birthrights

Protecting human rights in childbirth

Submission to National Maternity Review: The right to choice in maternity services

Introduction

Birthrights provides this submission to the National Maternity Review in order to inform its consideration of the legal framework surrounding women's right to make choices in maternity care. We are aware that there is often public confusion about whether women have a legal 'right' to choice in maternity care and we believe it is critical that the Review has a clear understanding of the various sources of legal rights and obligations in the health service. We make some suggestions below about how the Review could improve the legal framework and promote women's choice.

In summary, women do have an existing right to make choices in maternity care. The right is based on a number of different legal sources which affect whether the right is absolute or can be limited by the considerations of the health service or health professionals. In some cases, the right is absolute. For example, no woman can be compelled to accept medical treatment against her will regardless of the consequences for her and her baby. In other circumstances, such as the right to choose a particular form of pain relief or whether a partner can remain overnight after birth, rights can be limited if there are good and proportionate reasons for doing so.

In relation to the right to choose the place of birth, women have existing rights arising from human rights law and a legitimate expectation of the fulfilment of Department of Health policy which stipulates that women should be able to choose where to give birth. Commissioners also have the power to give women a direct payment for maternity services, which offers a potential mechanism for women to arrange their own maternity care.

Informed choice

The principal source of the legal right to make an informed choice in healthcare originates in the common law doctrine of consent. No person, including a pregnant woman, can be forced to accept medical intervention against their will (*Re MB (An Adult: Medical treatment)* (1998) 40 BMLR 160). In the recent decision of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 the Supreme Court held that healthcare professionals were required to give patients information about all material risks of childbirth and any medical intervention and offer any reasonable alternative course of action. The Court emphasised that health professionals must take the time for real dialogue with women and cannot rely on printed information leaflets. The decision embeds the doctrine of informed choice in

English law. As a consequence, maternity professionals must, as a matter of common law, give women real choice about their care. If choice is not provided, a woman may not have given informed consent and could bring a claim for negligence and/or assault.

The judgment in *Montgomery* is critical for the National Maternity Review: it means that the law, as defined by the UK's highest court, demands that women are given genuine informed choice by health professionals who are able to engage in an informed and ongoing dialogue with women about their care.

Human rights law

While the common law focuses on a traditional notion of consent, human rights law has developed a fuller appreciation of the right to make healthcare choices. In the United Kingdom, the Human Rights Act 1998 enshrines in law the rights in the European Convention on Human Rights. All NHS providers and their employees are obliged to respect the rights set out in the European Convention and a person can make a claim under the 1998 Act for a violation of their rights.

Article 8 of the European Convention enshrines a right to private life, which has been interpreted by the European Court of Human Rights to include a woman's right to make decisions about childbirth. Article 8 is a limited right, which means that the state, hospitals and healthcare professionals can lawfully restrict the right if they have a proper justification for doing so.

In *Ternovszky v Hungary* (2010) ECHR 67545/09, the European Court of Human Rights considered a claim by a woman who wished to give birth at home. She argued that the failure by the Hungarian state to regulate midwives so that they could attend home births meant that she had been denied her right to make choices about childbirth. The Court stated:

> ''Private life' is a broad term encompassing, inter alia, 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.'

Like the notion of consent, the right to choice is rooted in individual autonomy. But it recognises that choice sometimes requires positive support from others; it therefore offers much greater protection of autonomy than simple consent. In *Ternovszky*, the Court concluded that the state was obliged to provide a 'legal and institutional' environment that enabled women to make the choice to give birth outside hospital. This meant that midwives had to be properly regulated so that they could practice outside hospitals without fear of disciplinary sanctions. The decision is currently being reviewed by the Grand Chamber of European Court in *Dubska v Czech Republic* (2014) 61 EHRR 601, but the fundamental principle that women's birth choices are protected by the right to private life will not be disturbed. The principle applies to all childbirth decisions – choice of birth partner, choice of position in labour, choice of pain relief and so forth. For example, in *Konovalova v Russia* (2014) ECHR 37873/04 the European Court held that women's consent had to be obtained to the presence of medical students during childbirth.

Decisions of the European Court will inform the UK courts' interpretation of human rights under the Human Rights Act 1998 and we would expect any UK court to accept that women's birth choices are an essential expression of autonomy protected by Article 8.

