

# The law and ethics of abortion

BMA views

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## Key points

- Administering or procuring an abortion is a crime in the UK, however there are a number of exceptions to the crime which are set out in statute and common law.
- Abortion is lawful in England, Scotland, and Wales provided the criteria in the Abortion Act 1967 are fulfilled.
- Abortion is lawful in more limited circumstances in Northern Ireland, provided an individual case can pass certain common law tests.
- Unless abortion is necessary to save a woman's life or prevent grave permanent injury, doctors in England, Scotland, and Wales have a right of conscientious objection under the Abortion Act. At the same time, patients have a right to receive objective and non-judgmental care. Doctors with a conscientious objection should inform patients as soon as possible, and make appropriate arrangements for referral.
- As with all other medical procedures, patients must give the appropriate consent for abortion. From the age of 16, individuals should be assumed to have capacity unless proven otherwise. Decisions involving adults who lack the capacity to consent should be made on the basis of an assessment of their "best interests" in England, Wales, and Northern Ireland, or "benefit" in Scotland.
- Under-16s can consent to abortion if they are deemed competent. Those with parental responsibility for minors lacking capacity can consent to treatment in their best interests on their behalf.
- Patients, both adult and child, have the right to confidentiality. This cannot be overridden except in exceptional circumstances.

## 1. About this guidance

There are few medical procedures as divisive and politically charged as abortion. This guidance is intended to provide a statement of UK law and ethics so that doctors are aware of their responsibilities and rights regarding termination of pregnancy. It also sets out BMA policy on several aspects of the law.

**BMA policy and views are highlighted throughout this document.**

### 1.1 The BMA view on abortion

The BMA has longstanding policy which supports the Abortion Act 1967 as “a practical and humane piece of legislation.” This policy dates back to the 1970s and 80s. More recently, the BMA has agreed policy, which calls for changes to the Abortion Act to reflect changes in the way healthcare is delivered (see later sections).

In addition, in 2017 the BMA agreed policy that abortion should be regulated in the same way as other medical treatments. This policy states that abortion:

- i) should be decriminalised in respect of health professionals administering abortions within the context of their clinical practice;
- ii) should be decriminalised in respect of women procuring and administering the means of their own abortion.

The policy does not call for an absence of regulation. Limits could still be set, but they would be subject to professional and regulatory, rather than criminal, sanctions. In addition, criminal and civil laws that apply to other aspects of clinical care would continue to apply to abortion. For example, supplying abortion drugs without a prescription would be a criminal offence under the UK-wide Human Medicines Regulations 2012. Doctors at the BMA’s 2017 ARM (Annual Representative Meeting) asked the BMA to give further consideration to the significance of viability in relation to the role of the criminal law.

The BMA recognises the diversity of opinion amongst its membership. However, policy expressed in this document has been agreed through the well-established democratic procedures for making policy at the BMA’s ARM.

The BMA’s advice to its members is to act within the boundaries of the law and their own conscience. Patients are, however, entitled to objective and non-judgmental medical advice and treatment, regardless of a doctor’s personal view.

The BMA abhors any instances of harassment or discrimination against doctors on the basis of their views on abortion, either for or against.

Additionally, the BMA deplors any instances of intimidation of patients and staff by anti-abortion protesters. The BMA has campaigned for several years for “safe”/“buffer” zones outside abortion services to protect staff, women and those accompanying women from harassment and intimidating behaviour.

## 2. The Law on Abortion

### 2.1 The law in England, Scotland, and Wales

Abortion in England, Scotland, and Wales is governed by the Abortion Act 1967 as amended by the Human Fertilisation and Embryology Act 1990. The Abortion Act provides exceptions to the crime of administering or procuring an abortion.\*

Under the Abortion Act, a pregnancy can be lawfully terminated by a registered medical practitioner in an NHS hospital or premises approved for this purpose, if two medical practitioners are of the opinion, formed in good faith:

- “(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
- (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
- (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.”<sup>1\*\*</sup>

To demonstrate that an opinion has been formed “in good faith” does not require that the authorisation of an abortion be the right course of action, simply that the doctor has not been dishonest or negligent in forming the opinion that it is. Courts have generally considered that a doctor is acting in good faith if they have complied with accepted medical practice.

Where a doctor “is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman” the opinion of a second registered medical practitioner is not required. In these limited circumstances, there are no restrictions on where the procedure may be carried out.

The use of hormonal emergency contraception or IUDs (intrauterine devices) does not constitute abortion. A parliamentary question in 1983 clarified that the prevention of “implantation in the womb of any fertilised ovum” does not equal the “procuring of a miscarriage” as prohibited by the Offences Against the Person Act 1861.<sup>2</sup> “Miscarriage” should be understood as the end of an established pregnancy. This interpretation was tested and confirmed in the case of *R v HS Dhingra* in 1991,<sup>3</sup> and by a judicial review in 2002.<sup>4</sup>

\* Abortion remains a common law crime in Scotland; and a statutory crime in England, Wales, and Northern Ireland under the Offences Against the Person Act 1861 (England, Wales, and Northern Ireland); the Infant Life (Preservation) Act 1929 (England and Wales); and the Criminal Justice (Northern Ireland) Act 1945. Further detail can be found in the BMA discussion paper *Decriminalisation of abortion: a discussion paper from the BMA*, (February 2017), and *UPDATE on the decriminalisation of abortion* (March 2017) – both available at [www.bma.org.uk/ethics](http://www.bma.org.uk/ethics)

\*\* Note that the above conditions are lettered and ordered as set out in the Act, which differs from how they are ordered on the HSA1 form.

### 2.1.1 Time limits

A pregnancy may only be terminated under section 1(1)(a) of the Abortion Act if it has not exceeded 24 weeks. The majority of abortions carried out in England, Scotland, and Wales take place within this time, over 90 per cent of which are carried out at 13 weeks or earlier.<sup>5</sup> This percentage has remained relatively constant over the past decade. Early abortion is generally seen as medically preferable due to the lower risk of complication.

Amendments made in 1990 to the Abortion Act replaced a pre-existing link to the Infant Life (Preservation) Act 1929 which made it illegal to “destroy the life of a child capable of being born alive”, with an assumption that a child was capable of being born alive after 28 weeks’ gestation. Accordingly, terminations carried out under the remaining grounds, (section 1(1)(b) to 1(1)(d) of the Abortion Act) may be performed at any gestational age.

