



Department
of Health

Guidance in Relation to Requirements of the Abortion ACT 1967

For all those responsible for commissioning,
providing and managing service provision

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GUIDANCE IN RELATION TO REQUIREMENTS OF THE ABORTION ACT 1967

FOR ALL THOSE RESPONSIBLE FOR
COMMISSIONING, PROVIDING AND MANAGING
SERVICE PROVISION

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Contents

Contents..... 4

Introduction 5

Background..... 5

Annex A 13

Annex B 14

Introduction

1. The Chief Medical Officer (“CMO”) wrote to all Registered Medical Practitioners (RMPs) on 23 February 2012 and 22 November 2013 stressing the need for full compliance with the requirements of the Abortion Act 1967 (“the Abortion Act”). In the letter of 22 November, it was announced that the Department of Health would provide more detailed guidance to doctors in relation to the Abortion Act.
2. It is acknowledged that there have been advances in abortion care since the passage of the Abortion Act. Increasingly, abortions are provided through medical rather than surgical methods, at earlier gestations and there is generally multidisciplinary team (“MDT”) involvement. However, apart from amendments made in 1990, the Abortion Act remains unchanged. It is essential that all those involved in commissioning and providing abortion care, including those managing services, should understand the legal requirements placed on RMPs to ensure that their practice is lawful.
3. Abortion is an area in which people can hold very strong views. All those involved in abortion care, particularly clinicians, can be faced with working in a sometimes difficult and challenging environment with a number of vulnerable clients. This guidance is intended to support all those involved in commissioning, providing and managing abortion services to provide a high quality, legal service that meets the needs of women.

Background

4. Following the decision by the CPS in August 2013 not to prosecute two doctors investigated for certifying abortions based on the gender of the fetus, the CPS highlighted¹ the lack of guidance for doctors about abortion law. In particular, the statement made by the CPS in relation to those cases highlighted that “there is no guidance on how a doctor should go about assessing the risk to physical or mental health, no guidance on where the threshold of risk lies and no guidance on a proper process for recording the assessment carried out”.
5. In response, the Department of Health agreed to produce guidance on these issues. The guidance does not, and indeed cannot, change the law in relation to abortion, which is governed by the criminal law and the Abortion Act and is ultimately a matter for Parliament and the courts to determine. **However, the intention is to provide support for doctors by setting out how the law is interpreted by the Department of Health.** More detailed guidance for health professionals on abortion is also available from the General Medical Council (GMC), British Medical Association (BMA), Royal College of Obstetricians and Gynaecologists (RCOG) and the Royal College of Nursing (RCN).
6. Although there is no legal requirement for at least one of the certifying doctors to have seen the pregnant woman before reaching a decision about a termination, the Department’s view is that it is good practice for this to be the case. It is recognised however that, with technological advances, this may well mean that a doctor does not physically see the woman, e.g. there could be a discussion by phone or over a webcam.

¹ <http://blog.cps.gov.uk/2013/10/statement-from-director-of-public-prosecutions-on-abortion-related-cases.html>

This paragraph should also be read in conjunction with paragraphs 20 and 21 of this guidance.

Abortion legislation

7. The Offences Against the Person Act 1861 makes it a criminal offence to intentionally unlawfully procure a miscarriage, including for a woman to procure her own miscarriage. The Infant Life (Preservation) Act 1929 makes it an offence to intentionally kill a child, capable of being born alive, before it has a life independent of its mother. The Abortion Act creates exceptions to these offences in certain limited circumstances.
8. The Abortion Act makes abortion legal where the pregnancy is terminated by an RMP and, except in emergencies, where two RMPs are of the opinion formed in good faith that one of the lawful grounds specified in the Act are met.

Forming an opinion in good faith

9. If there is evidence that either certifying doctor has not formed their opinion in good faith then the doctor performing the termination is not protected by section 1(1) of the Abortion Act and has potentially committed a criminal offence by terminating the pregnancy. It is also possible that the doctor could be acting contrary to their professional duties.
10. Practices have come to light recently which call into question whether doctors have acted in accordance with their legal obligations under the Abortion Act. These practices include the signing of HSA1 forms by doctors before a woman has been referred, and doctors signing forms relying solely on decisions made about the woman in question by other doctors or members of the multi-disciplinary team without any other information.

