AIMS For a better birth...

Enforcing birth choices

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Elizabeth Prochaska asks if women have a legal right to choose where they give birth

As cuts to hospital budgets bite, women across the UK are finding that out-of-hospital birth provision - home birth services and midwiferyled units (MLUs) - are bearing the brunt of the austerity drive.

All too often, home birth services are being formally or informally 'suspended' due to lack of resources to employ sufficient midwives. MLUs have been closed for similar reasons, despite the fact that there is clear evidence that both MLUs and home birth services are very safe for healthy women and babies and more cost-effective than traditional hospital-based maternity care.1 While women have the ultimate say over where they give birth and cannot be transferred to hospital against their will (unless in very rare cases they are deemed mentally incapable by a court), when out-of-hospital services are withdrawn it becomes practically difficult to exercise real choices about birth. This article explains how the law offers potential solutions to inadequate maternity service provision and that women now have a recognised legal right to choose where and how to give birth.

In common with NHS services generally, the choice of a particular maternity service is not guaranteed by legislation. Nor is there statutory guidance that compels NHS Trusts to provide out-of-hospital birth services. However, the right to choose to give birth outside hospital is a long-standing aspect of Department of Health policy. The National Service Framework for Children, Young People and Maternity Services, published by the Department of Health in 2004, stated that NHS Trusts are expected to make out-of-hospital birth available to women. The Department of Health's guidance 'Maternity Matters: Choice, Access and Continuity of Care in a Safe Service', published in April 2007, described the decision over place of birth, including a decision to give birth at home, as a 'national choice guarantee'. NHS Trusts continue to be expected to make a full range of maternity services available to all women, including access to MLUs and home birth.2 While these policy statements do not give women enforceable rights, they do provide a useful context in any challenge to a decision to refuse to provide out-of-hospital services.

If a pregnant woman has been told by her midwife that she can give birth at home or in an MLU, she may have a 'legitimate expectation' of giving birth in her chosen location. This is simply a legal way of saying that she should get what she has been promised. Of course, the midwife can go back on her promise if she has good and proportionate reasons for doing so. Every case will depend on its own facts, but staffing shortages, for example, might potentially be a lawful reason to refuse to provide a home birth. However, where those shortages could have been foreseen in advance, a hospital ought to have contingency plans

in place (such as hiring independent midwives to cover the shortfall) to ensure that there are enough staff to provide the services it has promised (and is expected by the Department of Health to make available).

There have recently been exciting developments in human rights law, which also provide women with strong grounds for challenging decisions to refuse them access to MLUs or home birth. Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life. The right is derived partly from the universal principle of respect for physical autonomy and integrity. In Ternovszky v Hungary, a case about the criminalisation of home birth in Hungary, the European Court of Human Rights explained:

'"Private life" is a broad term encompassing, interalia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world, and it incorporates the right to respect for both the decisions to become and not to become a parent. The notion of a freedom implies some measure of choice as to its exercise. The notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8. Therefore the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent. The Court is satisfied that the circumstances of giving birth incontestably form part of one's private life for the purposes of this provision.'[3] This decision establishes that a woman has the right to decide for herself where and how she gives birth and, critically, that the state has an obligation to facilitate that choice. The Human Rights Act 1998 made the European Convention on Human Rights part of English law and all public authorities, including all providers of NHS services, are obliged to act in accordance with the Convention rights.

Article 8 is not an absolute right, so justifications for interfering with it can be put forward if the justification serves one of the extensive aims set out in Article 8(2) (such as protecting the rights of others). The interference must be 'necessary in a democratic society'. This means that the justification must be proportionate, which entails striking an appropriate balance between the woman's right and any countervailing factors. It is possible that withdrawal of maternity services might be justified by reference to limited public resources or staffing shortages. But proportionality requires clear evidence of the alleged justification and will be strictly scrutinised where a woman's physical autonomy is at stake. In light of the recent conclusions of the Birthplace in England Study on the comparative cost of out-of-hospital and hospital births,[1] it may be difficult to claim that the cost of guaranteeing out-of-hospital birth is too high. In cases where a woman is told she must attend hospital for clinical reasons the same balancing approach is appropriate, and the risk of harm to the woman or her baby must be weighed carefully against her right to choose where she gives birth.

Regardless of whether or not a woman has a legally enforceable right to choose where she gives birth, she can insist on remaining at home and cannot be transferred to hospital by midwives or paramedics unless she gives her consent. The Nursing and Midwifery Council (the regulatory body for midwives) has recognised that midwives owe a professional duty of care to attend any women who chooses to give birth at home[4] and any withdrawal of home birth services clearly breaches this duty and ought to be brought

to the attention of the NMC.

A recent case of mine shows that it is worth fighting decisions to refuse to provide a home birth (even at a late stage in pregnancy). A large London hospital suspended its home birth service for a month due to staff shortages and informed women who had planned home births that they would be transferred to hospital by ambulance regardless of whether or not they consented to transfer. AIMS put a couple in contact with me who had been promised a home birth by the hospital. With only a few weeks before their baby was due, they decided to threaten legal action, relying on a legitimate expectation and the Ternovskzy case. The hospital rapidly backed down and agreed to provide independent midwives to attend all the affected women at home. The Ternovszky case is a powerful and timely call to arms. Whether the decision is used by individual women to enforce their rights or to lobby policy-makers, the implications for the provision of out-of-hospital services are profound: women's choice must truly be put at the heart of maternity care.

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References

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