Mary Ford Neal: Health professionals' rights at risk when Parliament debates Domestic Abuse Bill

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Today (Monday 6 July) Parliament will consider proposed amendments to the Domestic Abuse Bill. One of the proposed amendments—New Clause 29 (NC 29)—has the potential to eradicate the statutory right of health professionals to opt out of participating in abortion up to 24 weeks, a right that has existed in this country for over 50 years.

The relevant part of NC 29 reads:

"Amendment of criminal law in relation to termination of pregnancy

(1) The Offences Against the Person Act 1861 is amended as follows.

(2) Sections 58 (administering drugs or using instruments to procure abortion) and

59 (procuring drugs, etc, to cause abortion) are repealed."

To understand the effect of this on the statutory right of conscientious objection in section 4 of the Abortion Act 1967, we must start from the judgment of the UK Supreme Court in the case of *Greater Glasgow Health Board v Doogan* [2014] UKSC 68. *Doogan* concerned the scope of the right to opt out under section 4.

Section 4 provides: "no person shall be under any duty…to participate in any treatment authorised by this Act to which he has a conscientious objection." In Doogan, the Supreme Court held that "treatment authorised by this Act" means treatment "made lawful by" the Act.

Abortion is a prima facie crime in England and Wales, under sections 58 and 59 of the Offences against the Person Act 1861, and (after viability) under the Infant Life Preservation Act 1929. The 1967 Act made abortion lawful ("authorised" it) in certain circumstances. NC 29 proposes to repeal the sections of the 1861 Act that make abortion criminal, but to leave the 1929 Act in place (for now).

So how this would affect the statutory right to conscientious objection in section 4? Since *Doogan* established that section 4 only covers what is "authorised" by the 1967 Act, the question is: what abortion *would* still be "authorised by the 1967 Act" if NC 29 is accepted?

The answer is that abortion before 24 weeks would no longer be "authorised" by the 1967 Act, but abortion after 24 weeks would. Abortion after 24 weeks would still be a prima facie crime (under the 1929 Act, which would still be in place), but abortion before 24 weeks would no longer be a prima facie crime (sections 58 and 59 of the 1861 having been repealed) so would require no "authorisation" from the 1967 Act (or any other source).

Following the *Doogan* decision that only abortion "authorised" by the 1967 Act is covered by the right to conscientiously object, this would mean that the right no longer applied to abortion before 24 weeks, so health professionals would no longer have the statutory right to opt out of participating in the majority of abortions. Conscientious objection would be available *only* in relation to abortions *after* 24 weeks—0.1% of abortions in England and Wales in 2018.

Another odd—and presumably unwanted—consequence of NC 29 would be that the 1967 Act would still "authorise" abortion up to 24 weeks in Scotland, but not England or Wales, because sections 58 and 59 of the 1861 Act never applied in Scotland, and their repeal would make no difference there. Thus, while health professionals in England and Wales had the statutory right removed in all but 0.1% of cases, their colleagues in Scotland would continue to benefit from it as before.

No one should be reassured by the fact that professional guidance documents also make provision for conscientious objection; this is no substitute for a statutory right. For one thing, the content of such documents is not law, and is no compensation for the peremptory erasure of a longstanding legal right. Most importantly, however, freedom of conscience is simply too important to be left to the "gift" of professional governing bodies. Fundamental rights and freedoms should be the remit of Parliament, not of professions who are ultimately unaccountable to the public.

To be clear, I am not suggesting that stripping away professionals' conscience rights is the *intention* of those proposing NC 29. Rather, this seems like an oversight, albeit one that reflects a worryingly casual attitude to the rights of health professionals. In any case, the goal of decriminalising abortion is achievable *without* eviscerating professionals' existing rights, by introducing a purpose-built decriminalisation Bill that includes a conscience clause, and letting Parliament debate all parts of the Bill properly.

Mary Neal *is a reader and Deputy Head of the Law School (Policy & Practice), University of Strathclyde in Glasgow, researching and teaching medical law and ethics with a particular focus on beginning and end of life issues and rights of conscientious objection. She is a current member of the BMA Medical Ethics Committee.*

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