

## GMC response to the Consultation on the draft Regulations on the Mental Capacity (Amendment) Act 2019 and Liberty Protection Safeguards – Wales

**Question 2: Do you agree that the draft Regulations on undertaking assessments, determinations and pre-authorisation reviews are clear and sufficient?**

**Somewhat agree**

We understand that prior to an authorisation being given, a draft authorisation record should be completed which can be drafted by anyone who the Responsible Body identifies as best placed to do so, with the Responsible Body ultimately agreeing or not the draft. We would like to understand how a Responsible Body will identify who is best placed to draft the authorisation record and where will this record be kept. We also wonder if there is the potential for individuals to push back so they are not given responsibility to complete the draft authorisation record which could cause delay. The development of national guidance provides an opportunity to clarify this and mitigate the possibility of action being passed between professionals. There could also be implications for medical professionals when it comes to the standards that we set for record keeping. We say in Good Medical Practice that clinical records must include the decision made and actions agreed, and who is making the decisions and agreeing the actions. It must be clear how it will be decided who the responsibility lies with for drafting the authorisation record and ultimately updating the clinical records.

When the LPS is authorised the Responsible Body will agree to a schedule of reviews and will be responsible for deciding who is best placed to carry out the review e.g. an 'individual' who is sufficiently independent. Given that a medical professional is likely to have had involvement in carrying out at least one of the required assessments, we could conclude that a medical professional is unlikely to be considered as sufficiently independent. Paragraphs 13.44 and 13.45 explain what is required of an 'individual' but it is still unclear who such an individual would be and how the Responsible Body will decide the allocation.

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**Question 3: Do you agree the draft Regulations enable the relevant professionals to carry out assessments and make determinations? Somewhat agree**

As we regulate doctors, our response is limited to ‘medical practitioners’ who are authorised to undertake all three assessments and make a determination. Assessing capacity is a core clinical skill for registered doctors which doesn't necessarily require specialist input (e.g. by a psychiatrist). A doctor should be able to draw reasonable conclusions about a person’s capacity during a dialogue with them. We say in our [Decision, making and consent](#) guidance that a doctor should be alert to signs that patients may lack capacity and must give them all reasonable help and support to make a decision (paragraph 82). We advise that where it is believed that a patient may lack capacity to make a decision, capacity must be assessed using the test set out in the relevant legislation, taking account of the advice in the relevant guidance. If a doctor finds it difficult to judge whether a patient has capacity to make a decision, they should seek support from someone who knows the patient well, for example, another member of the healthcare team or someone close to the patient (paragraph 84). In complex cases where a doctor believes they’re unable to make a judgement, they should seek specialist input from psychiatrists, neurologists, speech and language therapists or liaison nurses (paragraph 85).

We support the reference in the regulations to medical professionals rather than being prescriptive and specifying qualifications and experience. As outlined above, much is likely to depend on the decision that needs to be made and the ability to choose an appropriate medical professional to match individual circumstances which we hope will reduce delays in providing care. We note that the professionals listed in the regulations are those we suggest in our guidance a doctor may wish to refer to.

We will be regulating anaesthesia associates and physician associates from about 2023/2024 and the overarching legal term for them and doctors will become ‘medical professional’. You may wish to consider making provision now for new roles to be added and new terminology to be introduced.