Periodically, calls are made for the legislation to be amended to reduce the time limit for abortion, most notably during the passage of the Human Fertilisation and Embryology Act in 2008, and again in 2012 following significant coverage of a number of senior politicians’ views on the 24-week time limit. Currently, the standard medical threshold of viability is understood to be around 24 weeks’ gestation.<sup>6</sup>

**The BMA has longstanding policy that opposes any change to the current time limit for abortion. BMA policy agreed in 2013, holds that in light of the technical limitations of screening at earlier gestational stages, it would be unacceptable to change the time limit for abortion.**

### 2.1.2 Early medical abortion

Early abortion opens up the opportunity, particularly in the first trimester, for a woman to have a medical abortion rather than a surgical abortion, something which is medically safer. A medical abortion involves taking the prescription drugs mifepristone (formerly known as RU486) and (between 24 and 48 hours later) misoprostol. Misoprostol causes the womb to expel the embryo/fetus, usually within four to six hours.

When the Abortion Act was written into law, medical abortions were not possible. As such, the Abortion Act required that all abortions be performed in premises approved for surgical terminations. After mifepristone and misoprostol were licensed for use in the UK, the Abortion Act was amended by the Human Fertilisation and Embryology Act 1990, which expanded the power to approve premises for termination of pregnancy to include the power to approve premises for the administration of medical terminations. This amendment made it possible for medical abortion to be administered in approved clinics outside of NHS hospitals.

In 2017 and 2018 respectively, the Scottish and Welsh governments also enabled women to take the second drug, misoprostol, outside an approved clinical setting.<sup>7,8</sup> This change was made in response to reports that some women who had been administered misoprostol had begun to miscarry on the journey between the approved clinic and their home, causing significant distress.<sup>9</sup> In August 2018, the Home Office in England followed suit, announcing its intention to legalise the home use of misoprostol before the end of 2018. Both the RCOG (Royal College of Obstetricians and Gynaecologists) and FSRH (Faculty of Sexual and Reproductive Healthcare) support home use of misoprostol.<sup>10</sup>

### 2.1.3 Abortion for serious fetal abnormality

Under the Abortion Act, a pregnancy may be terminated at any gestation if there is a “substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.”<sup>11</sup>

The Abortion Act is silent on the definition of “serious handicap.” It is therefore a matter of clinical judgment and accepted practice. RCOG has detailed guidance for health professionals involved in late abortions for fetal abnormalities.<sup>12</sup> The BMA believes the factors that may be taken into account in assessing the seriousness of a handicap include the following:

- the probability of effective treatment, either in utero or after birth;
- the child’s probable potential for self-awareness and potential ability to communicate with others;
- the suffering that would be experienced by the child when born or by the people caring for the child.

Doctors faced with a potential late abortion for serious fetal abnormality should be aware that women should be given time to understand the nature and severity of fetal abnormality, and should be offered specialised counselling where appropriate, in order to assist them in reaching an informed decision about how to proceed. The purpose of prenatal screening is to expand the choices available to the pregnant woman and to allow her to make an informed decision about whether to continue with a pregnancy or seek a termination. Women should not be rushed into making a decision, but if a decision is made to terminate the pregnancy, this should proceed without undue delay. Appropriate support should be provided before and after the termination.

#### A note on fetal pain

Whether, and at what stage a fetus feels pain has been a matter of much debate.<sup>13</sup> The RCOG 2011 report *Fetal Awareness – Review of Research and Recommendations for Practice* concluded that the fetus cannot experience pain prior to 24 weeks’ gestation, as prior to this point, the necessary connections from the periphery to the cortex are not present. They also found limited evidence to suggest that fetuses can perceive pain after 24 weeks, and noted increasing evidence to suggest that the fetus never experiences a state of true wakefulness in utero.<sup>14</sup>

The BMA recommends that doctors should give due consideration to the appropriate measures for minimising the risk of pain, including assessment of the most recent evidence. The BMA suggests that even if there is no incontrovertible evidence that the fetus feels pain, the use of fetal analgesia when carrying out any procedure (whether an abortion or a therapeutic intervention) on the fetus in utero may go some way in relieving the anxiety of the woman and health professionals.

### 2.1.4 The requirement for two signatures

The Abortion Act requires the signatures of two registered medical practitioners on a form (named the HSA1 form) confirming that in their opinion, which is made in good faith, the terms of the Abortion Act have been satisfied. Although not stated in the Abortion Act itself, regulations published in 1991 require the two doctors to agree to the termination on the same grounds.<sup>15</sup> Where a woman’s request would meet more than one of the grounds in the Abortion Act, the two doctors must agree which ground is to be specified on the HSA1 form. This requirement for two signatures does not apply in an emergency.

### 2.1.4.1 Pre-signing of forms

In January 2012, the CQC (Care Quality Commission) identified evidence during one inspection that HSA1 forms were being pre-signed by doctors. A subsequent investigation into whether this practice was widespread found clear evidence of pre-signing at 14 out of the 249 locations inspected.<sup>16</sup> A 2013 letter from the Chief Medical Officer for England stated that the pre-signing or “counter-signing” of HSA1 forms was “unacceptable” and “incompatible with the requirement [of the law] to form an opinion in good faith.”<sup>17</sup> Guidance from the DHSC (Department of Health and Social Care) asserts that it considers pre-signing of forms “without subsequent consideration of any information relating to the woman” to be incompatible with the requirements of the Abortion Act.<sup>18</sup>

The GMC’s (General Medical Council) Good Medical Practice makes it clear that doctors are personally accountable for their professional practice, and must be able to justify their decisions and actions and demonstrate that they formed their opinion in good faith. The BMA believes that the practice of pre-signing is always likely to raise questions about whether the decision was made in good faith. However, there may be some circumstances where the pre-signing of HSA1 forms is not necessarily incompatible with the requirements of the Abortion Act. For example, a doctor could prepare a stock of pre-signed forms in advance of being away from clinic, which are only used where the doctor verbally authorises their use following a telephone conversation or other communication, during which they decide, in good faith, that the woman’s circumstances fit within the statutory grounds. However, these circumstances should be seen as exceptional, and in the BMA’s view it would be inadvisable to routinely pre-sign HSA1 forms.

