

**The Health Committee Clerk,
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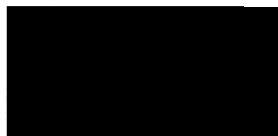
BMA NI Response to the Adult Protection Bill – evidence to the Health Committee Stage

The BMA (British Medical Association) is the trade union and professional association for doctors and medical students in the UK. We ensure that doctors and medical students have the resources and support to fight for improvements in the workplace and in medical practice for the benefit of ourselves, our colleagues, our patients and a healthier society. We do this through organising to win and campaigning to influence on the matters of importance to the medical profession.

BMA NI welcomes the opportunity to provide evidence to the Health Committees consideration of the Adult Protection Bill. Our comments are detailed below.

Should you require any further information, please do not hesitate to contact us.

Yours sincerely



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Summary

- The BMA opposes this Bill in its current form. At the heart of our concerns are two fundamental ethical and legal principles of paramount importance which the Bill seeks to set aside:
 - maintaining trust in a confidential health service for all patients; and
 - the right of adults with capacity to make their own decisions (even where others consider those decisions to be unwise).
- The Bill seeks to override the duty of medical confidentiality in relation to adults with capacity. This is a matter which is likely to have profound consequences for trust in the health service and patients' health-seeking behaviour in Northern Ireland. Once patients lose trust in the health service it is very difficult, or impossible, for it to be regained.
- The Bill is in direct contradiction to the principles in doctors' professional standards on confidentiality [set by the GMC](#) which are clear that adults with capacity:
 - have the right to make their own decisions about disclosures of confidential information; and
 - the right to manage the risks to which they are exposed (provided no one else is at risk) even if other people consider their decisions to be unwise.
- We understand that the intention underpinning the draft legislation is the need to take action to improve adult safeguarding following the failings identified in the 'Home Truths' report.
- We fully understand and wholly support these intentions. However, it is notable that the particular cases identified in the report concerned adults with dementia, mental health issues or severe learning difficulties which may raise questions about their capacity, however, the Bill itself extends to adults who have capacity.
- We are clear that information should be shared where it is in the best interests of an adult who lacks capacity to protect them from harm and abuse. We do not believe, however, that legislation should override the right to confidentiality of an adult with capacity (save in exceptional and limited circumstances 'in the public interest' as set out in [GMC guidance](#)). Adults with capacity should have their

wishes respected while at the same time be offered the appropriate support which might lead them to make decisions in their own interests.

- The crucial problem with the Bill is the definition of an ‘adult at risk’ in Clause 2. The definition in Clause 2 extends beyond adults who lack capacity. The definition includes adults who do not lack capacity and who retain the ability to make their own decisions.
- This means that adults with capacity will be captured by the mandatory reporting requirements of Clause 4. Healthcare professionals will be required to report adults with capacity without their consent to the HSC trust where they are considered at risk.
- We would like to see the Bill amended so that it refers only to adults lacking capacity. Adults with capacity should not have their confidentiality breached (save in the exceptional circumstances set out in GMC and BMA guidance).

Importance of a confidential health service

- It is vital that people feel they can share sensitive information in confidence with doctors and others within the care team. Patients should be able to expect that the information they give about their health will be kept confidential (save in exceptional and limited circumstances).
- We believe that this Bill, if passed unamended, will have a highly detrimental impact on the trust relationship between doctors and patients and deter some people from seeking care, with potential adverse impacts on those individuals but also on public health if people are reluctant to come forward to seek medical care from their doctor.
- A loss of trust by patients who are at risk may, in fact, achieve the opposite of the laudable intentions behind this Bill. For example, should victims of domestic abuse believe that their confidential information will be disclosed without their consent, this might deter those individuals from confiding in their doctor (or other healthcare professional). This means the health service will have lost an early opportunity to provide help and support to those individuals, possibly leaving them with nowhere else to turn. Adults who initially refuse disclosure or support may change their decision over time within the context of a trust relationship.
- A failure to respect confidentiality may also expose a victim of domestic abuse to increased risk. As stated in [BMA guidance](#):

Where adults consider themselves to be at risk from those close to them, they may also be concerned that a disclosure of information may put them at greater risk. If an abusive partner is interviewed by the police or social services for example, abuse may be intensified. The importance of adults

who may be at risk of harm being able to control the disclosure of their own information is therefore clear.

- The crucial importance of maintaining a confidential health service means that in all but exceptional and defined circumstances the appropriate legal basis for the disclosure of confidential information in relation to patients with capacity will be the explicit consent of the individual to whom the information relates.
- The preservation of trust in a confidential health service has long been recognised as essential by the law and doctors' professional obligations and is reflected in the high standards for disclosing data held in confidence by the health service.

GMC and BMA guidance: The rights of adults with capacity to make their own decisions:

- The Bill does not accord with the professional and regulatory standards for the disclosure of confidential information set for doctors by the GMC and ethical guidance from the BMA.
- Both sets of guidance reflect the ethical and legal principle that adults with capacity have the right to make decisions about how they manage the risks to which they are exposed (provided no one else is at risk of harm).

