

Recommendations for healthcare professionals asked to perform intimate body searches

Guidance for doctors from the British Medical Association and the Faculty of Forensic and Legal Medicine

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Doctors and nurses are sometimes asked to perform intimate body searches of people in police custody, prisoners or people suspected by HM Customs & Excise of smuggling drugs or other goods. The BMA and the Faculty of Forensic and Legal Medicine (FFLM) believe that detained individuals and suspects who are capable of considering the issues and reaching a decision should always be invited to give consent irrespective of the fact that, in certain circumstances, consent is not a legal requirement. At its annual representative meeting in 1989, the BMA discussed this issue and passed the following resolution, which became the formal policy of the Association:

‘That this meeting believes that no medical practitioner should take part in an intimate body search of a subject without that subject’s consent.’

This guidance specifically addresses the situation where an intimate examination is proposed, which is not primarily for the medical benefit of the individual. Where valid consent is obtained, doctors may undertake such examinations although, as the search will not be for the benefit of the patient, particular attention needs to be given to the potential pressures on the individual’s consent.

1. What is an ‘intimate’ search?

An intimate search is a search that consists of a physical examination of a person’s body orifices other than the mouth.

2. Consent

A fundamental ethical principle guiding medical practice is that no examination, diagnosis or treatment of a competent adult should be undertaken without the person’s consent. The ethical obligation to seek consent applies even where this is not a legal requirement.

In order for consent to be ‘valid’ the individual must have been given sufficient, accurate and relevant information; the individual must have the competence to consider the issues and to reach a decision; and that decision must be voluntary in terms of not being coerced. There are a number of ways in which the ability of detainees to give consent may be compromised:

- the individual’s competence to make a decision may be affected by illness, fear, fatigue, distress or by the effects of alcohol or drugs
- the lack of privacy during the consultation may affect the individual’s willingness to ask questions in order to receive sufficient information to make an informed decision
- the individual may give general consent to anything proposed in the hope of being released more quickly without considering the actual procedure to be undertaken
- the fact that a refusal to permit an intimate search may be seen to imply guilt, may pressurise the patient to give consent
- in limited circumstances (see below) the individual has no choice about whether the search will proceed, only the choice of whether it is carried out by a medical practitioner or by a police officer.

It has been suggested that, because of these pressures, a detainee will never be capable of giving consent which is truly ‘valid’. This purist position, however, does not reflect reality in the sense that most people can make valid choices even in situations of crisis. There are other situations where pressure is clearly exerted on the individual but the consent is still considered to be valid. It is important that the doctor assessing the validity of the consent is aware of the ways in which the individual’s ability to consent may be compromised and has taken these factors into account.

2.1 The doctor's ethical duty

Some doctors may decide that, because of the pressures on detainees, they will not undertake intimate body searches even where the individuals give apparent consent. It is important to recognise, however, that despite the inevitable pressures imposed by the nature of being detained, the individual is still likely to be able to make valid choices. An individual may, for example, have no option about whether the search will be undertaken but may, nevertheless, wish to express a preference between the search being undertaken by a medically qualified practitioner rather than by a police or prison officer (where this is the only other option). An individual suspected of concealing drugs in the rectum may prefer to have an intimate search undertaken, in the hope of being released sooner, rather than being detained for a longer period (see other options below).

The BMA and FFLM advise doctors working in, or contracted to, an institution where intimate searches are likely to be undertaken to seek agreement with the appropriate officers that, except in emergencies, the doctor will always be called, and attend, when an intimate search is proposed. This does not commit the doctor to carrying out the search but allows the doctor to talk to the detainee in order to ascertain his or her wishes about the conduct of the search and to establish whether the patient gives consent to the procedure being carried out.