There is no legal requirement for the doctor to personally examine a woman seeking termination. Indeed, there is the option on the HSA1 form for one or both of the doctors to certify that they have not seen or examined the woman. In 1981 the courts confirmed that abortion was a procedure carried out by a multi-disciplinary team, and that whilst the doctor should accept overall responsibility for all treatment with regard to a termination of pregnancy, they do not need to personally conduct every stage of the procedure, and can rely on information gathered by other members of their team in forming their opinion.<sup>19</sup> Nevertheless, doctors must be satisfied that the conditions of the Abortion Act have been met.

**BMA policy agreed in 2007, states that in the first trimester the requirement that a woman meet specified medical criteria, and for two doctors to approve an abortion, should be removed. This would mean abortion in the first trimester would be available on the same basis (informed consent) as other medical treatments. This policy is based partly on the fact that, from a clinical perspective, abortion is safer when carried out early in pregnancy.**

**Given the risks associated with pregnancy and childbirth, and the risks of a woman having to continue a pregnancy against her wishes (compared with the minor risks associated with early medical abortion), there will always be medical grounds to justify termination in the first trimester.<sup>20</sup> The requirement for two signatures in these circumstances has the potential to create delays and unnecessary barriers to access. In addition, no other medical procedure requires the agreement of two medical practitioners, making current abortion law increasingly out of step with the emphasis on patient autonomy elsewhere in medicine. The BMA’s policy is clear that any changes in relation to first trimester abortion should not adversely impact upon the availability of later abortions.**

### 2.1.5 Sex selective abortion

Sex selective abortion is the practice of terminating a pregnancy based upon the sex of the fetus. It has been the subject of considerable media and political attention in previous years, however reports of widespread abortion for reasons of gender preference in the UK remain largely anecdotal. Whilst there may be some evidence to suggest that it is practised elsewhere in the world, ongoing analysis of gender ratios in Britain have repeatedly found “no evidence for gender selective abortions occurring in Great Britain.”<sup>21</sup>

Abortion solely on the basis of parental preference of fetal gender, where there are no health implications (for the fetus or for the woman), cannot satisfy any of the grounds in the Abortion Act, and is therefore unlawful. The DHSC’s guidance states that abortion on the grounds of gender alone is illegal.<sup>22</sup> Further, that the only circumstances in which it would be lawful to terminate a pregnancy where gender is a factor is where there is a substantial risk of the fetus being born with a serious sex-linked condition. However, in the BMA’s view it is possible that another of the legal grounds for abortion could be met as a consequence of fetal gender, or that women who have a gender preference may meet the legal grounds for abortion for reasons unconnected to their preference.

The BMA believes that it is normally unethical to terminate a pregnancy on the basis of fetal sex alone, except in the case of severe sex-linked disorders. However, as part of their assessment, doctors should consider all relevant factors, which may include the woman’s views about the effect of the gender of the fetus on her physical and mental health. Doctors may come to the conclusion, in a particular case, that the effects on the physical or mental health of the pregnant woman of having a child of a particular gender would be so severe as to provide legal and ethical justification for a termination. If two doctors formed the opinion, in good faith, that there was a greater risk to the woman’s health from continuing the pregnancy than there would be from termination, abortion would be lawful.<sup>23</sup> The GMC has confirmed that its understanding of the Abortion Act is that fetal gender could be a contributing factor in determining that one of the lawful grounds for abortion has been met.

### 2.1.6 Reduction of multiple pregnancies

High-order multiple pregnancies are known to be associated with higher rates of mortality and morbidity for both woman and fetuses. Whilst the risk of multiple pregnancy can be, and has been, reduced through careful monitoring of ovulation induction and limiting the maximum number of embryos used in IVF treatment, it cannot be avoided in all cases.

Pre-1990, the legality of selective reduction of multiple pregnancy was unclear as the Abortion Act referred only to the termination of a “pregnancy”, and in selective reduction, the pregnancy itself is not terminated. However, section 37(5) of the Human Fertilisation and Embryology Act 1990 clarified and amended the Abortion Act to include section 5(2) which states that:

“For the purposes of the law relating to abortion, anything done with intent to procure a woman’s miscarriage (or, in the case of a woman carrying more than one fetus, her miscarriage of any fetus) is unlawfully done unless authorised by section 1 of this Act and, in the case of a woman carrying more than one fetus, anything done with intent to procure her miscarriage of any fetus is authorised by that section if:

- (a) the ground for termination of the pregnancy specified in section (1)(d) of that section applies in relation to any fetus and the thing is done for the purpose of procuring the miscarriage of that fetus; or
- (b) any of the other grounds for termination of the pregnancy specified in that section applies.”

Accordingly, selective reduction of pregnancy would be lawful provided that the circumstances met the criteria for termination of pregnancy set out in the Abortion Act. It has been suggested that a general risk of serious handicap to the fetuses, if the multiple pregnancy is not reduced, would not be covered by the Act, and that risk must be to the specific fetus.<sup>24</sup> However, where there is an increased risk to the woman as the result of a multiple pregnancy, selective reduction may be lawful under section 1(1)(a), (b) or (c) of the Act.

The BMA considers selective termination to be justifiable where the procedure is recommended for medical reasons (both physical and psychological). Women who have a multiple pregnancy should be carefully counselled where medical opinion is that continuation of the pregnancy without selective reduction will result in the loss of all the fetuses, but they cannot be compelled or pressured to accept selective abortion. Where there are no medical indications for aborting particular fetuses, the choice should be a random one.

### 2.1.7 Counselling

Whilst counselling can be seen as an important part of the abortion procedure, there is no legislative requirement for the provision or offer of counselling. There have been repeated calls at a parliamentary level to make it mandatory for women seeking abortions to receive independent counselling.<sup>25</sup> Supporters cite concerns that current arrangements, where abortion clinics offer counselling, create a conflict of interest. Meanwhile critics of this view believe that mandating independent counselling merely creates barriers to accessing abortion services.

