

Vulnerable adults and the disclosure of confidential information

Challenging situations can arise for health professionals where adults who are subject to abuse do not want confidential information disclosed, even where this would be the best way to ensure they are protected from harm.

Decisions can be particularly difficult where adults retain capacity under the terms of the Mental Capacity Act (2005) (MCA) but health professionals may believe that they are not making a free and informed choice. This could be, for example, as a result of pressure from or fear of the abuser.

Balancing a respect for the choices of adults who retain capacity, against the desire to promote their welfare can present genuine dilemmas.

Where individuals retain capacity under the MCA, (where, for example, the patient has no impairment or disturbance in the functioning of their mind or brain) doctors have no legal authority to make best interest decisions on their behalf, including decisions about the disclosure of confidential health information.

Where doctors nevertheless believe that patients with capacity are not in a position to make a free and informed choice about disclosing information that may protect them, and this arises as a result of external duress, they can be uncertain how to proceed. In these circumstances, balancing a respect for the choices of adults who retain capacity, against the desire to promote their welfare can present genuine dilemmas. Doctors can also be genuinely concerned that should they fail to disclose information necessary to protect adults at risk of harm they may be subject to criticism.

We start from the basic position that adults with capacity are usually in the best position to understand how to promote their own interests and ordinarily, confidential patient information should not be disclosed without the consent of the patient. Some exceptions to this are discussed below.

This brief guidance note sets out the current legal and ethical position in relation to disclosure of information relating to adults who retain capacity but may be subject to some form of duress. You will also find a section on further BMA and GMC guidance on disclosure of confidential information and on mental capacity.

In brief...

Where people have decision-making capacity under the MCA, doctors have no legal authority to make best interest decisions on their behalf.

Vulnerable adults, confidentiality and the disclosure of information

Confidentiality is essential to the development of a trusting professional relationship between doctors and patients. It is subject to both legal and ethical safeguards and inappropriate breaches of confidentiality can lead to legal action and to censure by the General Medical Council. Patients should be able to expect that the information they give about their health will be kept confidential.

Although the duty of confidentiality is owed to all patients, it is clearly important to people who may be at risk of harm. If people subject to abuse do not feel they can trust their doctors to keep their confidences they may be less likely to visit them. Vital opportunities to help and support them may therefore be lost.

Where adults consider themselves to be at risk from those close to them, they may also be concerned that a disclosure of information may put them at greater risk. If an abusive partner is interviewed by the police or social services for example, abuse may be intensified. The importance of adults who may be at risk of harm being able to control the disclosure of their own information is therefore clear.

In brief...

Patients should be able to expect that the information they give about their health will be kept confidential.

Consent and the disclosure of confidential information

The duty to keep patient information confidential is not absolute. Most obviously, information can be disclosed where the patient consents to its disclosure. Wherever doctors or other health professionals seek to disclose confidential information about competent adults they should consider in the first instance whether they can obtain consent. Ordinarily, where a competent patient refuses consent to disclosure this should be respected.

As we have seen though, competent adults can at times be put under external pressure to such an extent that decisions not to disclose information may not be entirely voluntary. In the sections that follow we look at the issues surrounding disclosure in these circumstances, both in relation to adults with capacity and adults lacking capacity under the terms of the MCA.

In brief...

Whenever doctors seek to discuss confidential information about competent adults they should consider in the first instance whether they can obtain consent.

Disclosure to the police, social services and partner organisations

Some legal statutes permit - although they do not require - the disclosure of confidential information in certain circumstances. The Data Protection Act 1998 and the Crime and Disorder Act 1998 for example both permit disclosure of information to other organisations such as the police, local authorities, social services and government bodies. If health professionals are contacted by police, social services or their partner organisations and they are uncertain whether disclosure is a statutory requirement, they should ask the person or body applying for the information to specify the nature of their lawful authority. In the absence of lawful authority, ordinarily, health professionals should only disclose information where the patient has given consent or there is an overriding public interest.

An example of a partner organisation is a Multi-Agency Risk Assessment Conference (MARAC). This is a meeting convened to discuss the highest risk domestic abuse cases in any given area with a view to creating a safety plan for each victim. MARACs operate in England, Wales and Northern Ireland. Information will usually be shared amongst a number of local agencies including health, police, housing and social services.

This guidance stresses the legal and ethical requirement to respect the choices of competent adults.

In the BMA's view, information relating to adults who retain capacity under the terms of the Mental Capacity Act 2005 (MCA) should only be shared where the individual consents to the disclosure, where it can be justified in the public interest or where there is other lawful authority, such as a court order or statute. A disclosure in the public interest is likely to be justified where it is essential to prevent a serious and imminent risk to public health, national security, to protect other people from risks of serious harm or death, or to prevent or detect serious crime. Other people here may include, for example, children in the house who may be at risk of serious harm.

A public interest disclosure will only be justified where it is necessary and proportionate. Any health professional disclosing information in these contexts must have a reasonable belief that it is likely to achieve the desired result and must only disclose as much information as is necessary to achieve it. Public interest disclosures where only the vulnerable adult is at risk are discussed in the section below.

