

# Written evidence submitted by the British Medical Association (MCAB40)

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## Mental Capacity (Amendment) Bill

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House of Commons, Committee Stage

### About the BMA

The BMA (British Medical Association) is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

The BMA calls on MPs to support the Mental Capacity (Amendment) Bill (MCA Bill) to better protect the rights and protections of vulnerable people who lack capacity to make decisions about their care and treatment.

### Key points

- We are concerned that the Mental Capacity (Amendment) Bill (MCA) does not include the same reference as the legislation it is replacing which would ensure that the individual carrying out an assessment is a Registered Medical Practitioner (RMP). It is important to address this by including the term RMP in this Bill to ensure patient safeguards remain in place.
- Under section 49 of the MCA Bill, the Court of Protection can order reports from NHS health bodies when it is considering any question relating to an adult who may lack capacity. The BMA supports concerns raised by the Royal College of Psychiatrists that this mandating of reports can be overburdensome and supports exploration of alternative solutions.

### The use of the term 'unsound mind'

The BMA called for and welcomed the Lords amendment to the Bill to replace the use of the outdated and potentially stigmatising terminology 'unsound mind' on the face of the Bill. The term 'mental disorder' is now used in the Bill as an alternative. We hope that the following concerns contained within this briefing can be addressed in the same constructive manner.

### Reports ordered by the Court of Protection under the MCA

Under existing legislation, a Mental Health Assessment must be undertaken as part of a Deprivation of Liberty Safeguards (DoLS) authorisation and a Mental Health Assessor must meet certain criteria to undertake this assessment. The existing Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008/1858 state:

*4.— Eligibility to carry out a mental health assessment*

*(1) A person is eligible to carry out a mental health assessment 1 if paragraphs (2) and (3) are met.*

- (2) The person must be—*
- (a) approved under section 12 of the Mental Health Act 1983; or*
  - (b) a registered medical practitioner who the supervisory body is satisfied has at least three years post registration experience in the diagnosis or treatment of mental disorder.*
- (3) The supervisory body must be satisfied that the person has successfully completed the Deprivation of Liberty Safeguards Mental Health Assessors training programme made available by the Royal College of Psychiatrists.*
- (4) Except in the 12 month period beginning with the date the person has successfully completed the programme referred to in paragraph (3), the supervisory body must be satisfied that the person has, in the 12 months prior to selection, completed further training relevant to their role as a mental health assessor.*

The BMA and other stakeholders including the Royal College of Psychiatrists are concerned that the Mental Capacity (Amendment) Bill (MCA) does not include the same reference as the legislation it is replacing which would ensure that the individual carrying out an assessment is a Registered Medical Practitioner (RMP). To ensure patient safety the remaining ambiguity in the wording of the Bill must be removed so that there is no question about the legitimacy of an individual tasked with carrying out an assessment.

We have sought legal counsel on this and continue to be concerned that while the current law provides that assessment of whether someone has a mental disorder for the purpose of a deprivation of liberty authorisation must be carried out by a s.12 doctor or someone with at least 3 years post-registration experience in the diagnosis or treatment of mental disorder; the new law will provide that the assessor is someone who has 'appropriate experience and knowledge'. This is a vague use of language and affords a large degree of discretion to the person selecting the assessor. While Government have advised that the new Code of Practice will give further guidance, we believe that this is an inadequate safeguard and that only the legislation can impose binding legal requirements.

We are therefore asking members of the Public Bill Committee to table and support the following amendments to address this worrying oversight:

**Remove clause 18 (2)** which states that: *An assessment must be carried out by a person who appears to the relevant person to have appropriate experience and knowledge*

**And to replace this with 18 (2)** which states that: *An assessment must be carried out by a registered medical practitioner.*

### **Section 49 report**

Under section 49 of the MCA Bill, the Court of Protection can order reports from NHS health bodies when it is considering any question relating to an adult who may lack capacity. The BMA supports calls by the Royal College of Psychiatrists to amend The Mental Capacity Act 2005 to leave out Section 49, which would remove the power of the court of protection to compel NHS bodies to provide reports on a person's mental capacity.

This is particularly pressing at a time when there is a significant shortage of psychiatrists, with almost one in 10 consultant psychiatrist roles currently unfilled in NHS, it seems

counterproductive to place an additional burden on those who are already over worked and would likely impact on clinical care more widely.

We recognise that the Court of Protection would require access to relevant information about an individual where it needs to make a determination and there will be occasions when this will have to be put together, or at least informed by, a medical professional. However, we believe that there is scope to look again at how this process is managed and come to a more manageable approach.

*January 2019*