdom* [2013] 57 EHRR 8, at para. 83

[18] *Ibid*, at para. 81

[19] In relation to the third applicant, Ms Ladele, it was noted that although the word 'conscience' features in Article 9(1) it is "conspicuously absent" in 9(2): see *Eweida and others v. United Kingdom* [2013] 57 EHRR 8, per Judges Vucinic and De Gaetano (dissenting)

[20] Resolution 1763 (2010), Parliamentary Assembly of the Council of Europe, see http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17909&lang=en as at 7 March 2017

The law therefore recognises freedom of conscience as distinct from freedom of religion more generally, although conscience may be informed by religious beliefs. And case law recognises a right to conscientious objection with a corresponding duty of reasonable accommodation. This means that *wherever reasonably possible*, law makers and public authorities should seek to avoid placing a person in a situation of either remaining faithful to his conscience or facing the consequences of breaching some requirement placed upon them.

No justification

The overriding aim of the proposed changes to standard 1 is stated to be "person-centred care". However, no justification is offered for the proposals which would satisfy any of the grounds contained within article 9(2) ECHR. In any event, the proposed changes adopt disproportionate means and cannot be said to be necessary in a democratic society.

The consultation implies that under the current standards person-centred care is compromised. However, no evidence is offered for this. In practice, most pharmacists work in contexts where multiple fully-qualified pharmacists and technicians are employed and/or other dispensaries are located within a reasonable distance. It is open to the dispensary to operate arrangements to ensure that a pharmacist with particular beliefs can work in good conscience and customers are able to access the services they need.

Furthermore, in the context of a judgment affirming the right of conscientious objection under article 9, the European Court of Human Rights has stated:

> *"The Court reiterates its settled case-law that the expression "prescribed by law" requires firstly that the impugned measure should have some basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct".*[21]

However, the proposed changes to standard 1 and the revised guidance will not make the relevant professional rules clear and accessible to the practitioner. Rather, they will confuse pharmacists and technicians as to the nature of their rights and responsibilities. It will be unclear that any right of conscience exists. Instead, the proposed changes put all the onus on the professional to navigate complex, vague and subjective guidelines. Pharmacy staff will fear asserting their religious beliefs on pain of disciplinary action. In any event, the standards and accompanying guidance are not law and even cut across legal rights.

It should be noted that the courts are prepared even to strike down legislation as incompatible with human rights where it is not formulated with sufficient precision to enable persons to foresee their rights and duties e.g. the United Kingdom Supreme Court in *The Christian Institute and others v The Lord Advocate*.[22]

[21] *Bayatyan v. Armenia* [2012] 54 EHRR 15, at para. 113

[22] *The Christian Institute and others v The Lord Advocate* [2016] UKSC 51

Equality and diversity

As a public authority in respect of its public functions, the GPhC is under a duty in the Equality Act 2010 not to "do anything that constitutes discrimination".[23] This includes its functions in issuing and applying professional standards and guidance.

The GPhC is also under a statutory duty to have due regard in its public functions "to the need to advance equality of opportunity between persons who share a relevant protected characteristic [including religion or belief] and persons who do not share it".[24] This includes removing or minimising "disadvantages" suffered by persons who share a protected characteristic, and taking "steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it".[25] Such steps are essential to the promotion of diversity.

The current proposals being consulted on do not demonstrate that proper regard has been had to the needs of those who have conscientiously-held objections to dispensing certain treatments. There is certainly no evidence of any meaningful Equality Impact Assessment.

In addition, the changes being consulted on would impact the employment protections in the Equality Act 2010. Significantly, the United Kingdom Supreme Court has ruled:

> *"The Equality Act [2010] requires that any employer refrain from direct or unjustified indirect discrimination against his employees on the ground of their religion or belief. So, even if not protected by the conscience clause in section 4 [of the Abortion Act 1967], the petitioners [two nurses] may still claim that, either under the Human Rights Act or under the Equality Act, their employers should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs".*[26] [emphasis added]

In fact, the GPhC's proposed changes to the standards and its revised guidance risk cutting across decisions made by employers about their duty to accommodate employees. The proposed changes to standard 1 and the guidance will narrow the scope for reasonable accommodation which employment law otherwise permits, meaning that pharmacists may not be able to claim their legal rights without breaching professional standards.

Similarly, an employer could be held to have breached his duties in employment law even though the employer was merely seeking to reflect the guidelines of the GPhC. Although the *Standards of conduct, ethics and performance* are directed to individual pharmacy professionals they naturally inform how employers will view their responsibilities to staff. It is also the case that many of those managing pharmacy professionals will themselves be pharmacists and therefore subject to the *Standards of conduct, ethics and performance*.[27]

[23] Equality Act 2010, Section 29(6)
[24] Equality Act 2010, Section 149(1)(b)
[25] Equality Act 2010, Section 149(3)
[26] *Greater Glasgow Health Board (Appellant) v Doogan and another* [2014] UKSC 68, at para. 24
[27] It is notable, for example, that the current *Standards of conduct, ethics and performance* (2012) include a requirement *"7.8 Make sure that your actions do not stop others from keeping to their legal and professional responsibilities, or present a risk to patient care or public safety"*.