This guidance stresses the legal and ethical requirement to respect the choices of competent adults. Victims of domestic abuse are frequently vulnerable, sometimes extremely so, even though they may retain the cognitive abilities to make decisions on their own behalf. As part of the consent-seeking process, where a vulnerable adult is making a decision that is seriously at odds with an objective assessment of his or her interests, health professionals should sensitively explore the reasons behind the decision. This could include exploration of the possibility of confidential referrals to groups or organisations that offer support to vulnerable adults. It is only when the health professional has properly explored the patient's circumstances and the reasons behind the apparent refusal that they should consider some of the options discussed below. Health professionals should also seek advice from colleagues in these circumstances.

In brief...

Information relating to adults with capacity should only be shared without consent where it is in the public interest or where there is other lawful authority such as a court order or statute.

Public interest and the competent adult

We have seen that a refusal to disclose information by a competent adult can be overridden in order to protect a third party, such as a child who may be in the household, from a risk of serious harm. It becomes more difficult where an adult refuses to disclose information in order to protect him or herself.

A refusal of disclosure by a patient should not result in them being abandoned by services. Care and support should continue to be offered.

In the BMA's view, competent adults have the right to make decisions about how they manage the risks to which they are exposed and such decisions should ordinarily be respected. Again, in these circumstances, doctors should sensitively explore with the patient the reasons for non-disclosure and, where appropriate, offer referral to or information about appropriate support services. A refusal of disclosure by a patient should not result in the patient being abandoned by services, and continuing care and support should be offered.

Doctors can themselves feel vulnerable to future criticism where they have a genuine belief that a patient is at risk of harm but are uncertain whether, legally and ethically, they can disclose information. Discussion with colleagues, with medical defence bodies, with the BMA and the GMC can all help doctors work through their concerns. Doctors should make clear contemporaneous notes of the decision they make and the reasons behind it and should also make a note of any discussion with colleagues or supporting organisations.

In some circumstances health professionals may seek to disclose information on the basis of the public interest in order to protect competent adults where they have a reasonable belief that the individual will be the victim of serious crime such as violent assault. Here a difficult balance will need to be found between respecting a patient's decision-making rights and an assessment of the likelihood of a serious crime being prevented by disclosure.

Although in the BMA's view disclosure here may be justified, health professionals should keep in mind the difficulty of prosecuting a crime where the victim refuses to participate with the criminal justice system, as well as the impact of disclosure on the patient's trust in the profession. Given the difficulties associated with preventing crime where the victim refuses to co-operate, disclosure of information without consent in these circumstances is likely to be exceptional. This is likely to be where there is strong evidence of a clear and imminent risk of a serious crime likely to result

in serious harm to the individual, and the disclosure of information is likely to prevent it.

Any health professional considering disclosure in these circumstances should take advice from appropriate professional, regulatory or medical defence bodies.

In brief...

Competent adults have the right to make decisions about how they manage the risks to which they are exposed.

Vulnerable adults and jurisdiction of the High Court

We have seen that where patients retain capacity under the terms of the MCA, legally, best interests decisions cannot be made on their behalf. In the past, health professionals have expressed great frustration at not being able to intervene where vulnerable people are clearly at risk. Although health professionals do not have lawful decision-making authority here, recent case law has established that the court may have authority to intervene in some instances.

The power to intervene is based upon the Court's inherent jurisdiction - a common law doctrine that states that a superior court can hear any question that comes before it, unless that power has been specifically limited by statute or rule. The court will not use its inherent jurisdiction to override a considered decision by an adult with capacity who may be vulnerable. Rather the court will intervene in order to ensure, as far as possible, that the individual can make an informed decision unencumbered by external coercion.

Where health professionals have serious concerns about whether a vulnerable but competent adult is being coerced into a decision, including a decision not to disclose information when it would clearly be in their objective best interests to do so, they should consider seeking legal advice about whether it would be appropriate to approach the courts.

In brief...

Where health professionals have serious concerns about whether a vulnerable but competent adult is being coerced into a decision they should consider taking legal advice about approaching the courts.

Adults who lack the capacity to consent or disclose information

Where adults lack the capacity to make a decision about whether or not to disclose information relating to harm or abuse, decisions need to be made on their behalf.

Decisions can either be made by an attorney acting under a health and welfare lasting power of attorney, or, in the absence of an attorney, relevant health professionals can make a decision based upon an assessment of the individual's 'best interests'. Exceptionally decisions can be made by the court or by a court-appointed deputy. Attorneys are under a legal obligation to act in the best interests of the individual who appointed them.

Where attorneys appear to be making decisions that are clearly not in the best interests of the individual, and the problems cannot be resolved locally, the decision can be referred to the Court of Protection.

Decisions taken on behalf of an incapacitated adult involve making as objective an assessment as possible of what would be in the individual's overall best interests taking into consideration all relevant factors. Any 'best interests' assessment will ordinarily involve discussion with those close to the individual. In relation to domestic abuse however care has to be taken to ensure that anyone consulted who is close to the individual is in fact acting in his or her interests.

Although the past and present wishes of an incapacitated adult need to be taken into account when making a best interests assessment, they are not necessarily determinative. The decision needs to be made on the basis of the individual's current circumstances and needs, including, where necessary and appropriate, referral to appropriate authorities.

In brief...

Where adults lack capacity, decisions can lawfully be made on their behalf, based on an objective assessment of their best interests.