**The BMA supports the availability and offer of impartial and non-directive counselling to women considering abortion, but believes there is no evidence to warrant implementing mandatory, independent counselling services, separate from the services provided by abortion providers.**

#### Abortion and mental health

Evidence supporting a link between abortion and mental health problems is scant and controversial. In 2011, the Academy of Medical Royal Colleges published *Induced Abortion and Mental Health*, which undertook a systematic review of mental health outcomes of induced abortion. It concluded that having an abortion does not increase the risk of mental health problems – rather, it is having an unwanted pregnancy that is associated with an increased risk of mental health problems, regardless of whether the pregnancy is carried to term or terminated. The most reliable indicator of post-abortion mental health problems is having a history of mental health problems.<sup>26</sup>

### 2.1.8 Conscientious objection

#### 2.1.8.1 Legal scope

Section 4 of the Abortion Act is a conscientious objection clause which permits doctors to refuse to participate in terminations, but which obliges them to provide treatment necessary to save the life or to prevent grave permanent injury to a pregnant woman.

Despite a doctor's right to conscientiously object, patients are entitled to receive objective and non-judgmental medical advice and treatment. Paragraph 52 of the GMC's Good Medical Practice states that:

“You must explain to patients if you have a conscientious objection to a particular procedure. You must tell them about their right to see another doctor and make sure they have enough information to exercise that right. In providing this information you must not imply or express disapproval of the patient's lifestyle, choices or beliefs. If it is not practical for a patient to arrange to see another doctor, you must make sure that arrangements are made for another suitably qualified colleague to take over your role.”<sup>27</sup>

The BMA believes that a doctor's conscientious objection must be made clear to the patient as soon as possible, and patients must be able to see another doctor as appropriate. Referral in these circumstances need not always be a formal procedure. However, it is not sufficient to simply tell the patient to seek a view elsewhere. Doctors should not impose their views on others, but may explain their views to a patient if invited to do so. The BMA has produced more detailed guidance on doctors' personal beliefs which can be found on the BMA website.<sup>28</sup>

GP practices may wish to state in advance if any GPs in their practice have a conscientious objection to abortion, for example in their practice leaflets, so that patients are aware ahead of making an appointment.

Unreasonable delay in referral, with the intention or the result of compromising the possibility of a woman obtaining a termination is wholly unethical, and may leave the practitioner open to litigation or professional sanctions. RCOG has issued guidance on recommended referral times.<sup>29</sup>

The BMA supports the right of doctors to have a conscientious objection to termination of pregnancy and believes that such doctors should not be marginalised. Some doctors have complained of being harassed and discriminated against because of their conscientious objection to termination of pregnancy. Equally, there have been reports of doctors who do carry out abortions being subject to harassment and abuse. The BMA abhors any instances of harassment or discrimination of doctors on the basis of their moral views on abortion, and would encourage any members experiencing such behaviour to contact a BMA employment advisor for support and advice.

The case of *Janaway v Salford Health Authority* clarified that the word “participate” in the Abortion Act should be given its ordinary and natural meaning.<sup>30</sup> As such, the conscientious objection clause is limited to those who take part in the administration of the procedure in a hospital or approved clinic. In the *Janaway* case, this meant that a doctor’s secretary could not conscientiously object to typing a referral letter for abortion services. In the same case, the Judge went on to say that “the regulations do not appear to contemplate that the signing of the certificate would form part of the treatment for the termination of pregnancy.” Accordingly, it appears to indicate that GPs do not have a legal right to claim exemption from giving advice or performing the preparatory steps to arrange an abortion, if the request for abortion meets the legal requirements.

The case of *Doogan and Wood v Greater Glasgow & Clyde Health Board* considered whether the scope of the conscientious objection clause may be broader than had previously been conceived.<sup>31</sup> However, this view was rejected by the Supreme Court at the end of 2014. Department of Health (now Department of Health and Social Care) correspondence shared with the BMA in the early 90s clarified that the conscientious objection clause can be used by medical students to opt out of witnessing abortions. The BMA would advise any student with a conscientious objection to disclose this fact to supervisors, managers, or GP partners as soon as possible so that this can be taken into account when planning patient care.

### **2.1.8.2 Questions about abortion in job applications**

The Department of Health (now Department of Health and Social Care) published guidance in 1994 on the information about abortion that may be included in job advertisements and descriptions and the questions that may be asked at interview.<sup>32</sup> In 2003 the Department of Health confirmed to the BMA that its guidance was not intended to cover career posts that had little content other than termination of pregnancy. Trusts can, therefore, explicitly advertise where duties of career posts are exclusively for termination of pregnancy.

Similar guidance was published in Scotland in 2004.<sup>33</sup>

### **2.1.8.3 Moral scope**

In some cases a distinction can be made between legal and ethical obligations. There may be some tasks that fall outside the legal scope of the conscience clause but morally within it. Generally, it will not be beneficial for women undergoing termination of pregnancy to be cared for by doctors who feel distressed or unhappy about their involvement in a procedure, and so providing individual patients are not disadvantaged, and continuity of care for other patients can be maintained, requests from doctors to opt out of involvement in termination procedures should be considered and accommodated wherever possible.

Where such tasks are unavoidable, health professionals must pursue a non-judgmental approach to the woman concerned.

## 2.2 The law in Northern Ireland

The Abortion Act does not apply to Northern Ireland. This means there are no statutory exemptions to the offence of “unlawfully... [attempting to] procure a miscarriage” under the Offences Against the Person Act 1861 in Northern Ireland. Nonetheless, a common law exemption was created by the precedent in *R v Bourne*.<sup>34</sup>

The Bourne case concerned a London gynaecologist who performed an abortion on a 14-year old girl who was pregnant as the result of rape. The Judge’s reasoning was based on the interpretation of the word “unlawfully” in section 58 of the Offences Against the Person Act. The Judge reasoned that the inclusion of the word “unlawfully” meant it was possible that an abortion could be performed lawfully. The Judge considered that an abortion could be lawful where the provisions of the Infant Life (Preservation) Act 1929 were complied with. The Infant Life (Preservation) Act, states that “causing a child to die before it has an existence independent of its mother” is lawful provided it is done “in good faith”, “for the purpose only of preserving the life of the mother.” The jury agreed that the gynaecologist who “was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck” had performed the abortion in good faith, for the purpose of preserving the life of the mother. The Gynaecologist was acquitted.

Thus, the courts in Northern Ireland are left with the task of interpreting the word “unlawful” in the Offences Against the Person Act using the Criminal Justice (Northern Ireland) Act 1945 (which now applies the Infant Life (Preservation) Act 1929 to Northern Ireland) and the precedent set in Bourne. In the judgment in *Northern Health and Social Services Board v A & Ors*,<sup>35</sup> the Court clarified the legality of abortion:

“The doctor’s act is lawful where the continuance of pregnancy would adversely affect the mental health or physical health of the mother... The adverse effect must, however, be a real and serious one and it will always be a question of fact and degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the unborn child.”