The current proposals risk more frequent and complex legal disputes between employers and employed pharmacy professionals – disputes which the GPhC may itself be drawn into, distracting it from its proper role as a regulator.

We consider that the proposals being consulted on, if enacted, are open to legal challenge. This includes by way of judicial review of any decision to adopt the proposed new wording of standard 1 and the revised guidance, for which there are several potential grounds. The Christian Institute reserves its rights in relation to pursuing a legal challenge.

Comparison with Good Medical Practice

The medical profession provides a robust example of how freedom of conscience can be addressed in a professional context while still maintaining the interests of service users.

In the medical sphere, rights of conscientious objection are enshrined in legislation. As well as the conscience clause permitting medical staff not to participate in abortion[28], there is a right of conscientious objection in relation to not supplying or prescribing emergency contraception.[29] More widely than medical care, a right of conscientious objection is recognised in relation to participation in work involving the treatment and development of human embryos.[30]

The existence of such explicit conscience rights in the medical sphere shows that they can be consistent with maintaining good patient care. A proper balancing of rights is long established. The legislative exceptions in the field of medicine and embryology also demonstrate that many people (religious or otherwise) believe that human life begins at conception and that this is a belief worthy of respect in a democratic society. Given this, the reluctance of the GPhC to use the word 'conscience' in its standards is surprising.

The General Medical Council's *Good Medical Practice* ("GMP") provides:

> *"52. You must explain to patients if you have a conscientious objection to a particular procedure. You must tell them about their right to see another doctor and make sure they have enough information to exercise that right. In providing this information you must not imply or express disapproval of the patient's lifestyle, choices or beliefs. If it is not practical for a patient to arrange to see another doctor, you must make sure that arrangements are made for another suitably qualified colleague to take over your role."*[31]

GMP is explicit about the right of conscientious objection and that it relates to any procedure about which a doctor might have strongly-held convictions. At the same time, GMP seeks to maintain a person-centred approach. The requirement to "not imply or express disapproval" is similar to that being proposed by the GPhC, but this is firmly embedded in the context of explicitly recognising a right of conscientious objection.

[28] Abortion Act 1967, Section 4
[29] The National Health Service (General Medical Services Contracts) Regulations 2015, schedule 1 para. 3
[30] Human Fertilisation and Embryology Act 1990, Section 38
[31] *Good Medical Practice*, General Medical Council, April 2014, para. 52

The GMC's explanatory guidance *Personal Beliefs and Medical Practice (2013)* fully recognises "*that personal beliefs and cultural practices are central to the lives of doctors and patients, and that all doctors have personal values that affect their day-to-day practice."*[32] In applying the right of conscientious objection, the guidance then states:

> *"4 Doctors may practise medicine in accordance with their beliefs, provided that they act in accordance with relevant legislation and:*
>
> - *do not treat patients unfairly*
> - *do not deny patients access to appropriate medical treatment or services*
> - *do not cause patients distress.*
>
> *If any of these circumstances is likely to arise, we expect doctors to provide effective patient care, advice or support in line with* Good medical practice*, whatever their personal beliefs."*

These guidelines contain much more clearly defined thresholds than the factors being proposed by the GPhC in the proposed revised guidance. They are also much more objectively measurable. A requirement not to cause distress is a more robust threshold than one simply not to cause embarrassment or discomfort.

The fact that clearly defined protections exist for medical practitioners highlights the lack of clarity and safeguards in the GPhC proposals. At a time when pharmacy professionals seem to be promoted as frontline providers of healthcare, the GPhC's departure from what is long-established practice in the medical profession is illogical.

We believe the example of GMP provides a possible way forward for the GPhC. Alternatively, the GPhC might consider operating an 'opt in' system for pharmacy professionals in relation to certain areas of dispensing, similar to the proposals of the Royal Pharmaceutical Society in 2013 in relation to participation in assisted suicide.[33]

Proxy campaigns

The Secular Medical Forum, an affiliate of the National Secular Society (NSS), has claimed that the current consultation is a "direct result" of concerns raised by them with the GPhC. They say that "most of the concerns and recommendations" they raised have been incorporated into the current consultation.[34] But the position of the NSS in relation to freedom of conscience is a matter of public record, including intervening in legal cases to limit the right of reasonable accommodation. This includes a case in which the United Kingdom's approach was found to be too restrictive already, in breach of article 9.[35]

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[32] *Personal Beliefs and Medical Practice*, General Medical Council, 2013, para. 3

[33] *Assisted Suicide – Royal Pharmaceutical Society Policy Statement*, Royal Pharmaceutical Society, January 2013

[34] 'Pharmacy rules to emphasise patients' rights thanks to secular medical campaigners', *National Secular Society*, 4 January 2017, see http://www.secularism.org.uk/news/2017/01/pharmacy-rules-to-emphasise-patients-rights-thanks-to-secular-medical-campaigners as at 7 March 2017

[35] Submissions on behalf of the National Secular Society (Eweida and Chaplin v the United Kingdom, Ladele and McFarlane v the United Kingdom), 14 September 2011

The proposed changes being consulted on will give secular groups more tools to pursue their campaigning activities, potentially using complaints against pharmacy professionals as proxy battles. The GPhC should not allow itself to be politicised in this way.

The Christian Institute
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