

# Parliamentary Inquiry into Freedom of Conscience in Abortion Provision

## Briefing from Christian Medical Fellowship July 2016

This Inquiry will assess the extent to which there is adequate protection for doctors and other healthcare workers who do not wish to participate, directly or indirectly, in the provision of abortions. It will also examine how freedom of conscience in the law and professional guidance can be developed for healthcare professionals.

The closing date for submissions is Monday 11 July. Full details are [here](#).

This briefing paper sets out CMF's concerns with the interpretation of the law, and suggests ways in which the law and professional guidance might be shaped in the future.

### 1. Current interpretations of the law are inconsistent.

There is general agreement that the 'conscience clause' in the Abortion Act<sup>1</sup> protects doctors and nurses from being forced against their consciences to be *directly* involved in carrying out abortions, for example by performing or assisting an operative procedure or administering abortifacient drugs. However the situation is less clear when involvement is *indirect*, for example by referring a patient for assessment with a view to abortion.

In the [Glasgow Midwives case](#) (Doogan and Wood), [the Scottish Court of Appeal](#) (Lady Dorrian) ruled that the two nurses involved could refuse to delegate, supervise or support staff involved in abortions: *'In our view the right of conscientious objection extends not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose.'*<sup>2</sup>

However this was overturned by the Supreme Court in 2013. [Lady Hale](#) ruled that: *"Participating' is limited to direct [hands-on] participation in the treatment involved. It does not cover administrative and managerial tasks.'*<sup>3</sup>

Regarding onward referral, the ruling stated: *'...it is a feature of conscience clauses generally within the health care profession that the conscientious objector be under an obligation to refer the case to a professional who does not share that objection. This is a necessary corollary of the professional's duty of care towards the patient.'*<sup>4</sup>

This legal ruling appears to go beyond the 2013 General Medical Council (GMC) guidance that doctors are *not* obliged to refer patients seeking abortion to other doctors who will do it but must: *'make sure that the patient has enough information to arrange to see another doctor who does not hold the same objection'*.<sup>5</sup>

For nurses and midwives, guidelines from their professional bodies are tighter. A new, and controversial, position statement on abortion from the Royal College of Midwives (RCM),<sup>6</sup> following the Hale ruling, suggests that the right of conscientious objection (CO) be recognised *'but should only apply to direct involvement in the procedure of terminating pregnancy'* and that onward referral to another competent practitioner be made mandatory.

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<sup>1</sup> Section 4 of the Abortion Act (1967) requires that 'no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection' <http://www.legislation.gov.uk/ukpga/1967/87/section/4>

<sup>2</sup> <http://www.bailii.org/scot/cases/ScotCS/2013/2013CSIH36.html>

<sup>3</sup> [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2013\\_0124\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0124_Judgment.pdf)

<sup>4</sup> Greater Glasgow Health Board (Appellant) v Doogan and another (Respondents) (Scotland) [2014] UKSC 68

<sup>5</sup> [http://www.gmc-uk.org/guidance/ethical\\_guidance/21171.asp](http://www.gmc-uk.org/guidance/ethical_guidance/21171.asp)

<sup>6</sup> <https://www.rcm.org.uk/sites/default/files/RCM%20Abortion%20Statement.pdf>

Guidance from the British Medical Association (BMA) says that where conflicts regarding conscientious objection and the interests of patients arise, they must be resolved in favour of patients.<sup>7</sup>

There is a lack of coherence and clarity regarding the scope of CO and obligation to onward referral since the Hale ruling. CMF supports the GMC guidance and is concerned that the Hale ruling creates an obligation to refer that the guidance does not require. Clearly a balance must be struck between the clinician's right to CO and the patient's right of access to abortion where the law allows it. However if clinicians who conscientiously object to abortion are *required* to refer, many will consider that this makes them complicit in any abortion that follows – they would be forced into having a causal role in the very procedure to which they object. Support for restricting the law and professional bodies from imposing a *duty* to refer can be found in the ruling of a High Court case in New Zealand in 2010.<sup>8</sup>

CMF believes that the wording of the current 2013 GMC guidance achieves an appropriate balance that should form the basis of future guidelines from all professional bodies in healthcare.

The word 'treatment' in the Abortion Act's conscience clause has invited different legal interpretations of what constitutes actual treatment. In contrast, the Human Fertilisation and Embryology Act 1990 conscience clause (S38) offers broader protection by using the word 'activity': '*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.*'<sup>9</sup>

## 2. Current interpretation of the law may be inconsistent with other legislation

The UK Equality Act (2010)<sup>10</sup> prohibits direct or indirect discrimination on the grounds of religion and belief, amongst other grounds. Though not yet tested in the courts, it is strongly arguable that the 'philosophical belief' in the sanctity of life from conception would be protected under its provisions. A clinician holding this belief, and who is required by her professional body to refer her patient for a procedure that is at odds with her convictions, would therefore have a case under the terms of the Equality Act.

