The Irish Nurses and Midwives Bill: Legal changes and challenges

A recent article in this legal series (Symon, 2010) charted some of the debate about the extreme use of legal force against several Hungarian midwives. Within democratic countries, civil liberties, due process and human rights are all accorded high status. People are allowed to petition for change to legal rules that are deemed unfair. Nobody is above the law, which means that the law, and those who administer it, are subject to review.

Some readers may have felt that a situation in a country a thousand miles away is of little concern. While I believe they would be wrong, there were some who contributed to that debate who noted that there is a legal situation far closer to home which also demands our attention. This is the proposed legislation affecting midwives in the Republic of Ireland. At the time of writing, a general election is pending, due to be held on 25 February 2011. The Nurses and Midwives Bill, the first attempt at legislating this field in 50 years, had not cleared all the necessary stages when the 30th Dáil (Irish parliament) was dissolved. While the fate of the proposed Nurses and Midwives Bill is unclear, it will need to be addressed by the incoming government. The mechanisms and implications of the draft legislation deserve to be examined.

Proposed provisions of the Bill

The initial intention behind the proposed bill may have been welcomed by Irish midwives, since the Bill, if enacted, will create a new regulatory body that explicitly recognizes midwifery as a separate profession. The Irish Nursing Board (An Bord Altranais), which has overseen midwives since 1985, will be replaced by the Nursing and Midwifery Board of Ireland. The new provisions will, among other things, establish a Midwives' Committee to advise the Board, and provide for clinical supervision of midwives (Healy, 2010). The legislation, it has been claimed, would bring the governance of nursing and midwifery closer to the regulation of other healthcare professions, and would promote patient safety.

Andrew Symon
Senior Lecturer in Midwifery
University of Dundee

> "It has been argued that the proposed law will effectively outlaw home birth for many women who have been able to achieve this with independent midwifery support."

Opponents of the Bill argue that it has two principal flaws. The Association for Improvements in the Maternity Services (AIMS) Ireland notes that the proposed Midwives' Committee will be subordinate to the Board, 'set(ting) the profession back half a century' (AIMS Ireland Admin, 2011). This, they say, ignores the 2005 Health and Social Care Professionals Act, which gave self-governing status to twelve professional groups, including dietitians, physiotherapists, psychologists, radiographers and social workers. Why should midwives not have the same self-governing rights as these other groups?

Even more contentiously, say AIMS Ireland, the proposed law will effectively outlaw home birth for many women who up to now have been able to achieve this with independent midwifery support. This is because independent midwives (known as self-employed community midwives or SECMs) will be unable to secure indemnity insurance except for cases satisfying very stringent criteria. For the last 2 years, the care that SECMs could offer has been constrained within the restricted terms of a memorandum of understanding (MOU). A state clinical indemnity scheme extended insurance to SECMs but only if they signed up to the MOU. According to AIMS Ireland, the MOU has already affected the work of SECMs, precluding them, for example, from supporting a home birth which is also a vaginal birth after caesarean section (VBAC). The rhetoric of the MOU is about 'safety'—only 'low risk' women will be allowed to use the services of a SECM covered by indemnity insurance under the MOU. Section 40 of the proposed bill will strengthen the stringent terms of reference already contained in the MOU. Providing care to a woman who does not fulfil the low-risk criteria would mean a midwife was practising beyond the scope of the law, i.e. illegally. The proposed penalties for convictions range from €5000 and/or 6 months imprisonment to a maximum fine of €160 000 and/or 10 years imprisonment.

Legal objections

Legal objections to the proposed legislation have been raised. It is claimed that requiring midwives but not other healthcare professionals to have indemnity insurance is discriminatory, and may breach Article 14 of the European Convention on Human Rights. The EC Directive 2005/36, which is law in all EU member states, allows for the exercise of professional judgment. Critics say the proposed legislation may deny midwives the right to practise autonomously, and thereby to earn a livelihood, which would be a restriction of their scope of practice, and contrary to the EC Directive.

The European Court of Human Rights declared in December 2010 that a woman's right to choose where to give birth is protected under the European Convention on Human Rights (Article 8: The Right to Private and Family Life). This offers another possible legal challenge. Further, to ensure that a midwife has complied with the terms of the MOU, the Health and Safety Executive (which would administer the scheme) will require certain files to be handed over, which may breach data protection rules.

This process of challenge is fundamental to the checks and balances of a civil society. Laws must carry the consensus of the people. While it is fashionable in some circles to declare a disinterest in politics and law-making ('Why bother? It won't make any difference'), this stance runs counter to the responsibilities of living in a democracy. The law, and by extension the rules that govern our working lives, are everyone's business.

Learning from others' experiences

Why is it important to look at the experience of other countries? We are interlinked, and an insular attitude will not serve us well. A threat to the rights of women to make informed choices (with an inherent threat to midwifery practice) in one part of Europe will have a ripple effect elsewhere. Hungary may be a long way away, and the Irish situation may seem too different to that of the UK to be relevant. However, there are common themes, here and elsewhere. The remarkably vague rhetoric of safety is being used to make restrictions on choice. Even in the Netherlands, for years the prime European example of low risk midwifery and high home birth rates, there are fears of a backlash (de Jonge et al, 2009).

Midwives need to be aware of how the safety rhetoric will be used to underpin organizational and legal challenges to service provision. Our recent study into the outcomes for women accessing an independent midwife in the UK (Symon et al, 2010) found decision-making taken to what some would call extreme lengths—but these are the legal privileges of the autonomous individual. The rhetoric of 'safety' and 'evidence' is used to denounce such decisions—witness King's College Hospital's (2009) announcement about the Albany Midwives practice and the recent Committee Opinion of the American College of Obstetricians and Gynecologists (ACOG) (2011) on home births.

In a situation such as this, each side will marshal its evidence. Just because proposed change or legislation will back up its case with examples does not mean that those challenging such changes are without their own evidence. Being part of a civil society requires us to be informed participants in the debates and arguments that frame policy and practice. **BJM**

Acknowledgement: The author would like to thank Dr. Jo Murphy-Lawless, Sociologist at the School of Nursing and Midwifery in Trinity College, Dublin for her comments and suggestions on a late draft of this article.

AIMS Ireland Admin (2011) Factfile: Why Sections 24 and 40 need to be amended. http://aimsireland.com/phpbb/viewtopic.php?t=1291 (accessed 17 February 2011)

American College of Obstetricians and Gynecologists (2011) The American College of Obstetricians and Gynecologists issues opinion on planned home births. 20 January 2011. http://tinyurl.com/627rg24 (accessed 17 February 2011)

de Jonge A, van der Goes BY, Ravelli A et al (2009) Perinatal mortality and morbidity in a nationwide cohort of 529 688 low-risk planned home and hospital births. *BJOG* **116**(9): 1177–84

Healy E (2010) Nurses and Midwives Bill 2010. *Irish Medical Times.* 12 May. http://tinyurl.com/4nv8vda (accessed 17 February 2011)

King's College Hospital (2009) Albany Midwifery Practice. www.kch.nhs.uk/news/archive/2009/albany-midwifery-practice/ (accessed 17 February 2011)

Symon (2010) Effective 'criminalization' of home birth in Hungary? *BJM* **18**(12): 804–5

Symon A, Winter C, Donnan P, Kirkham M (2010) Examining autonomy's boundaries: a follow-up review of perinatal mortality cases in UK independent midwifery. *Birth* **37**(4): 280–7