Abortion certification

11. Form HSA1 must be completed, signed and dated by two RMPs **before** an abortion is performed². The HSA1 form must be kept with the patient notes for 3 years from the date of termination³. The form must be completed by both RMPs certifying their opinion, formed in good faith that at least one and the same ground for abortion in section 1(1) of the Abortion Act exists⁴. The certification takes place in the light of their clinical opinion of the circumstances of the pregnant woman's individual case. The lawful grounds for abortion are set out in Annex A.

² Regulation 3(2) Abortion Regulations 1991 S.I. 1991/499

³ Regulation 3(4) Abortion Regulations 1991 S.I. 1991/499

⁴ See the form in Part 1 to Schedule 1 and regulation 3(ii)(d) of the Abortion Regulations 1991

Assessing risk to physical or mental health, the threshold of risk and recording how the assessment is carried out

12. Whilst there is no statutory requirement for either doctor to have seen and/or examined the woman, it is the Department's interpretation of the law that both doctors should ensure that they have considered sufficient information specific to the woman seeking a termination to be able to assess whether the woman satisfies one of the lawful grounds under the Abortion Act.
13. This assessment will include consideration of any risk to the woman's physical or mental health as one of the lawful grounds. The identification of where the threshold of risk to the physical or mental health of the woman lies is a matter for the clinical opinion for each of the doctors.
14. Although the burden of proof would be on a prosecutor to show that an opinion was not formed in good faith, DH recommend that RMPs should be prepared to justify how they considered information specific to the woman when forming their opinion, for example by recording in the patient record that they have assessed the relevant information and reached the conclusion based on this information. This is in line with guidance from the GMC^{5,6} (see Annex B).
15. It should be noted that ultimately, if challenged, the question as to whether an individual doctor formed an opinion in good faith would be for a court to decide based on the facts in the individual case.

What is pre-signing of HSA1 forms?

16. In February 2012, CQC inspectors identified a number of cases where signatures on HSA1 certificates predated the referral and assessment of women in a clinic. For example, one woman was referred to the clinic on 20 December and assessed on the 22 December. The certificate reflected that a doctor at the clinic had seen the woman and signed the form on 22 December. However, the signature of the second doctor, also a practitioner at the clinic, was dated 19 December. Therefore, on the information provided, the second doctor had certified the abortion before being assigned the case, and before having any opportunity to consider the clinical files or other specific information to the woman.

⁵ Section 19, Good Medical Practice, General Medical Council (2013)

⁶ Section 71, Good Medical Practice, General Medical Council (2013)

17. The pre-signing of HSA1 forms calls into question whether a doctor could turn his or her mind to a specific woman's circumstances and form a good faith opinion about which, if any, of the lawful grounds under the Abortion Act might apply (see Annex A). In subsequent investigations the CQC identified a further 14 services where there was clear evidence of pre-signing of HSA1 forms. Poor practice identified included photocopying of signatures on forms. DH 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.

Signing HSA1 forms based on the decisions of another doctor

18. It has also come to light that, in some cases, the second RMP might simply sign an HSA1 based on the decision of the first RMP, relying solely on that doctor's judgment to provide a second signature without considering any information specific to the woman concerned.
19. An example of where this situation could arise would be where an "on-call" doctor is asked to sign an HSA1 form without access to the patient records to form their opinion in good faith with no other information specific to the woman being available. Junior doctors, in particular, may feel under pressure to comply with such a request.
20. The purpose of the requirement that **two** doctors certify the ground(s) for termination is to ensure that the law is being observed; this provides protection for the woman and for the doctors providing the termination⁷. One of the two certifying doctors may also be the doctor that terminates the pregnancy. The clear intention of the Act is for *each* doctor to consider the woman's circumstances in forming a good faith opinion. This is reflected in the recognition that the doctors may find that different grounds are met (although they must both find the same ground is met for the abortion to be lawful⁸). Treating certification by one or either doctor as a 'rubber stamp' exercise is therefore contrary to the spirit of the Act and calls into question whether that doctor is in fact providing an opinion that they have formed themselves in good faith rather than relying solely on a colleague's opinion, however trusted that colleague's judgement may be. DH considers the signing of forms without consideration of any information relating to the woman to be incompatible with the requirements of the Abortion Act.

