Charles Foster on medicolegal aspects of new GMC guidelines

Conscience in the CONSULTATION

key points

New GMC guidance supplements *Good Medical Practice* by seeking to clarify conduct in situations where doctors may have conflicts with their beliefs.

Human rights legislation, abortion law, and the 1990 HFE Act consider conscientious objection. There are further contractual aspects for NHS GPs.

The guidance is reassuring, and should act not just as a shield, protecting conscientious objectors from trouble, but also as a sword: it should be a disciplinary offence under the guidance to fail to accord to conscientious objectors the rights recognised by the guidance.

On 17 March 2008 the General Medical Council ('GMC') published its guidance *Personal Beliefs and Medical Practice*. The guidance is long and detailed and needs to be read in full by anyone who hopes to remain on the medical register. Only an outline of a few provisions can be discussed here.

The guidance must be read in conjunction with *Good Medical Practice*,[1] on which it purports to be a commentary.[2] *Good Medical Practice* emphasises that doctors must make the care of their patients their first concern;[3] must treat their patients with respect, whatever the patients' life choices;[4] and must not discriminate unfairly against patients by allowing personal views to affect adversely either the professional relationship with them or the treatment provided or arranged.[5]

Conflicts with beliefs

It further notes that 'If carrying out a particular procedure or giving advice about it conflicts with your religious or moral beliefs, and this conflict might affect the treatment or advice you provide, you must explain this to the patient and tell them they have a right to see another doctor. You must be satisfied that the patient has sufficient information to enable them to exercise that right. If it is not practical for a patient to arrange to see another doctor, you must ensure that arrangements are made for another suitably qualified colleague to take over your role'[6] and 'You must not express to your patients your personal beliefs, including political, religious or moral beliefs, in ways that exploit their vulnerability or that are likely to cause them distress'.[7]

These broad statements of principle beg a number of questions. The new guidance was drafted in an attempt to answer some of those questions. By and large it is thoughtful and helpful. Its statement of the philosophy that should govern the relationship between a doctor's personal beliefs and the doctor-patient relationship is impossible to criticise. Christian doctors will welcome the acknowledgment that 'personal beliefs and values, and cultural and religious practices are central to the lives of doctors and patients',[8] as well as the explicit recognition that doctors as well as patients have rights.[9]

While the guidance is just that, 'guidance', it is intended to be authoritative. It sternly warns that 'Serious or persistent failure to follow this guidance will put your registration at risk'.[10]

Conscientious objection: a legal overview

Article 9 of the European Convention on Human Rights (ECHR), grafted into English law by the Human Rights Act 1998, provides that 'Everyone has the right to freedom of thought, conscience and religion; this right includes…freedom...to manifest his religion or belief in worship, teaching, practice and observance'. The relevance of this Article to medical conscientious objection has not yet been definitively determined. It may well be that the future law of conscientious objection will be articulated mainly in terms of Article 9.

The law of conscientious objection to abortion has been discussed previously in *Triple Helix*.[11] The Human Fertilisation and Embryology Act 1990 also preserves an express right to refuse to participate in any treatment authorised under the Act.[12]

NHS GPs

The position of NHS GPs is important and interesting. The National Health Service (General Medical Services Contracts) Regulations 2004[13] require that GP contracts that include 'additional services' (services

that the GP is not obliged to provide) must contain particular terms. Two of those 'additional services' are contraceptive services and maternity medical services.

If contraceptive services are provided the contractor must make available 'the giving of advice about emergency contraception and where appropriate, the supplying or prescribing of emergency hormonal contraception or, where the contractor has a conscientious objection to emergency contraception, prompt referral to another provider of primary medical services who does not have such conscientious objections'.[14] The contractor must also make available 'the provision of advice and referral in cases of unplanned or unwanted pregnancy, including advice about the availability of free pregnancy testing in the practice area and, where appropriate, where the contractor has a conscientious objection to the termination of pregnancy, prompt referral to another provider of primary medical services who does not have such conscientious objections'.[15] Where practices provide maternity medical services there are provisions with similar conscientious objection clauses in relation to the referral of women 'whose pregnancy has terminated as a result of miscarriage or abortion'.[16]

It must be remembered that these are contractual obligations which are entered into by practices. It is the practice as an entity that has these obligations, rather than the individual doctors within it. The GP principals who enter into these contracts and run the practice are of course obliged to ensure that the practice abides by the terms, and failure by those principals to do so could be a disciplinary matter in which the GMC might conceivably take an interest. This would be on the basis that decent doctors do not flout their contractual obligations.

