

Police, Crime, Sentencing and Courts Bill

House of Lords: Report stage

December 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.

The BMA, NDG and GMC welcome the Government's amendments addressing the concerns we, alongside members of the House of Lords, have been raising about the impact of the Bill's information-sharing provisions on medical confidentiality - crucially, upholding the common law duty of confidentiality protection for *all* confidential health information.

Key points

- The BMA alongside the National Data Guardian (NDG) and the General Medical Council (GMC) has been vocal about significant concerns¹ regarding provisions in the original drafting of the Bill which override the duty of medical confidentiality, including legally requiring confidential health information to be shared with the police. **We urged the Government to amend the Bill to remove the provisions in Part 2, Chapter 1 that set aside obligations of confidence.**
- **We are pleased that our concerns have been heard and welcome the Government's set of amendments to Clauses 9, 15, 16 & 22 as a way of addressing the Bill's detrimental impact, as it was originally drafted, on medical confidentiality.**
- The amendments ensure that the Bill does not authorise the disclosure of 'patient information' or 'personal information' held by a health or social care authority. **Hence, all confidential health information - whether clinical or demographic - will continue to be protected by the common law duty of confidentiality.**
- For future reference, from an ethical and professional perspective there is no distinction between clinical and demographic information, both of which are subject to the same standard of confidentiality. Although these are set out separately in the amendments, we nonetheless welcome the commitment from the Government via these amendments to ensure that *all* information given by patients in confidence to their doctor will continue to be protected under the existing legal standards.
- **Maintaining the status quo means that confidential data can be disclosed to the police on a case-by-case basis** where doctors use their professional judgment to balance the benefits and harms of disclosure, taking into account the level of seriousness of the crime.
- **In conclusion, the BMA welcomes the Government's amendments which remove the blanket powers currently in the Bill that set aside the common law duty of medical confidentiality. The amendments preserve existing legal protections for information shared in confidence between a patient and their doctor and we hope Peers will support these important changes to the Bill.**

¹ See our briefings for previous stages of the Bill's scrutiny



1. Background: our concern with the Bill as originally drafted

The BMA, NDG and GMC consistently raised concerns about provisions in the Bill which, as currently drafted, fall short of the well-established ethical and professional 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) would 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 regulations to enable 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 are clear that setting aside of the duty of confidentiality, to require confidential information to be routinely given to the police when requested, would 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’, could leave many patients reluctant or fearful to consult or share information with doctors.

The BMA, NDG and GMC have been vocal that the Bill, as originally drafted, raises serious concerns and must be amended to preserve existing legal protections for information shared in confidence between a patient and their doctor. As such, we welcome the Government bringing forward amendments to address these concerns, following engagement with the BMA, NDG, GMC and Peers.

2. Addressing these concerns - Government amendments to Clauses 9, 15, 16 and 22

Common law duty of confidentiality

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. People must feel that they can share information with health professionals in confidence, without worrying how it will be used - an erosion of trust could negatively impact on the doctor-patient relationship and deter some people from seeking care, with potential adverse impacts on those individuals but also on public health. Cases before the courts have reaffirmed that society has an interest in maintaining a confidential health service,² and, moreover, Article 8 of the Human Rights Act 1998 supports this common law duty of confidentiality.

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. This is recognised in the GMC’s guidance on confidentiality.

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.

As originally drafted, we were seriously concerned about the Bill’s inclusion of a compulsory, blanket obligation for CCGs and LHBs to share confidential health information with the police. Under the status quo, doctors use their professional judgment to balance the benefits and harms

² See *Ashworth Security Hospital v MGN* [2002] UKHL 29 and *Campbell v MGN* [2004] UKHL 22.

of disclosure, taking into account the level of 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 welcome engagement with the Government that has led to amendments which would ensure that the Bill does not authorise the disclosure of any information given in confidence between a patient and their doctor. As a point for future reference, the BMA notes the distinction in the amendments between ‘patient information’ and ‘personal information’ and would like to make it clear that such a distinction must not be used in future contexts as a precedent for differential treatment of clinical and demographic data. The BMA, NDG and GMC are clear that *all* information provided by patients when receiving or registering for health and care is subject to the same duty of confidence.

Anonymous versus identifiable health data

We have argued that anonymous data, instead of identifiable data, would suffice to assist a specified authority in its planning to prevent and reduce serious violence in a given area - i.e. to serve the ambition behind the data-sharing provisions in the Bill for government and specified authorities to collaborate to prevent and reduce serious violence in England and Wales. The Government’s amendments would mean that this form of data-sharing would remain possible whilst maintaining existing legal protections for identifiable health data.

The sharing of anonymous data 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 support the Bill’s ambition to facilitate planning and collaboration to reduce serious violence and welcome the Government’s acceptance that a blanket power to share identifiable, confidential health information about individuals on a routine basis is not necessary to fulfil this purpose.

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