⁷ Scientific Developments Relating to the Abortion Act 1967, Twelfth Report of Session 2006-7, House of Commons, Science and Technology Committee

⁸ Regulation 3(ii)(d) Abortion (Amendment) (England) Regulations 2002 S.I. 2002/887

The role of the MDT

21. It is acknowledged that the MDT, including nurses and counsellors (it is possible that the MDT would include a midwife where a congenital abnormality has been diagnosed antenatally) plays an important role in supporting women seeking an abortion and in obtaining information from women⁹. RMPs can rely on information obtained by members of the MDT but it is DH's interpretation of the law that the RMPs should themselves review the information before reaching an opinion, for example by considering the paperwork or speaking to members of the team. The RMP must be satisfied that they can justify how they reached their decision in good faith if later challenged. The opinions required under the Act are clearly those of the RMP, not of any other member of an MDT, however experienced or trusted. DH does not think that the Act can be read to enable the opinion required to be that of another person entirely, or the opinion of a team as a whole. An RMP may, of course, take into account the opinions and views of colleagues in forming an opinion and it is often important to do so, but the opinion provided must be their own.

Faxing of HSA1 forms

22. If the first doctor signs and dates a HSA1, which is faxed to the second doctor who then signs and dates the faxed copy certificate then, although they will have technically signed and dated two separate certificates, in DH's view the doctors will have complied with the requirements as to certification set out in the Abortion Regulations 1991¹⁰ ("the Abortion Regulations). However, as set out above, it is still expected that both doctors should take positive steps to obtain information specific to the woman seeking a termination as part of reaching their decision as to whether there are grounds under the Abortion Act.
23. As the certificate will contain sensitive personal data, it must be processed (transmitted, stored, disposed of etc.) in accordance with the Data Protection Act 1998 (DPA). The DPA permits the "sensitive personal" data to be transmitted from one doctor to another if the patient explicitly consents, or the processing is necessary for medical purposes and is undertaken by a health professional or by someone who is subject to an equivalent duty of confidentiality¹¹. Data Protection Principle 7 requires that: 'Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data'¹².

⁹ Section 35, Good Medical Practice, General Medical Council (2013)

¹⁰ Regulation 3(2) Abortion Regulations 1991 S.I. 1991/499

¹¹ Paragraph 8, Schedule 3, Data Protection Act 1998.

¹² Paragraph 7, Schedule 1, Data Protection Act 1998

24. There are some recent examples of fines being imposed by the Information Commissioners Office (ICO) where faxes containing sensitive personal data were sent to the wrong fax number. For example an NHS Trust in London was fined £90,000 for persistently committing this error. Abortion providers therefore need to consider whether fax is a sufficiently secure method of transmitting the forms. Providers' should consider the ICO's guidance about the use of faxes:

http://www.ico.gov.uk/for_organisations/data_protection/security_measures.aspx

Abortion on the ground of gender

25. Abortion on the grounds of gender alone is illegal. Gender is not itself a lawful ground under the Abortion Act (see Annex A for the lawful grounds under Section 1(1)). However, it is lawful to abort a fetus where two RMPs are of the opinion, formed in good faith, "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", and some serious conditions are known to be gender-related.

Completion of Form HSA4

26. Section 2 of the Abortion Act requires all RMPS terminating a pregnancy to give notice to the Chief Medical Officer (CMO). **It is a criminal offence for RMPs not to notify the CMO of every termination they perform.** In England, the Abortion Regulations¹³ require that Form HSA4 be submitted to the CMO within 14 days of the procedure. This notification is used by the Department of Health as an aid to checking that terminations are carried out within the law. Form HSA4 requires detailed information relating to the procedure, including the names and addresses of the doctors who certified there were lawful grounds under the Abortion Act, gestation, method used and place of termination. Every form is checked and monitored by DH officials authorised by the CMO. Data derived from the forms is used to publish annual statistics on abortion. It is crucial that all abortions performed are notified to the CMO, both as a matter of law and for there to be appropriate public and Parliamentary scrutiny and trust in the data that are published.
27. Forms can be submitted electronically or using the paper based system would strongly encourage the use of electronic reporting as this is a more secure system and reduces the risk of lost or misplaced forms or missing data. More information on electronic reporting can be found at:

<http://media.dh.gov.uk/network/261/files/2012/05/F-Detailed-guidance-note-for-HSA4-Webform1.pdf>

¹³ Regulation 3(2) Abortion Regulations 1991 S.I. 1991/499.