The doctor has an important role to play in ensuring that whatever decision the individual makes, it is based on accurate information about the possible consequences and options. So, for example, the individual should be informed:

- that, in some limited circumstances (see below), refusal to give consent may result in the search being carried out by a police officer rather than a medical practitioner
- that a court may draw inferences from a refusal to consent which means, in practice, that a refusal may be taken to imply guilt
- of the health risks, if any, of refusing the search, eg the risk of a package of drugs concealed in the rectum splitting and the drugs being absorbed into the blood stream causing an overdose
- of the risks associated with the search being carried out including, where appropriate, the possibly greater risk associated with the search being carried out by a person who is not medically qualified
- of any different procedures which may be used (see below).

Based on this information, it is for the subject to make a decision about whether to consent to the doctor carrying out the search. If the doctor is satisfied the subject has understood the implications and given valid consent, despite the pressures, the search may proceed. When consent is withheld, this should be recorded in the notes and the BMA and FFLM advise doctors not to participate.

There may be very rare circumstances where an intimate search may be justified in order to save the individual's life, notwithstanding that the patient had previously refused consent to the search for forensic purposes. This situation could arise, for example, if the suspect collapses and there are reasonable grounds to believe that he or she may be carrying a toxic substance. In such circumstances the search is no longer for forensic purposes, but in order to save the individual's life.

2.2 Young people and those who lack capacity

The law is clear that an intimate search of a child or young person, or of an individual with a mental disorder or handicap may take place only in the presence of an appropriate adult¹ of the same sex (unless the person specifically requests the presence of a particular adult of the opposite sex who is readily available). The search of a juvenile may take place in the absence of the appropriate adult only if the young person states, in the presence of the appropriate adult, that he or she would prefer the search to be done without that person present and the appropriate adult agrees.

The BMA and the FFLM, however, advise doctors not to participate in an intimate body search in the absence of valid consent. If an adult or young person lacks the capacity to consent to an intimate body search, their consent will not be valid.² If the procedure is not in the subject's best interests, the BMA and the FFLM advise doctors not to participate, regardless of the presence of an appropriate adult.

3. Other options

The police may, in certain specified circumstances, detain a suspect in custody for up to 192 hours (eight days) by applying for warrants for further detention. Where an extended period of detention has been authorised and it is suspected that an object is concealed in the subject's rectum, or has been swallowed, unless there are compelling reasons for immediate action, a search can often be avoided by using this time to allow for the body's natural processes to either pass or dislodge the concealed object.

The time interval is of less practical benefit where it is suspected that the object is concealed in a woman's vagina. There are, however, less invasive means of searching which should be used wherever possible, although the use of such techniques also presents problems. Ultrasound or X-ray is the most suitable alternative technique and it can demonstrate masses of small density, for example in the vagina, but it requires the individual's cooperation (see section 4.1.2).

4. Legal provisions

Various pieces of legislation (see below) permit some intimate body searches to be undertaken without the need for the subject's consent. While these statutory provisions permit doctors to undertake such searches, without fear of legal recourse, they do not oblige doctors to do so. The BMA and FFLM do not consider it appropriate for doctors to be involved in forced intimate searches and believe that doctors should only agree to participate where the individual has given consent or where the situation is life-threatening (see above). For information, the relevant legislation is summarised below.

4.1 Police and Criminal Evidence Act 1984 Police and Criminal Evidence (Northern Ireland) Order 1989 Criminal Justice and Public Order Act 1994 Drugs Act 2005

The rules governing intimate body searches carried out in England and Wales at the request of the police are covered by section 55 of the Police and Criminal Evidence Act 1984, as amended by section 59 of the Criminal Justice and Public Order Act 1994 and the Drugs Act 2005, sections 3 and 5. In Northern Ireland, they are covered by Article 56 of the Police and Criminal Evidence (Northern Ireland) Order 1989, as amended, and the Drugs Act 2005, section 6.

An intimate body search may be undertaken if an officer of at least the rank of inspector has reasonable grounds for believing:

- a) that a person who has been arrested and is in police detention may have concealed on him anything which:
 - i. he could use to cause physical injury to himself or others; and
 - ii. he might use while he is in police detention or in the custody of a court; or
- b) that such a person:
 - i. may have a Class A drug concealed on him; and
 - ii. was in possession of it with the appropriate criminal intent before his arrest.