NHS Constitution

The NHS Constitution is a core source of legal rights for patients. It was first published in 2009 and amended and republished in March 2013 after a public consultation exercise, which led to some minor changes to its scope. It sets out the principles and values that are intended to govern the NHS and the legal rights and responsibilities of NHS patients and staff. All NHS bodies are required to have regard to the NHS Constitution in exercising their functions (Health Act 2009, s 2).

The right to make a choice about the services commissioned by NHS bodies is guaranteed by the NHS Constitution. The NHS Constitution Handbook (page 65) explains that the right encompasses 'a right to choose the organisation that provides your NHS care when you are referred for your first outpatient appointment with a service led by a consultant.'

The right reflects the statutory duty on commissioners enshrined in Regulation 39 of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 ('the 2012 Regulations'). Regulation 39 provides:

> '39 Duty to ensure persons are offered a choice of health service provider
>
> (1) A relevant body must make arrangements to ensure that a person—
> (a) who requires an elective referral; and
> (b) for whom that body has responsibility,
> is given the choices specified in paragraph (2).
>
> (2) Subject to regulations 40 and 41, the choices specified for the purposes of this paragraph are the choice, in respect of a first outpatient appointment with a consultant or a member of a consultant's team, of—
>
> (a) any clinically appropriate health service provider with whom any relevant body has a commissioning contract for the service required as a result of the referral; and
> (b) any clinically appropriate team led by a named consultant who is employed or engaged by that health service provider.'

An 'elective referral' is defined by Regulation 38 as 'a referral by a general medical practitioner, general dental practitioner or optometrist to a health service provider for treatment that is not identified as being immediately required at the time of referral'.

Regulation 40(1)(b) expressly excludes maternity services from the duty to provide a choice of provider. The NHS Constitution reflects Regulation 40 by providing that maternity services are excluded from the right to choose a provider.

Maternity services do not fit within the concept of an 'elective referral' in Regulation 38, which appears to be intended to apply to referrals into consultant-led services for non-urgent procedures, such as hip replacements or ophthalmologic operations. Maternity care is often community based and midwife rather than consultant-led and there are currently very few private providers. The Department of Health may have decided that community based services in which the NHS retains a near monopoly on provision, were less suited to the right to choose a provider.

However, mental health services, which were originally excluded from the right to choice in the NHS Constitution and which are similar to maternity services, have now been included. The justification for excluding maternity services is inadequate, especially in light of long-standing Department of Health policy on choice (discussed further below). If they were to be included in the right to choice, it would simply be necessary to amend Regulation 40(1)(b) to remove the exclusion.

In theory, all of the rights guaranteed by the NHS Constitution can be enforced through legal proceedings (either by way of judicial review or in civil claims for damages). Some rights – such as the right not to be discriminated against, the right to receive free care or the right to confidentiality – will be more easily individually enforceable than others, such as the right to expect continuous improvements in healthcare, which a court may regard as target duties rather than conferring individually enforceable rights. If the right to choose a provider was extended to maternity services, it could be enforced by women through legal proceedings.

Department of Health maternity policy

The Department of Health's current operative maternity policy is contained in the 'Maternity Matters: Choice, Access and Continuity of Care in a Safe Service', published in April 2007. Maternity Matters sets out four 'national choice guarantees', which it stated would be implemented by the end of 2009 (§2.1). The choice guarantees included a choice to access a midwife directly via self-referral and a choice about where to give birth, including giving birth at home.

Maternity Matters is reflected in the NHS Choice Framework 2015/16 published by the Department of Health. This document is directed at patients and describes the choices that they are entitled to make about their care. In relation to maternity care, the Choice Framework states:

> 'What choices do I have?
> You can expect a range of choices over maternity services, although these depend on what is best for you and your baby, and what is available locally:
> When you find out you are pregnant
> You can:
> • go to your GP and ask them to refer you to a midwifery service of your choice

> • go directly to a midwifery service of your choice. You do not have to ask your GP to refer you first.
> …
> When you give birth
> You can choose to give birth:
> • at home, with the support of a midwife
> • in a local midwifery facility (for example, a local midwifery unit or birth centre), with the support of a midwife
> • in any available hospital in England, with the support of a maternity team. This type of care will be the safest option for some women and their babies. If this is the case for you, you should still have a choice of hospital.
> …
> Is this a legal right?
> No. … The exact nature of the available choice will depend on what's best for you and your baby, and, the services available.'