Despite this clarification, without legislation there is continuing legal uncertainty over the precise circumstances in which abortion is lawful in Northern Ireland. This has been the subject of judicial review over the years. A successful High Court appeal by the Family Planning Association in October 2004 required the Department for Health, Social Services and Public Safety (DHSSPS) to produce clear guidance for women and doctors on the circumstances in which abortion is permissible. Guidelines for health professionals were issued in 2009 but were subsequently withdrawn following a legal challenge in 2010.

After a lengthy process, including further judicial review, in 2016 the DHSSPS produced Guidance for health and social care professionals on termination of pregnancy in Northern Ireland.<sup>36</sup> The guidance states that an abortion is lawful only where:

- it is necessary to preserve the life of the woman; or
- there is a risk of real and serious adverse effect on a pregnant woman’s physical or mental health if she continues with the pregnancy, which is either long term or permanent.

This guidance was published shortly after the Belfast High Court ruled that Northern Ireland’s restrictive laws, which do not permit abortion on the grounds of fatal fetal abnormality and sexual crime (rape and incest) (up to the date when the fetus becomes capable of an existence independent of the mother) are incompatible with Article 8 of the European Convention on Human Rights (ECHR) – the right to respect for private and family life.<sup>37</sup>

The High Court’s ruling was subsequently overturned by the Supreme Court in 2018, which found that the claimant, the NIHRC (Northern Ireland Human Rights Committee), did not have standing to bring the action.<sup>38</sup> The NIHRC lacked standing because the case was ‘actio popularis’ or ‘abstract’, in that it did not involve an actual or potential victim of an unlawful act. Nonetheless, a majority of the Supreme Court agreed that Northern Ireland’s abortion laws were incompatible with the ECHR. Further, that although the Supreme Court’s

views were not binding (due to the failure of the action), the Court's views were of "cardinal importance" and should be noted by those "with whom the power lies" to change the law. It has since been reported that judicial proceedings are being taken forward by individual women, who have the necessary standing to bring this type of case.<sup>39</sup>

Of note, earlier in the same year, a Northern Ireland inter-government departmental working group published a report on termination of pregnancy in cases of fatal fetal abnormality.<sup>40</sup> The report was commissioned in 2016 by the then Northern Ireland Health and Justice Ministers, with a view to informing Northern Ireland Executive policy deliberations. The report recommends that:

- '...a change is made to abortion law to provide for termination of pregnancy where the abnormality is of such a nature as to be likely to cause death either before birth, during birth or in the early period after birth;' and
- 'where a diagnosis has been made of such an abnormality, it is to be accepted that the continuance of such a pregnancy poses a substantial risk of serious adverse effect on a women's health and wellbeing.'

The BMA will continue to monitor the situation in Northern Ireland and update guidance accordingly.

Doctors in Northern Ireland wishing to discuss or seek advice on particular cases may contact the BMA's medical ethics and human rights department or the local BMA office. (See also section 3.2.3 on the duty to report.)

**BMA policy supports the decriminalisation of abortion in Northern Ireland, as elsewhere in the UK; and where it would remain applicable, the extension of the Abortion Act to Northern Ireland. The Westminster government has made clear that any changes in abortion legislation in Northern Ireland would have to be instigated by the Northern Ireland Assembly with the support of the public in Northern Ireland. In a 2018 Parliamentary debate, it was stated that "Abortion has been a devolved matter in Northern Ireland since it was established as a legal entity in 1921, and it would not be appropriate for Westminster to seek to impose its will, or to be the arbiter of an issue that has long been devolved to the people of Northern Ireland. The Government believes that the question of any future reform in Northern Ireland must be debated and decided by the people of Northern Ireland and their locally elected, and therefore accountable, politicians."<sup>41</sup>**

### 2.2.1 Conscientious objection

Doctors in Northern Ireland should follow the GMC's guidance on moral and religious views. They should be aware, however, that as the Abortion Act does not extend to Northern Ireland, they do not have a statutory right to conscientiously object to involvement in abortion where it has been deemed lawful.

### 2.2.2 Women in Northern Ireland and abortion

Hundreds of women from Northern Ireland travel to England, Wales, and Scotland each year for abortion.<sup>42</sup> In 2017, British and Scottish governments announced that abortion services in England, Wales, and Scotland respectively, would be made available for women ordinarily resident in Northern Ireland.<sup>43</sup> Doctors treating these women should be aware of the particular support these women might require and make appropriate provision for aftercare. In addition, there is a suggestion that increasing numbers of women are seeking unlawful medical abortions in Northern Ireland, through online pharmacies and other suppliers.<sup>44</sup>

## 2.3 The law in the Channel Islands and Isle of Man

The main focus of this guidance is abortion in the UK; however, the BMA also represents doctors in the Channel Islands and Isle of Man. Many of the principles outlined in this guidance will apply equally to those islands. An outline of the abortion laws for the Channel Islands and Isle of Man can be found below. Women are known to travel from the islands to the UK to access abortion services.

### 2.3.1 Jersey

The Termination of Pregnancy (Jersey) Law 1997 codifies and amends the customary law of Jersey. Abortion is “not to be unlawful”:

- “where it is necessary to save a pregnant woman’s life”;
- “to prevent grave permanent injury” to a pregnant woman’s physical or mental health;
- before 24 weeks where there is a “substantial risk that, if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped”; or
- before 12 weeks if “the woman’s condition causes her distress” and the requirements for consultation set out in the law have been complied with i.e. two consultations not less than seven days apart, with the woman having received information about counselling and adoption, amongst other things.

The law also sets out a right to conscientious objection (except where abortion is necessary to save the life of, or prevent grave injury to the physical or mental health of, a pregnant woman), and other conditions regarding who can perform an abortion, where abortions can be carried out, who should be consulted (including registered medical practitioners from specified specialties in some circumstances), and the recording of the grounds on which an abortion is lawful.

### 2.3.2 Guernsey, Herm and Jethou

The Abortion (Guernsey) Law 1997 sets out both the criminal offence and when abortion is lawful.