An officer may not authorise an intimate search of a suspect unless he or she has reasonable grounds for believing that the object of the search cannot be found without the suspect being intimately searched.

The subject's consent to the search is not a requirement for searches undertaken under 4.1(a) above, although the BMA and FFLM consider that, ethically, such searches should only be carried out by doctors when the detainee has given consent. To undertake an intimate body search under 4.1(b) above, written consent is required.

4.1.1 Searches for something that could and might be used to cause physical injury

The police may authorise an intimate body search to remove an object, which the individual may use, while in custody, to cause physical harm to himself or herself, or others. Searches under this section:

- may be carried out by a constable of the same sex as the detainee if an officer of at least the rank of inspector considers that it is not practical for the search to be carried out by a 'suitably qualified person' (a medical practitioner or a registered nurse)
- may be carried out at a police station, a hospital, a doctor's surgery or other medical premises.

The FFLM and BMA have been informed of attempts to use this section of the legislation to authorise a search for drugs for forensic purposes on the grounds that the drugs constitute an object, which could cause physical harm to the person concealing them. Using this section, rather than the section authorising searches for drugs, would allow the search to proceed without consent and would allow a police officer to carry out the search if a doctor refused to participate.

We consider this practice to be totally unacceptable, potentially dangerous and a misuse of the legislation. While, as discussed in section 2.1, a doctor should always be called, and attend, when an intimate search is proposed, any doctor confronted with an attempt to use the legislation in this way should withdraw from any involvement with the search and raise the matter with the senior officer responsible for giving authorisation; the BMA or FFLM should also be informed.

As mentioned above, there may be very rare circumstances where an intimate search may be justified in order to save the individual's life, notwithstanding that the patient had previously refused consent to the search for forensic purposes.

Those who are carrying out intimate searches for weapons or other objects that could be used to cause physical injury should assess and take steps to protect their own safety during the search.

4.1.2 Searches for Class A drugs

The police may authorise an intimate body search or an ultrasound or X-ray to be taken if they have reasonable grounds to suspect that the person has concealed a Class A drug with the intent to supply or export. All such procedures can only be carried out with the written consent of the person to be searched or scanned. If an individual refuses, appropriate inferences may subsequently be drawn by a court or jury. The authorisation for the procedure, grounds for that authorisation and the consent of the person due to be searched or scanned, must be recorded in the custody record.

Class A drugs include heroin, cocaine, ecstasy, methadone and injectable amphetamines but not cannabis. Searches or scans under this section must:

- be carried out by a 'suitably qualified person' (a medical practitioner or a registered nurse), not by a police officer

- be carried out at a hospital, a doctor's surgery or other medical premises, not at a police station.

While, where appropriate, the BMA and the FFLM advise that less invasive search procedures should be used in preference to intimate body searches, it should be borne in mind that X-ray techniques involve irradiating the patient. Such techniques are not suitable for pregnant or potentially pregnant women; at present in the UK, abdominal X-ray examinations are not normally carried out in the second half of the menstrual cycle in case conception has occurred.

4.2 Intimate searches in Scotland

The Police and Criminal Evidence Act (PACE) does not apply to Scotland. Where an intimate search is considered necessary in Scotland in the interests of justice and in order to obtain evidence, this may lawfully be carried out under the authority of a sheriff's warrant. As with searches authorised under PACE, however, the BMA and FFLM consider that such searches should be carried out by a doctor only when the individual has given consent. If consent is not given, the doctor should refuse to participate and have no further involvement in the search.

4.3 Customs and Excise Management Act 1979

Legal provision is also provided for intimate searches authorised by HM Customs and Excise; these searches are for investigative purposes and may be carried out before or after arrest. There is no legal requirement to obtain the individual's consent to the search, although the BMA considers there to be an ethical obligation for doctors to do so. An intimate search carried out under the Customs and Excise Management Act must be:

- based on an assessment that there are reasonable grounds to suspect that the individual is carrying an article which is chargeable with a duty which has not been paid or secured or on which there is a prohibition or restriction on importation or exportation
- authorised at senior executive officer level
- carried out by a suitably qualified person (a registered medical practitioner or registered nurse).

