

Section 49

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What is a Section 49 report?

Under section 49 of the Mental Capacity Act 2005 (the “MCA”), the Court of Protection (the “CoP”) may require NHS health bodies and local authorities to arrange for a report to be made for the purpose of considering any question relating to someone who may lack capacity. The report must deal with such matters relating to the individual in question ‘as the court may direct.’ An order under section 49 places an obligation on the NHS body (typically a mental health trust) to comply with such requests. This obligation does **not** extend to any individual member of staff and the Trust must make appropriate arrangements to complete the report.

Section 49 reports are frequently requested from Trusts where there is no prior knowledge of, or relationship with, the individual in question. Producing a report is a complex process involving assessing the patient, reviewing notes, discussing with relevant professionals and compiling information. The amount of time required to review a long and complex set of medical records presented can be significant. The minimum time for completing a report is usually around 6-8 hours, but it is not uncommon for reports to take 16 hours and at times even longer to complete.

Who will be asked to complete a Section 49 report?

Reports can be completed by any suitably qualified trust employee or indeed an external person with the necessary training and expertise, contracted to do the work on behalf of the trust. Although consultant psychiatrists are well within their rights to refuse requests to engage with this work, in practice, they are overwhelmingly asked to do the work. Senior nursing and social work staff, psychologists, other medical staff, and psychotherapists will all generally be qualified to provide such reports in a mental health trust as well.

When the trust receives a request to provide a section 49 report, they have seven days to nominate an appropriate person to complete the report and to notify the court of this.

What will the Section 49 report require?

The author of the report must provide a statement of truth that relates both to the facts in the report, and their stated professional opinions. Preparation of a report will almost always involve examining the patient’s mental state, current circumstances, and medical records as well as speaking to others such as carers, family members or others close to the patient.

What if the NHS body has no previous knowledge of the person?

The Court can order an NHS body (or Local Authority) to produce a report even if it has no knowledge of the patient and is not party to the Court proceedings. In these cases, the demand for a report is based upon the individual’s geographical location rather than any care needs or historical medical or psychiatric treatment.

Can a Trust/Consultant charge a fee for the work undertaken?

NHS Health bodies are not allocated funds by the CoP to produce these reports. There is huge variation between courts as to the number of reports requested. At the same time, trusts vary in their approach to getting the work done and compensating those who do it.



The BMA's position

Engagement with stakeholders

A section 49 report is often seen by the court as an alternative to a traditional report by an independent expert. Furthermore, there are very significant differences in practice between jurisdictions and over time within jurisdictions. Work with the judicial system is required to ensure greater consistency. The BMA Medico Legal Committee will work in partnership with the Royal College of Psychiatrists and other key stakeholders to find long term solutions to explore the possibility of other professions doing this work, professionals outside of the secondary care mental health services, which are hugely overstretched. If it continues to be done by doctors, it is the BMA's view that they must be properly remunerated.

Obligations on Trusts

The BMA firmly believes that all Trusts must have a Section 49 policy agreed between the trust senior management and the local negotiating committee. There should be a named lead who receives all court orders. They can then monitor the number and types of requests and make provision for the work to be done. The named lead would also be able to clarify timescales for providing the report. Additionally, the named lead should report to the trust board at least annually on the number of reports requested from the trust, the time taken, and the discipline of staff who have completed them.

Policies should stipulate clearly that this work is not restricted to doctors and describe the staff who can be approached to provide reports (**see above**). There should be consideration in the first instance of contracting an external expert to complete these reports for the court on behalf of the trust, particularly if the individual is not under the care of the organisation.

It is the BMA's view, that individuals completing this work must be compensated for the time taken to complete the report, regardless of whether the patient is currently under the care of the trust or not. Compensation could take the form of one of the following (or if appropriate a combination, e.g., of TOIL and pay):

- Cancelling Direct Clinical Care (the "DCC") sessions to complete the work
- A locum being employed to complete the DCC work on behalf of the person completing the report while they do it
- As this is non contractual work, being compensated at an hourly rate commensurate with their skills and experience and agreed with the trust Local Negotiating Committee (LNC).
- Administrative staff would also require appropriate compensation
- Time Off In Lieu ("TOIL")

Non contractual work

All non-contractual work needs to be agreed between the consultant and the employer and is subject to negotiation over terms, including pay. Consultants are within their rights to negotiate their own rates of pay and are not obliged to undertake this work if they deem the rates of pay to be inadequate. LNCs are able to negotiate standardised rates with employers locally. However, even where such agreements are in place this does not override your right to refuse non-contractual work.

BMA minimum rate card

The decision to engage in other activity worked beyond the standard contract (such as waiting list initiatives) rests entirely with the consultant. There is wide variation around the country in the amount paid for this work. In order to achieve uniformity, fairness and consistency, we have developed a [BMA minimum rate card](#). The BMA is now advising all NHS consultants to ensure that such extra-contractual work is paid at the BMA minimum recommended rate and to decline the offer of extra-contractual work that doesn't value them appropriately.

General Practice

An NHS body takes its definition from section 49(10) of MCA 2005 and section 148 of the Health and Social Care (Community Health and Standards) Act 2003. The definition of NHS body in section 148 does not include GP practices. Therefore, GP practices cannot be directly ordered by the Court of Protection to produce a report under section 49.

The vast majority of GP practices *in contract with* the NHS are not NHS bodies even if their contractor CCGs/PCOs are. The court sending a Section 49 request to a GP practice is not able to compel the practice to undertake the work because the practice is not a public body. Orders under section 49 would normally be sent to an NHS body to complete itself, i.e., a NHS Trust delegates the most suitable clinician within the Trust to complete the report. However, it would be possible for an NHS body (e.g., an NHS Trust) that had been ordered to 'arrange for a report to be made' to request that a GP produce the report because it is entitled under section 49(3) to instruct 'such other person' that it 'considers appropriate' do it. However, in doing so, the trust cannot compel a GP as an independent practitioner to do the work and if the GP agrees to do the work, he/she is entitled to be paid a rate agreeable to the GP.

BMA

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