Abortion is lawful if two recognised medical practitioners are of the opinion, formed in good faith, that:

- abortion is “immediately necessary to save the life of the pregnant woman”
- abortion is “necessary to prevent grave permanent injury to the physical and mental health of a pregnant woman”;
- the pregnancy has not exceeded 24 weeks’ gestation and “that, at the time of the diagnosis, there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped”; or
- the pregnancy has not exceeded 12 weeks’ gestation and “the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.”

The law also sets out a right to conscientious objection (except where abortion is necessary to save the life of a pregnant woman), and other conditions regarding who can perform an abortion, where abortions can be carried out, and the recording of the grounds on which an abortion is lawful.

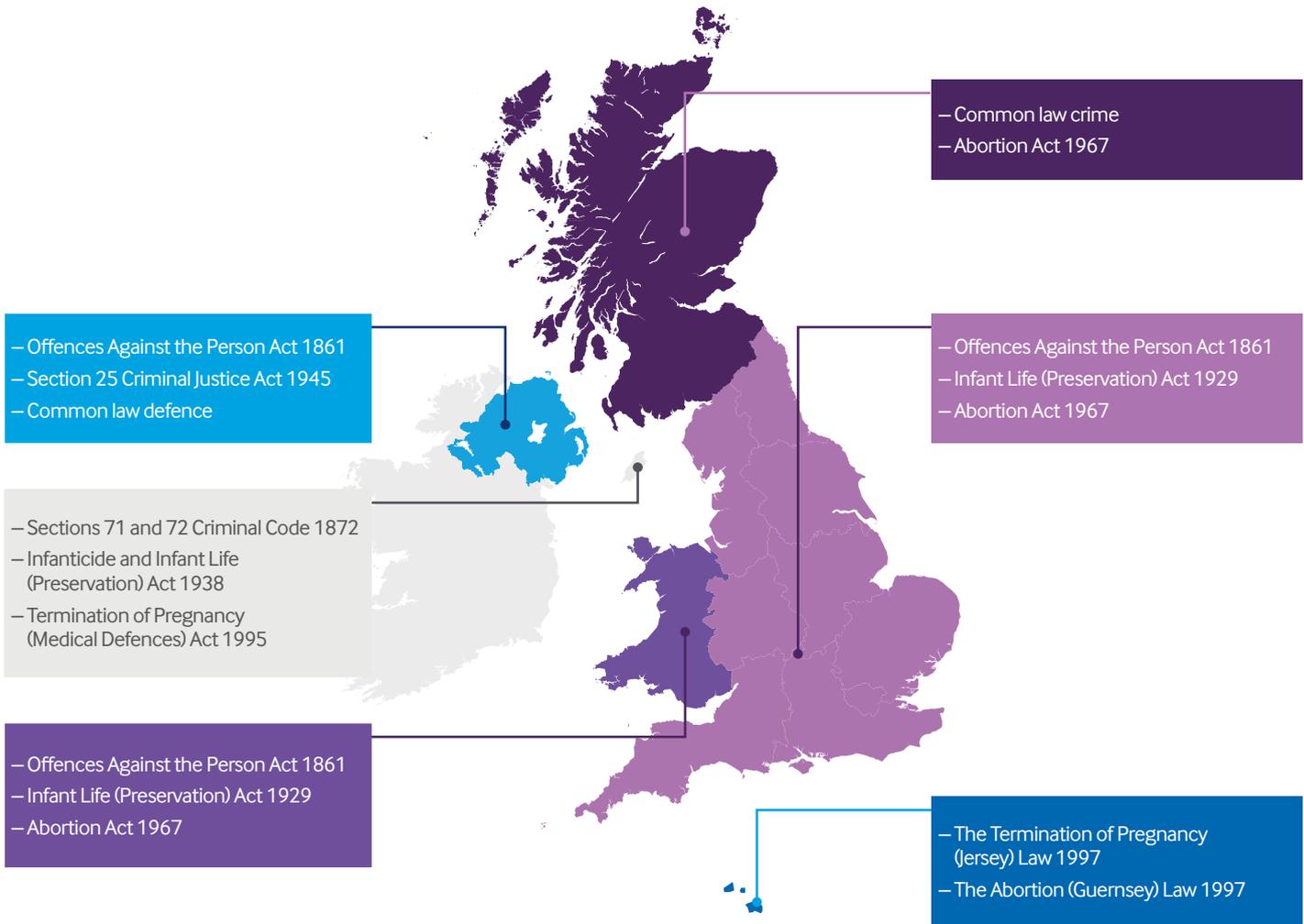
### 2.3.3 Isle of Man

At the time of writing, the Abortion Reform Bill 2017 was passing through the Isle of Man Parliament (The High Court of Tynwald). The Bill proposes a much less restrictive and punitive law in relation to abortion on the Isle. For example, allowing abortion “upon request” up to 14 weeks’ gestation. The Bill also makes provision for conscientious objection protection for healthcare professionals and the creation of “buffer”/“safe” zones outside clinics offering abortion services.

The Bill can be tracked on the Tynwald website at [www.tynwald.org.im](http://www.tynwald.org.im)

In addition to the core statute and common law outlined above, abortion is also subject to further regulation, as well as professional and clinical standards. Furthermore, the criminal and civil laws that apply to other aspects of clinical care also apply to abortion.

## Map of the law on abortion



In addition to the core statute and common law outlined above, abortion is also subject to further regulation, as well as professional and clinical standards. Furthermore, the criminal and civil laws that apply to other aspects of clinical care also apply to abortion.

## 3. Ethical considerations

### 3.1 Consent

Termination of pregnancy cannot proceed without patient consent, except when a patient lacks capacity and termination is in the patient's best interests. There are a number of different factors which must be taken into account in the consent process, depending on the age and capacity of the patient.

#### 3.1.1 Competent adults

It is a fundamental principle of medical law that adults have the right to make decisions on their own behalf, and are assumed to have the capacity to do so, unless proven otherwise. If capacity is challenged, the responsibility for proving that an adult lacks capacity falls upon the person challenging it.