Article 9 of the European Convention of Human Rights (ECHR)<sup>11</sup> provides that, subject to some narrowly defined exceptions, '*Everyone has the right to freedom of thought, conscience and religion*' and to '*manifest his religion or belief, in worship, teaching, practice and observance.*' Article 14 prohibits discrimination, including on the grounds of religion or belief. Following a recent ECHR decision,<sup>12</sup> the protection afforded under Article 9 has been expanded to protect '*a practice or manifestation motivated, influenced or inspired by religion or belief...regardless of whether it is a mandatory requirement of the religion or belief*'. Further, the availability of alternative employment in the workplace, that would accommodate the employee's beliefs, is no longer to be a limiting factor.

Lady Hale advised the Glasgow midwives that they '*may still claim that, either under the Human Rights Act or under the Equality Act, their employers should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs*'.

The notion of 'reasonable accommodation' already exists in other jurisdictions, for example in Canada, where an employer must prove 'undue hardship' in order to justify a discriminatory measure.<sup>13</sup>

<sup>7</sup> Expressions of doctors' beliefs, BMA [bit.ly/1QKnp4e](http://bit.ly/1QKnp4e)

<sup>8</sup> HALLAGAN AND ANOR V MEDICAL COUNCIL OF NZ HC WN CIV-2010-485-222 2 December 2010

<sup>9</sup> <http://www.legislation.gov.uk/ukpga/1990/37/section/38>

<sup>10</sup> [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf)

<sup>11</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>12</sup> [2013] IRLR 231

<sup>13</sup> <http://laws-lois.justice.gc.ca/eng/acts/h-6/page-2.html#docCont>

Consider the example of a medical secretary, asked to type a letter referring a patient for assessment with a view to terminating a pregnancy. Abortion may be against her religious beliefs but, following Hale, clause 4 of the Abortion Act will not offer her exemption on the grounds of conscience. She may, however, claim that to be 'required' to participate in the referral process would make her complicit in any subsequent abortion and would discriminate against her under the terms of the ECHR.<sup>14</sup>

To weaken the scope and application of its 'conscience clause' could make the Abortion Act incongruent with Article 9 of the ECHR, and encourage conscientious objectors to pursue their claims under the terms of the Convention.

CMF recommends that clarity regarding the issue of referral is reflected uniformly in the guidelines issued to healthcare professionals. We also recommend that Articles 9 and 14 of the ECHR, prohibiting discrimination on the grounds of religion and belief, be recognised as undergirding the protection provided by the conscience clause of the Abortion Act.

### 3. The erosion of moral integrity in healthcare

'The right of conscientious objection goes to the heart of medical practice as a moral activity. The right helps preserve individuals' moral integrity, preserves the reputation of the profession, safeguards against coercive state power, and protects from discrimination those with minority ethical beliefs.'<sup>15</sup> The current trajectory to limit the scope and application of CO risks undermining the essential moral values that underpin our healthcare system and that date back to the foundations of the medical profession.

From the earliest times the practice of medicine has been grounded in certain core ethical values, such as those in the Hippocratic Oath<sup>16</sup> and the Declaration of Geneva,<sup>17</sup> that are reflected in the GMC's *Good Medical Practice*.<sup>18</sup> These values are central to clinicians' self identity and when they are coerced by employers, or by the power of the state, to act in a way which transgresses these values then their internal health is conflicted and their moral integrity damaged.<sup>19</sup> History teaches us that when the core ethical commitments that should safeguard the practice of medicine have been corrupted and violated, doctors may begin to act in ways which deny those fundamental moral values.

It is essential to the moral health of medicine and the allied professions that legal and regulatory systems are maintained which protect the rights of clinicians to refuse to take part in practices which violate their most profound moral convictions.

#### In summary, we recommend:

- the conscience clause in The Abortion Act be retained but consideration be given to clarifying its scope by changing the word 'treatment' to 'activity' as used in the Human Fertilisation and Embryology Act 1990
- due note be taken of the expansion of ECHR provisions after recent cases, and UK law and ECHR be reconciled
- that clarity and uniformity of interpretation be brought to the scope and application of the conscience clause in guidelines produced by professional bodies, along the lines of the 2013 GMC guidance
- that those guidelines protect clinicians from the obligation to refer their patients for assessment with a view to a procedure to which they conscientiously object.

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<sup>14</sup> Under the ECHR her 'philosophical beliefs' would not have to have a religious basis. She need only show that her belief is (a) genuinely held (b) not simply an opinion or viewpoint based on the present state of information available (c) concerns a weighty and substantial aspect of human life and behaviour (d) attains a certain level of cogency, seriousness, cohesion and importance (e) is worthy of respect in a democratic society (f) is not incompatible with human dignity and (g) is not in conflict with the fundamental rights of others.

<sup>15</sup> <http://www.cmf.org.uk/resources/publications/content/?context=article&id=25406>

<sup>16</sup> [https://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](https://www.nlm.nih.gov/hmd/greek/greek_oath.html)

<sup>17</sup> <http://www.cirp.org/library/ethics/geneva/>

<sup>18</sup> GMC Good Medical Practice 2006

<sup>19</sup> <http://www.cmf.org.uk/resources/publications/content/?context=article&id=25406>