On the face of it there is nothing unreasonable about the obligations in the GP contract. No practice is forced to offer contraceptive services (for instance), but if a practice opts to, it seems fair enough to expect them at least to facilitate access to its patients of all the services under the heading of contraceptive services.

The new guidance: involvement in abortion

Paragraph 21 states that:

'Patients may ask you to perform, advise on, or refer them for a treatment or procedure which is not prohibited by law or statutory code of practice in the country where you work, but to which you have a conscientious objection. In such cases you must tell patients of their right to see another doctor with whom they can discuss their situation and ensure that they have sufficient information to exercise that right. In deciding whether the patient has sufficient information, you must explore with the patient what information they might already have, or need.'

Paragraph 26 provides that:

'Where a patient who is awaiting or has undergone a termination of pregnancy needs medical care, you have no legal or ethical right to refuse to provide it on grounds of a conscientious objection to the procedure. The same principle applies to the care of patients before or following any other procedure from which you have withdrawn because of your beliefs.'

As they stand, these paragraphs raise some obvious questions. CMF wrote to the GMC asking for clarification. Here are the GMC's answers:[17]

'You ask three specific questions about whether our guidance obliges doctors to provide particular services:

1. Will doctors be obliged to sign abortion authorisation forms?
2. Will doctors be obliged to clerk patients for abortion (ie carry out pre-op examination and assessment)?
3. Will doctors be obliged to refer patients seeking abortion to other doctors who will authorise it?

The answer to all three questions is 'no' – see *Good Medical Practice* and paragraph 21. Reading paragraph 26 in the context of *Good Medical Practice* and the preceding paragraphs of the supplementary guidance (particularly paragraph 21), should ensure that readers understand our intention in the guidance. This is to distinguish between doctors refusing to participate directly in, or facilitate the execution of, procedures to which they have a conscientious objection on the one hand, and on the other, refusing to provide any other care on the grounds that the patients concerned were about to undergo, or had undergone such a procedure. It is the procedure to which the doctor objects, not the patient.'

The guidance: other areas

Doctors opposed to abortion will find these responses reassuring. But there are other types of treatment to which some will have conscientious objection. Examples include post-coital contraception and gender reassignment. Legislation does not provide specific protection for individual conscientious objectors in these areas (unlike in the cases of abortion and procedures covered by the HFE Act). Do the principles articulated by the GMC in its responses to the CMF apply where there is no statutory protection? The answer given both by common sense and by the GMC is yes.[18]

Conclusion

The GMC's guidance gives robust protection to doctors who object conscientiously to any medical or surgical treatment. Its application will need to be, and will be, watched carefully. The guidance should act not just as a shield, protecting conscientious objectors from trouble, but also as a sword: it should be a disciplinary offence under the guidance to fail to accord to conscientious objectors the rights recognised by the guidance.

If the guidance proves inadequate, either as a sword or a shield, Article 9 of the ECHR might remedy the deficiency. Article 9's main use at the moment is to ensure (a) compliance of doctors' employment contracts with the principles in the guidance and (b), a related point, to ensure that the position of conscientious objectors is protected as against people and bodies not subject to the jurisdiction of the GMC.

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references

1. *Good Medical Practice*, General Medical Council, 2007
2. The guidance refers to *Good Medical Practice* as the 'core guidance', and comments 'This supplementary guidance is intended to provide more detailed advice': paragraph 2
3. *Good Medical Practice*, Duties of a Doctor
4. *Ibid*, paragraph 7
5. *Ibid*, paragraph 7
6. *Ibid*, paragraph 8
7. *Ibid*, paragraph 33
8. *Personal Beliefs and Medical Practice*, paragraph 4
9. *Ibid*, paragraph 7: '[The guidance] attempts to balance doctors' and patients' rights – including the right to freedom of thought, conscience and religion, and the entitlement to care and treatment to meet clinical needs – and advises on what to do when those rights conflict.'
10. *Ibid*, paragraph 3
11. Foster C. Conscientious objection to abortion – ethics, polemic and law. *Triple Helix*, Autumn 2005: 7
12. s. 38 provides: '(1)'No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so. (2) In any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.'
13. SI 2004/291
14. Schedule 2 paragraph 3(2)(d)
15. Schedule 2 paragraph 3(2)(e)
16. Schedule 2 paragraph 7(1)(c)
17. Reproduced with the permission of the GMC. The full letter is at *admin.cmf.org.uk/pdf/ethics/2008-03-26-GMC_letter_to_PSaunders.pdf*
18. *Ibid*, paragraph 7