GMC guidance on confidentiality

- [GMC guidance](#) states:

The rights of adults with capacity to make their own decisions

Para 57. As a principle, adults who have capacity are entitled to make decisions in their own interests, even if others consider those decisions to be irrational or unwise. [emphasis added] *You should usually ask for consent before disclosing personal information about a patient if disclosure is not required by law, and it is practicable to do so. You can find examples of when it might not be practicable to ask for consent in paragraph 14.*

Para 58. If an adult patient who has capacity to make the decision refuses to consent to information being disclosed that you consider necessary for their protection, you should explore their reasons for this. It may be appropriate to encourage the patient to consent to the disclosure and to warn them of the risks of refusing to consent.

Para 59. You should, however, usually abide by the patient's refusal to consent to disclosure, even if their decision leaves them (but no one else) at risk of death or serious harm. [emphasis added] *You should do your best to give the patient the information and support they need to make decisions in their own*

interests – for example, by arranging contact with agencies to support people who experience domestic violence. Adults who initially refuse offers of assistance may change their decision over time.

BMA guidance on [Adults at risk, confidentiality and information sharing](#)

- BMA guidance mirrors that of the GMC and states:

In the BMA's view, adults with capacity have the right to make decisions about how they manage the risks to which they are exposed and such decisions should ordinarily be respected. In these circumstances, doctors should sensitively explore with the patient the reasons for non-disclosure and, where appropriate, offer referral to or information about appropriate support services.

And

Wherever doctors or other healthcare professionals seek to disclose confidential information about adults with capacity they should consider in the first instance whether they can obtain consent. Ordinarily, where a patient with capacity refuses consent to disclosure this should be respected. This principle is reflected in GMC guidance on confidentiality...

The guidance goes on to discuss the exceptional circumstances when information could be disclosed in the public interest and the difficulties this presents.

In some circumstances healthcare professionals may seek to disclose information on the basis of the public interest in order to protect adults with capacity where they have a reasonable belief that the individual will be the victim of serious crime such as violent assault. Here a difficult balance will need to be found between respecting a patient's decision-making rights and an assessment of the likelihood of a serious crime being prevented by disclosure.

Although in the BMA's view disclosure here may be justified, healthcare professionals should keep in mind the difficulty of prosecuting a crime where the victim refuses to participate with the criminal justice system, as well as the impact of disclosure on the patient's trust in the profession.

Given the difficulties associated with preventing crime where the victim refuses to co-operate, disclosure of information without consent in these circumstances is likely to be exceptional. This is likely to be where there is strong evidence of a clear and imminent risk of a serious crime likely to result in serious harm to the individual, and the disclosure of information is likely to prevent it.

Common law position in Northern Ireland: the freedom to make an unwise decision

- As set out in [the BMA's toolkit on mental capacity in Northern Ireland](#), a basic principle of the common law in Northern Ireland is that:

All adults retain the right to make decisions which seem unwise or irrational to others. Although such actions may raise questions about capacity which require further exploration – where for example they follow a period of illness or an accident – they are not determinative of capacity. What matters is the ability to make the decision, not the content of the decision per se.

Comments on specific clauses

Clause 1: Principles for performing functions under this Part

This clause states that ‘the principle that the trust or social worker should intervene, or authorise an intervention, only if satisfied that the intervention— (i) will be in the best interests of the adult’ (Clause 1 (a)(i)).

The legal position on ‘best interests’ is set out in the [BMA's toolkit on mental capacity in Northern Ireland](#) (section 5) and relates only to adults lacking capacity.

Clause 1 should be amended so that it reflects the correct legal definition of ‘best interests’ in Northern Ireland.

Clause 2: ‘Adult at risk’

Clause defines an ‘adult at risk’ (A). A is considered to be an ‘adult at risk’ if:

- (a) A is unable to protect A's own well-being or property;
- (b) the conduct of another person is causing (or is likely to cause) A to be harmed; and
- (c) A's personal circumstances increase A's exposure to harm. (Clause 2 (1)(a-c)).

This definition includes adults with capacity.

Clause 2 should be amended so that it is clear the definition includes only adults who lack capacity under the terms of the Mental Capacity Act (Northern Ireland) 2016.

Clause 4: The duty to report and co-operate in inquiries

Clause 4 introduces a requirement to report an adult ‘at risk of harm’ (harm being physical, psychological, theft or fraud) without their consent even where they have capacity to the local healthcare trust.

Clause 4(2)(a) and (b) states:

Where a person or body to which this section applies has reasonable cause to suspect—

(a) that a person is an adult at risk, and

(b) that action needs to be taken (under this Part or otherwise) in order to protect that person from harm, the body or person must report the facts and circumstances of the case to the HSC trust in whose operational area the adult ordinarily resides.

This requirement includes healthcare professionals (clause 4 (1)(g) and (h)).

Our concerns about clause 4 can be addressed by our suggested crucial amendment to Clause 2 i.e. the definition of ‘adult at risk’ should be amended to make it clear that the Bill relates only to adults lacking capacity.

Clause 8: examination of records

This clause sets out that where medical records are required by a social worker the grounds for disclosure are:

- consent by the adult at risk (Section 8(2)); or
- a ‘production order’ - which applies where consent is refused or the individual lacks capacity. (Section 8(4)(a) and (b)).

Should the definition of an ‘adult at risk’ be amended in the way we have suggested, this clause will need to be amended so that it refers only to the requirements for medical records where an adult lacks capacity.