28. Currently, around 10% of paper HSA4 forms received are returned to RMPs because of missing, incomplete or invalid data. The main errors that occur are missing doctors' names on page one, missing gestation and missing ground information, both on page four. Incomplete forms will be returned to either the RMP terminating the pregnancy or to the place of termination. If an amended form is not returned within 6 weeks, reminders will be sent until the information is received. Incomplete forms are a financial burden: they generate additional work for those completing the forms and for those who process them on behalf of the CMO. The MDT may have a role in filling in the detail of the form but the RMP terminating the pregnancy is the person legally responsible for giving notice to the CMO. DH therefore recommends that RMPs always check the form before signing it and returning it to the CMO. Clinics and hospitals should have protocols and processes in place to ensure that HSA4 forms are being returned in a timely and accurate manner. Reporting an abortion for fetal abnormality to a fetal abnormality register does not negate the legal requirement for RMPs to also notify the CMO.

Role of the RMP in abortion procedures

29. For medical abortions, the Courts have determined that provided the RMP personally decides upon and initiates the process of medical induction and takes responsibility for it throughout the termination, the protection under the Act applies to both the RMP and any other person participating in the termination under his or her authority. The nurse or midwife would not be responsible for leading or directing the procedure or care, or taking the overall decisions, this is firmly the responsibility of the doctor. The Nursing and Midwifery Council's (NMC) Code will apply to all actions taken or decisions made by the nurse or midwife.

Place of termination

30. Unless performed in an emergency, the Abortion Act states that all abortions must take place in an NHS hospital or a place approved by the Secretary of State. Within the NHS, abortions have traditionally been carried out in gynaecology wards and day care units. Independent sector hospitals or clinics which are outside the NHS must obtain the Secretary of State's approval and have agreed to comply with the Required Standard Operating Procedures set out in the Procedures for the Approval of Independent Sector Places for the Termination of Pregnancy.¹⁴

¹⁴ Interim Procedures for the Approval on Independent Sector Places for the Termination of Pregnancy, DH, August 2012

31. The Care Quality Commission (CQC) is responsible for implementing the regulatory framework set out in the Regulations made under the Health and Social Care Act 2008. The Department is currently updating The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010, and in parallel with this, the CQC guidance about compliance with those regulations will also be updated. CQC is also making other changes to how they inspect and regulate health and social care services to ensure that those services provide people with safe, effective, compassionate and high-quality care¹⁵. It is the responsibility of registered providers and registered managers to comply with the registration requirements and keep up to date with guidance on compliance issued by the CQC.

Counselling

32. Guidance on the provision of non-judgemental counselling was included in the Government's Framework for Sexual Health Improvement published in March 2013. Patients should be able expect impartial advice from the NHS and CCGs and NHS providers should be accountable for the services they recommend.

¹⁵ <http://www.cqc.org.uk/public/about-us/our-performance-and-plans/our-strategy-and-business-plan>

Annex A

Grounds for Abortion under Section 1 of the Abortion Act

Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith that:

- A. The continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated (Abortion Act, 1967 as amended, section 1(1)(c))
- B. The termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman (section 1(1)(b))
- C. 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 (section 1(1)(a))
- D. 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 any existing children of the family of the pregnant woman (section 1(1)(a))
- E. 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 (section 1(1)(d))

Or, in an emergency, certified by the operating practitioner as immediately necessary:

- F. To save the life of the pregnant woman (section 1(4))
- G. To prevent grave permanent injury to the physical or mental health of the pregnant woman (section 1(4))

In determining whether the continuance of a pregnancy would involve such risk of injury to health account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

Annex B

Relevant Guidance from Good Medical Practice, General Medical Council (2013)

- (1) Section 19: *“Documents you make (including clinical records) to formally record your work must be clear, accurate and legible. You should make records at the same time as the events you are recording or as soon as possible afterwards.”*

- (2) Section 35: *“You must work collaboratively with colleagues, respect their skills and contributions”*

- (3) Section 71: *“You must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. You must make sure that any documents you write or sign are not false or misleading.”*
 - a. *You must take reasonable steps to check the information is correct.*
 - b. *You must not deliberately leave out relevant information.”*