The Choice Framework makes it clear that the choices it sets out, including the choice of self-referral, depend on women's individual circumstances and availability of services, but where an appropriate service is available, women can expect that their GP to refer them to the midwifery service they choose or to be able to refer themselves directly to the service without their GP's approval. In practice, we understand that GPs often resist referrals to both non-NHS providers and NHS providers outside a woman's area, and women rarely make direct referrals.

The statement that birth choices under the Choice Framework are not legal rights only reflects the fact that the NHS Constitution does not guarantee a choice of provider. However, the wider suggestion that there is no legal right to choose place of birth or provider because women's choices depend on what 'is best' for her and her baby, and availability is misleading. These factors do not affect the existence of a legal right to respect for a woman's autonomy and choice under the Human Rights Act 1998, as explained above, though they may affect the justification for a limitation on the right.

While national policy does not create enforceable legal rights, it can be used to support a legal claim based on the legitimate expectation that a woman will receive a particular service. The stronger and more consistent the policy, the better the protection for women.

Legal action to enforce right to choice of place of birth

There has not yet been a judicial decision in the UK on women's right to choose where to give birth. In 2011, women commenced legal action challenging the suspension of the home birth service by Whipps Cross University Hospital, but the hospital rapidly backed down and provided independent midwives for affected women. Subsequent legal challenges have been contemplated in relation to the withdrawal of home birth service by Queen Elizabeth Hospital in King's Lynn but have been hampered by lack of funding and the difficulty of bringing a case in which the client is imminently due to give birth.

There is no doubt that women could bring a human rights claim against a CCG or NHS Trust for failure to provide a service and informed by the Department of Health's maternity policy. Following the decisions of the European Court, the UK court would be bound to find that a decision that restricted a woman's birth choices interfered with Article 8 and that it was necessary therefore to assess whether there was proportionate justification for the decision. If a decision was based on properly considered high-level policy factors, such as a decision to prioritise staffing for a hospital service over a home birth service, the court would be more willing to accept the reasons for limiting the right. Nonetheless, commissioners and NHS Trusts would have to evidence their decision-making carefully and might be expected to have considered alternative options, such as engaging private providers who could make the service available.

It is also important to appreciate that a decision to give birth at home may engage the right to refuse hospital treatment. On the basis of the law of consent described above, woman is lawfully entitled to refuse to attend hospital to give birth, regardless of any threat to her or her baby's health. It is likely that the state would still be obliged under its positive obligation to protect life in Article 2 ECHR to provide midwifery services to a woman who refused hospital treatment. Those hospitals which are currently refusing to provide midwifery services to women at home risk violating their obligations under Article 2.

Direct payment for maternity services

Commissioners have the legal power under the National Health Service (Direct Payments) Regulations 2013 to provide a direct payment to a woman for her to use to pay for her own

maternity services. Commissioners are not obliged to make payments when requested, but they must consider the request in accordance with public law principles. This means that any refusal to make a direct payment must be rational and justified.

We are aware that CCGs have refused to make direct payments to cover the costs of independent midwives in areas where the home birth service has been suspended on the basis of safety concerns. It is questionable whether these concerns are reasonable in light of evidence on the safety of independent midwives and the improved health outcomes for women with healthy pregnancies.

Improving choice in maternity services

While women have existing legal rights to choice in maternity services, the legal framework could be strengthened and clarified. A relatively simple means of improving the law relating to choice would be to amend the NHS Constitution and the 2012 Regulations so that maternity services are included in the right to choose a provider in the same way that choice is guaranteed to recipients of other health services. This would give women the confidence that they were entitled to receive choice and oblige providers and commissioners to accept their responsibilities for providing it. Alongside this change, developing Commissioners' existing obligations to consider direct payments could prove a fruitful means of enabling women to choose different maternity providers, but greater understanding of direct payments is needed amongst both CCGs, Trusts and women if they are to function effectively.

We would be happy to discuss any of these issues with you in greater depth if that would assist the Review.