As with all other medical procedures, a woman seeking abortion should be provided with sufficient, accurate information to help her make a decision, and her consent must be freely and voluntarily given. RCOG guidance on the care of women seeking abortion recommends that services have processes in place to identify coercion or issues which make women particularly vulnerable, including child protection needs and domestic abuse/gender-based violence. Services should also refer to and signpost appropriate support services in a timely manner.<sup>45</sup>

#### 3.1.2 Adults lacking capacity

Under the Mental Capacity Act 2005, a person is regarded as lacking capacity to make a decision if, as a result of an impairment of, or a disturbance in the functioning of the mind or brain, they are unable to:

- a) understand the information relevant to the decision;
- b) retain the information relevant to the decision;
- c) use or weigh the information; and
- d) communicate the decision (by any means).

Where an adult fails any part of this test, the entire test is failed and she does not have the relevant capacity to give consent. Case law has emphasised that the inability to make a decision must be a result of the impairment or disturbance in the functioning of the mind or brain.

Where an adult is deemed to lack capacity, decision making on their behalf is governed by the Mental Capacity Act in England and Wales; the Adults with Incapacity (Scotland) Act 2000 in Scotland; and by the common law in Northern Ireland. (The Mental Capacity (Northern Ireland) Act 2016 was enacted in 2016, however timescales for the implementation of the Act are unclear.)

Where individuals lack capacity, the central tenet of the English and Welsh legislation, and the common law in Northern Ireland, is "best interests", and in Scotland "benefit." It is the BMA's view that these terms can be interpreted in largely the same way. However, any practitioners working in Scotland and recommending an intervention in an incapacitated person's best interests that is unlikely to provide clinical benefit should consider seeking legal advice.

Health professionals presented with a pregnant woman lacking capacity to give valid consent, who meets the legal grounds for abortion, should use their professional judgment to assess whether it is in her best interests to continue with the pregnancy, or to terminate the pregnancy. It is important to remember that assessing best interests extends beyond medical best interests alone, and doctors should consider the incapacitated woman's past and present wishes, feelings, beliefs and values. An essential part of this assessment will involve discussion, as appropriate, with those close to the patient, including any proxy decision-maker, with due consideration to confidentiality.

The courts have confirmed that there is no mandatory requirement to seek court approval to perform an abortion where issues of capacity and best interests are clear.<sup>46</sup> However, in cases of doubt, it would be advisable to seek further clinical advice. In the following circumstances, cases should be referred to the court:

- where there is a dispute about capacity;
- where the patient may regain capacity during or shortly after pregnancy;
- where the decision of the medical team is not unanimous;
- where the patient, the potential father, or the patient’s close family disagrees with the decision;
- where the procedures under section 1 of the Abortion Act have not been followed; or
- where there are other exceptional circumstances, for example, the pregnancy is the patient’s last opportunity to conceive.<sup>47</sup>

The need for abortion to be considered in respect of a woman who lacks capacity, and who lacked such capacity at the time of conception, is likely to raise serious questions about her ability to consent to sexual intercourse, and may require investigation as to whether a criminal offence has occurred. The BMA has produced guidance jointly with the Law Society on the law relating to mental capacity, which recognises the rights of all people to voluntarily enter into sexual relationships, but also focuses on the obligation to protect vulnerable adults from abusive relationships.<sup>48</sup> If there are grounds to believe that a pregnancy has resulted from unlawful sexual intercourse (sexual intercourse without consent is rape), immediate steps should be taken to protect the woman (and others who may be at serious risk) from possible further abuse.

Further information on assessing mental capacity, including an interactive assessment tool, can be found online on the BMA website.<sup>49</sup>

### 3.1.3 Competent minors

Any young person, regardless of age, can independently seek medical advice and give valid consent to medical treatment if, in the opinion of the doctor, they are capable of understanding the nature and possible consequences of the procedure. This was established in the House of Lords’ ruling in *Gillick v West Norfolk & Wisbech Area Health Authority*,<sup>50</sup> In the later case of *R (Axon) v Secretary of State for Health*, the Court of Appeal (England and Wales) confirmed that the principles in *Gillick* will apply to decisions about treatment and care for sexually transmitted infections, contraception and abortion. The precedent set by both cases has since been translated into GMC guidance.<sup>51</sup>

The law is clear that a parent’s refusal to give consent for a termination cannot override the consent of a competent young person.<sup>52</sup>

The BMA sometimes receives queries from doctors concerning children and young people seeking medical care without an adult. Whilst requests by young people for serious medical treatments, such as abortion, without parental involvement can cause anxiety amongst doctors, the BMA takes the view that establishing a trusting relationship between doctor and patient will do more to promote health than a blanket refusal to see young patients without parental consent. Further advice and information on the treatment of children and young people can be found in the BMA’s Children and young people toolkit.<sup>53</sup> More detailed guidance on the provision of advice and treatment for matters of sexual and reproductive health for under-16s is available from DHSC.<sup>54</sup>

When consulted by a woman under 16 requesting abortion, the doctor should in particular:

- consider whether the young woman understands the potential risks and possible longer-term effects of abortion;
- consider whether she has sufficient maturity, e.g. *Gillick* competence, to make the decision and give valid consent;
- encourage her to discuss the situation with her parents, or alternatively, another adult whom she feels she can trust;
- discuss the importance of support during and after the termination; and
- if the doctor is not the patient’s own GP, encourage the young woman to consent to information being shared with her GP.

### 3.1.4 Minors lacking capacity

If a young person is assessed as lacking competence, someone with parental responsibility may legally consent to a termination on her behalf. In all cases, the patient's views must be heard and considered. If a young woman refuses to permit parental involvement, legal advice should be sought about whether the parents should be informed against her wishes, which may require an application to the courts. At all stages, the first duty of health professionals remains the welfare of the patient, who may benefit from referral to specialist counselling.

As with adults lacking capacity, if a doctor considers a young patient to be unable to consent to a termination of pregnancy, this raises the question of whether she was also able to consent to sexual intercourse.

### 3.1.5 Involvement of partners

The law is clear that a decision to terminate a pregnancy rests with the woman concerned and her doctor, and that a woman's partner has no legal right to demand or refuse a termination.<sup>55</sup> However, it is good practice to encourage women to discuss the decision with their partner. Where a woman does not wish to share information with her partner, confidentiality must be maintained unless there are exceptional reasons to justify a breach.

## 3.2 Confidentiality

### 3.2.1 Adults

As with all other medical procedures, patients seeking a termination have a right to expect that doctors will not disclose personal health information to a third party without consent. Women seeking termination are likely to be particularly concerned about confidentiality, and doctors should be sensitive to this.