The individual has the legal right to appeal to a justice of the peace or to a superior of the officer who authorised the search. The person hearing the appeal will consider the grounds for suspicion and decide whether the suspect is to be submitted to the search.

5. Other places of detention

Doctors may also be asked to participate in intimate body searches in other circumstances, such as searches of people detained in prison or under the Mental Health Act. Regardless of the circumstances or premises in which the search is requested, the same ethical standards apply and the BMA considers that doctors should only agree to undertake such searches with the individual's consent or, in relation to an adult lacking capacity, if it is in his or her best interests.

6. Guidelines for practice

The BMA and FFLM advise doctors working in, or contracted to, an institution where intimate searches are likely to be undertaken to seek agreement with the appropriate officers that, except in emergencies, the doctor will always be called, and attend, when an intimate search is proposed. These institutions should have written agreements in place with the senior management and/or clinical staff at a local hospital or other medical premises so that appropriate facilities are available, within a reasonable timescale, when a search is required.

When faced with a request for an intimate body search, doctors are advised to take into account the following factors.

- The doctor should ensure that urgent therapeutic requirements of the detainee have first been met.
- The doctor should satisfy him or herself that proper authorisation for the search has been obtained and that the authorisation, and the patient's consent, has been recorded in the custody record. If the doctor is not satisfied, he or she should refuse to perform the search.
- The doctor should always speak to the suspect when an intimate body search has been proposed. Arrangements should be made to permit the greatest degree of privacy possible without putting the doctor at risk. The procedure for undertaking the search should be explained as well as the grounds on which the search was authorised and what the options are. Where refusal is likely to be seen to imply guilt, this should be explained to the detainee and, similarly, where the search has been authorised for something that could and might be used to cause injury, and the alternative is for the search to be carried out by a police officer, the detainee should be informed of this.
- If the patient consents to the search, and the doctor is satisfied that the consent is valid – despite the obvious pressures on consent (see above) – the search may proceed. The doctor should speak to the senior staff at a local hospital or medical premises to seek permission for the use of appropriate premises to undertake the search (unless prior agreement has already been reached).
- If the patient refuses consent, and has been informed of the consequences and options, the refusal should be respected and the doctor should withdraw from any further involvement with the search. The doctor should explain to those requesting the search why he or she will not comply with the request. It may be helpful, as part of this explanation, to refer to these guidelines.

For further information about these guidelines, BMA members may contact:

0300 123 123 3 or:

British Medical Association

Department of Medical Ethics, BMA House, Tavistock Square, London WC1H 9JP

Tel: 020 7383 6286

Fax: 020 7383 6233

Email: ethics@bma.org.uk

Web: www.bma.org.uk/ethics

Faculty of Forensic and Legal Medicine

Third Floor, 116 Great Portland Street, London W1W 6PJ

Tel: 020 7580 8490

Email: info@fflm.ac.uk

References

1. Code C of the Police and Criminal Evidence Act Code of Practice defines an appropriate adult in the case of a juvenile as:
 - (i) the parent, guardian or, if the juvenile is in local authority or voluntary organisation care, or is otherwise being looked after under the Children Act 1989, a person representing that authority or organisation;
 - (ii) a social worker of a local authority social services department;
 - (iii) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police.

In the case of a person who is mentally disordered or mentally vulnerable:

- (i) a relative, guardian or other person responsible for their care or custody;
- (ii) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not a police officer or employed by the police;
- (iii) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police.

(Police and Criminal Evidence Act 1984; Home Office (2005) *Police and Criminal Evidence Act 1984 (s. 60(1)(a), s 60 A(1) and s. 66(1)) Codes of practice A-E, fifth edition*. London: The Stationery Office)

2. FFLM (2008) *Consent from Children and Young People in Police Custody in England and Wales*. London: FFLM.

BMA Ethics Department
British Medical Association, BMA House, Tavistock Square, London, WC1H 9JP
www.bma.org.uk

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