Reviewers report

Title: Concepts of decision making capacity for patients requesting assisted suicide: a qualitative analysis of expert evidence presented to the Commission on Assisted Dying.

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Reviewer: Jacinta Tan

Reviewers report:

1. I think this is a very interesting paper and on a subject that needs more attention. A fair amount of research has been done on capacity without any critical comment or consideration of what capacity might itself be. This paper addresses the issue in the real world by observing how capacity is mentioned and used in submissions about assisted suicide. This makes it a very useful paper and a good addition to the sparse practical literature on this subject.

Minor essential revisions

2. Because this is a piece of sociological research and not a theoretical paper, there should be a section on strengths and limitations of the methods, findings and conclusions. This is really important in this case as the submissions were never intended as critiques of capacity nor may indeed have not intended any ethical argument for a submission concerning the law; so this is secondary use research in every sense. Given this fact, the authors need to be cautious in how they impute intent, use and definition of capacity by the authors. It is quite likely that were they to interview the authors directly, they might obtain completely different answers and draw different conclusions. Having said that, a strength is also that these uses of the notion of capacity are not consciously done as an end in itself and it is very useful indeed to examine how people do use these concepts in real life.

3. I thought there was a slight problem in the approach of the authors in that they did not very clearly distinguish between several different issues: a) the ethical basis of argument regarding the authors' position on assisted suicide, and whether and how this appealed to capacity; b) the authors' own (apparent) conceptualisation of the notion of capacity; c) the authors' own interpretation of the legal concept of capacity as contained in the Mental Capacity Act; and d) whether the MCA could indeed support b) or c) or indeed a). It should be relatively simple to tease these apart but important not to confuse them.

4. As I assume BMC Ethics is an international journal, it would be worth putting in more context than is provided regarding British legal process, the MCA and so on, so that an international reader from a different jurisdiction can relate to the debate and understand what the context of these submissions are.

5. I think the conclusion is too strong - to conclude from a single secondary use
study that 'current thinking about mental capacity as it relates to assisted suicide is inconsistent and problematic' is too strong. The research certainly shows inconsistency which is problematic, and the authors can indeed argue that given the high profile and supposed expertise of the people submitting arguments this points to particular problems, but they cannot generalise quite as easily. They should also highly the problem with qualitative research in general and this rather skewed sample in particular in claiming representativeness in any way in terms of reflecting balanced spread of thinking regarding assisted suicide, let alone capacity.

6. Having said all this, these 'essential revisions' are in my view not fatal to the paper and in themselves easily done without much disturbance to the main body of the paper. I think this paper would be excellent and should merit publication once these changes have been achieved.

**Level of interest:** An article of importance in its field

**Quality of written English:** Acceptable

**Statistical review:** No, the manuscript does not need to be seen by a statistician.

**Declaration of competing interests:**

I declare I have no competing interests.