Due to the sensitive nature of abortion, doctors will sometimes receive requests from patients to remove information about previous terminations from their medical record. The BMA's view is that doctors would need to have exceptional reasons for removing clinical information from a patient's medical record. Removing key medical information may make a doctor's later decisions appear unsupported, particularly if further consultations and treatment have arisen as a result of this information, and could also be detrimental to the future care of the patient.

If the doctor consulted is not the patient's own GP, the woman should be encouraged to consent to information being shared with her own GP. However, if she refuses to consent to the sharing of this information, her wishes should be respected.

This right to confidentiality can only be breached in exceptional circumstances. As noted above, the need for an abortion to be considered in respect of a woman who lacks capacity may raise questions about her ability to consent to sexual intercourse and may lead the doctor to believe that a serious crime has been committed. This may warrant breaching confidentiality to disclose information in order to prevent the woman (and others who may be at serious risk) from further harm.<sup>56</sup>

### 3.2.2 Minors

The duty of confidentiality owed to a person under 16 is the same as the duty owed to any other person. This was confirmed by the courts in the cases of *Gillick and Axon*, and outlined in GMC guidance, which states that "[When] providing contraceptive, abortion and STI advice and treatment to young people... You should keep consultations confidential even if you decide not to provide advice or treatment other than in ...exceptional circumstances".<sup>57</sup> For example "where there is an overriding public interest in the disclosure; when you judge that the disclosure is in the best interests of a child or young person who does not have the maturity or understanding to make a decision about disclosure; or when disclosure is required by law."<sup>58</sup>

It is clearly desirable for young people to have their parents' help and support for important and potentially life-changing decisions such as abortion. Whilst young patients should be encouraged to share information with their parents or legal guardians, they cannot

be compelled to do so. The BMA has frequently argued that if young people believe consultations with doctors are not confidential, they will be put off seeking help for issues related to sexual and reproductive health, with potentially serious ramifications for their long-term health.

As with the case of adults lacking capacity, a young person's need for an abortion may give rise to concerns about her ability to consent to sexual intercourse. Doctors should be aware that in England, Scotland, and Wales they do not need to inform police or social services of all underage sexual activity. (See below for information on Northern Ireland.) However, where a young person is under the age of 13, they are considered in law to be unable to consent. All information about sexual activity involving children under 13 should usually be shared. Any decision not to disclose should be discussed with a named or designated doctor for child protection, and the decision and reasons underlying it should be recorded.<sup>59</sup>

There may be circumstances where a doctor has reason to believe that the pregnancy is the result of child abuse, incest or exploitation, and here a disclosure may be necessary and justifiable. The GMC recommends that information be shared about abusive or seriously harmful sexual activity involving any child or young person, including that which involves:

- (a) a young person too immature to understand or consent;
- (b) big differences in age, maturity or power between sexual partners;
- (c) a young person's sexual partner having a position of trust;
- (d) force or the threat of force, emotional or psychological pressure, bribery or payment, either to engage in sexual activity or to keep it a secret;
- (e) drugs or alcohol used to influence a young person to engage in sexual activity when they otherwise would not;
- (f) a young person's sexual partner being someone known to the police or child protection agencies as having had abusive relationships with children or young people.<sup>60</sup>

In such cases, the patient should be told as soon as possible that confidentiality cannot be guaranteed, and should be offered appropriate help, counselling and support.

### 3.2.3 Duty to report in Northern Ireland

Section 5 of the Criminal Law (Northern Ireland) Act 1967 places a duty, unique to Northern Ireland, on everyone to report to the police information they may have about the commission of a relevant offence (one with a maximum sentence of five years or more.) There are few exceptions to the law. For example, "medical confidentiality" is not, in and of itself, understood to be an exception. This means that doctors are under a duty to report unlawful abortion. The recent Northern Ireland DHSSPS guidance on abortion states that:

"Health and social care professionals must balance the need for confidentiality of patients with the obligation to report unlawful terminations of pregnancy to the police and the need to protect others from risk of serious harm."<sup>61</sup>

Under the Act, doctors are also under a duty to report to the police evidence of sexual activity taking place involving a young person under 16, even where the activity is entirely mutually agreed and non-exploitative. This section was amended by the Sexual Offences (Northern Ireland) Order 2008 to exclude from the duty to report information about an offence under Article 20 of the Order (sexual offences against children committed by children or young persons). Doctors are not therefore under a duty to report sexual activity involving a child aged 13 to 15 years old where the other party is under 18. The duty to report still applies where one of the parties is under 13 or over 18.

Where doctors are unsure of their duties and obligations, they should seek advice.

## 4. Summary

Abortion is lawful and not a crime in England, Scotland, and Wales, provided that the criteria set out in the Abortion Act 1967 are fulfilled. Abortion is lawful in Northern Ireland in far more circumscribed circumstances. The Abortion Act requires doctors to make an assessment within the context of each individual case, including assessing the potential impact of pregnancy and birth on a woman's physical and mental health and the wellbeing of any existing children. As with all medical decisions, any decision must be supported by the provision of appropriate information about all available options and implications.

Under the law in England, Scotland, and Wales, doctors are able to exercise a right of conscientious objection to participation in termination of pregnancy, unless the abortion is necessary to preserve the woman's life or prevent grave permanent injury. However, patients also have a right to receive objective and non-judgmental care. Where doctors wish to conscientiously object, they should explain this to their patients and make suitable arrangements for their care to be provided elsewhere.

As with all medical procedures, patients must give appropriate consent to a termination of pregnancy. It is a general principle that from the age of 16 individuals are assumed to have capacity unless proven otherwise. Decisions involving adults who lack the capacity to consent should be made on the basis of an assessment of their "best interests", or "benefit" in Scotland. Under-16s can consent if they are deemed competent. If a young woman under the age of 16 is incapable of consenting, those with parental responsibility can consent to treatment in her best interests on her behalf.

Women seeking termination of pregnancy, both adults and children, have the right to confidentiality. This can only be breached in exceptional circumstances, for example, where a doctor believes a child has been abused, and that she or other girls are at risk of serious harm. In Northern Ireland specific rules apply where a relevant offence has been committed (see section 3.2.3).

For further information about this guidance, BMA members may contact:

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