Parliamentary brief
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BMA

Police, Crime, Sentencing and Courts Bill

House of Lords: Second Reading
September 2021

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.

We are concerned about provisions in the Bill which override the duty of medical confidentiality, including by legally requiring identifiable health information about individuals to be shared with the police. Therefore, we urge Peers to probe these measures and highlight our concerns.

Preventing and reducing serious crime - the use of confidential health data

The BMA is concerned about provisions in the Police, Crime, Sentencing, and Courts Bill which we believe fall short of the well-established ethical criteria for the sharing of confidential health information (Chapter 1: clauses 9, 15, and 16). These provisions are:

- CCGs (clinical commissioning groups) and LHBs (local health boards) will be legally required to provide confidential health information to the police (clause 16 (4)). The duty of confidentiality has been set aside here (clause 16 (5)).

- There are also permissive powers in the Bill for CCGs and LHBs to share confidential health information with a wider list of recipients i.e. other specified authorities, including councils and educational authorities, as well as the police (clauses 9 and 15). Again, the duty of confidentiality is set aside here.

We believe that setting aside of the duty of confidentiality, to require confidential information to be routinely given to the police when requested, will have a highly damaging impact on the relationship of trust between doctors and their patients. A removal of a long-established protection for confidential health information, alongside a broad interpretation of 'serious crime', may mean many patients are reluctant or fearful to consult or to share information with doctors.

Status quo - sharing confidential data to prevent, reduce, or prosecute serious crime

There are already well-established routes for doctors to disclose confidential information on 'public interest' grounds, on a case-by-case basis, if it is necessary for the prevention, detection, or prosecution of serious crime or where there is an imminent risk of serious harm to an individual.

There is no legal definition as to what constitutes a 'serious' crime but in the BMA's view, serious crime includes murder, manslaughter, rape, treason, kidnapping, violent assault, and abuse of children or similar acts which have a high impact on the victim. Serious harm to the security of the state or to public order and serious fraud will also fall into this category.

Confidential healthcare information - a special legal status

The BMA recognises the Bill's intention to comply with existing data protection legislation, but this alone does not offer adequate protections for confidential healthcare information. The particular sensitivity of health information has long been afforded special legal status, over and beyond the Data Protection Act, in the form of the common law duty of confidentiality.

Cases before the courts have reaffirmed that society has an interest in maintaining a confidential health service,[1] and, moreover, Article 8 of the Human Rights Act 1998 supports this common law duty of confidentiality. It is, therefore, extremely concerning that the Bill sets aside this special legal status.

We believe the common law duty of medical confidentiality must be upheld.

Anonymous versus identifiable health data

It is our understanding that the intention behind the data-sharing provisions in the Bill is for government and specified authorities to collaborate to prevent and reduce serious violence in England and Wales. We wholly support this ambition, but we are seeking clarification from the Home Office and Department of Health and Social Care as to why identifiable, confidential health information about individuals would be necessary to fulfil this purpose.

It is our view that **anonymous** data, instead, would suffice to assist a specified authority 'in the exercise of its function to prevent and reduce serious violence'. This would allow numerical data about the prevalence of serious violence to be used - for example, a disclosure that there were *x* number of attendances last month for *y* injury at A&E in Hospital *z*. Such anonymous data-sharing could facilitate planning to reduce and prevent serious crime without breaching doctor-patient confidentiality.

We believe that the provisions in chapter 1 which set aside the duty of confidentiality should be removed from the Bill. Based on our understanding of the Bill's stated aim, anonymous data should be sufficient.

Even if it is the case that there are purposes for which the Home Office wishes to identify individuals, the existing thresholds for disclosure (as above), which reflect the importance of medical confidentiality, must still apply. This will no longer be the case if the common law duty of confidentiality is set aside in favour of the disclosures which will be required and permitted under this Bill.

Interpretation of 'serious violence'

The duty in clause 7 to 'prevent and reduce serious violence' is broadly drafted, for example, 'violence' includes damage to property (clause 12 (3)). This is very different to our interpretation of 'serious violence' (as set out earlier), and we believe that the envisaged data-sharing falls some way short of the established ethical and professional standards of medical confidentiality that are central to public trust in the health service.

We believe that the provisions in chapter 1 drastically alter the existing basis on which confidential data might be shared in order to prevent or detect serious crime.

Compulsory, blanket disclosures versus discretionary, case-by-case disclosures

The Bill's inclusion of a compulsory, blanket obligation for CCGs and LHBs to share confidential health information with the police is very worrying. Currently, doctors use their professional discretion to balance the benefits and harms of disclosure, taking into account the level of

[1] See *Ashworth Security Hospital v MGN* [2002] UKHL 29 and *Campbell v MGN* [2004] UKHL 22.

seriousness of the crime, when the police request access to confidential information. Doctors are not automatically required to override their duty of confidence to their patient.

We believe that the provisions in chapter 1 inappropriately prioritise the duties of the police over the public interest in maintaining public confidence in medical services.

Future consequences

The future ramifications of the Bill's provisions must also be highlighted, as the planned replacement of CCGs with Integrated Care Boards could have a real impact on the potential for police to access significant amounts of confidential health information.[2] These Boards could potentially hold large quantities of confidential information to which the police will have access under these provisions.

The future consequences of setting aside duties of confidentiality in this Bill could be even more damaging in the future given the forthcoming changes to CCGs.

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[2] CCGs are to be abolished under the Health and Care Bill (Section 13 inserts 14Z27 into the NHS Act 2006 'Abolition of Clinical Commissioning Groups')