# Law and Ethics for Midwifery

Elinor J. Clarke

ROUTLEDGE

# Law and Ethics for Midwifery

Legal and ethical competence is a cornerstone of professional midwifery practice and an essential part of midwifery training. *Law and Ethics for Midwifery* is a unique and practical resource for student midwives.

Written by an experienced midwifery lecturer, this text draws on a wide variety of real-life case studies and focuses particularly on the core areas of accountability, autonomy and advocacy. Opening with two chapters providing overviews respectively of ethical theories and legislation, the book is then arranged thematically. These chapters have a common structure which includes case studies, relevant legislation, reflective activities and a summary, and they run across areas of concern from negligence through safeguarding to record-keeping.

Grounded in midwifery practice, the text enables student midwives to consider and prepare for ethical and legal dilemmas they may face as midwives in clinical practice.

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This book is dedicated to two amazing women:
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Finally, thank you to all mothers, babies and families that I have been privileged to share childbirth experiences with.

# Statutes and statutory instruments

## Statutes

| *Title* | *Year* | *Source/comments* |
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| *Title* | *Year* | *Source/comments* |
|---|---|---|
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| Nurses, Midwives and Health Visitors Act | 1997 | Chapter 3, 4 |
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| Prescription Only Medicines (Human Use) Order No. 1997 (SI 1997/1830) | 1997 | Medicines |
| The Nurses and Midwives Approval Order<br>SI 1983 No. 873 33/1175 | 1983 | Principle rules<br>Teaching qualifications |
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| SI 1986 No. 786 | 1986 | Education |
| SI 1989 No. 1456 | 1989 | Education |
| SI 1990 No. 1624 | 1990 | Midwifery training |
| SI 1991 No. 135<br>The Nurses, Midwives and Health Visitors (Registration) Modification Rules Approval Order | 1991 | Changes to principle rules |
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| SI 1996 No. 3101 | 1996 | New rules and code |
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| SI 2013 No. 261<br>(National Health Service, England, Mental Health, England, Public Health England) Regulations | 2012 | Updated Midwives Rules |

| *Title* | *Year / No.* | *Focus* |
|---|---|---|
| NHS, England, Mental Health, England, Public Health, England. The National Health service and Public Health (Functions and Miscellaneous Provisions) Regulations 2013 | 2013 No. 261 | Part 3 (9, 10, 11) notification of births and deaths (home birth) |
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| Mayra Cabrera aka *Cabrera* Case 2008<br>(unlawful killing – Bupivacaine toxicity) | 2005<br>2008 | 6 |
| *C* v *S* [1987] Abortion | 2 All ER 987<br>1 All ER 1230 | 12 |
| *Donaghue* v *Stevenson* (1932) | AC 562 | 17 |
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| *Janaway* v *Salford Health Authority* (1989) | AC 537 | 12 |
| *Jepson* v *The Chief Constable of West Mercia Police Constabulary* [2003] | EWHC 3318 | 12 |
| *Keeler* v *Superior Court of Amador County* (1970)<br>California Supreme Court | 470 P 2d 617 | 12 |
| *Maynard* v *West Midlands RHA* [1984] | 1 WLR 634 (HL) | 17 |
| *Owen* v *Coventry Health Authority* 1986 | See Montgomery (2003: 19) | 6 |
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| *Paton* v *UK* (1980)<br>Challenged in Brussels – failed | 3 ECHR 408 | 12 |

| *Legal Case* | *Location* | *Chapter* |
|---|---|---|
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| *Pearce* v *United Bristol Healthcare Trust* | 48 BMLR 118 | 6, 17 |
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| *Sidaway* v *Board of Governors of Bethlem Hospital* [1985] | 1 All ER 643<br>HL | 6, 17 |
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| Mr A and Mr B 2002 (IVF mix up)<br>Justice Butler-Sloss<br>*Leeds Teaching Hospitals NHE Trust* v *Mr A* | High Court 2003<br>Lloyds Rep Med | 6, 17 |
| *Whitehouse* v *Jordan* (House of Lords) [1981] | 1 All ER 267 | 17 |
| *Wilsher* v *Essex Area Health Authority* [1986] | 3 All ER 801 | 17 |
| Natalie Evans 2005 | Court of appeal<br>ECHR 2005 | 6 |
| Beth Williams 2014 (dead husband's frozen sperm) | HFEA | 6 |

## Professional misconduct cases

**General Dental Council (GDC 2013)** Mr Omar Addow (56 years), Birmingham UK. Misconduct hearing: struck off the GDC register for allegedly offering to perform FGM.
**General Medical Council (GMC 1993)** Doctor Farooque Hayder Siddique, London, UK. Struck off the GMC register for misconduct.
**General Medical Council GMC (2004)** Doctor struck off the GMC register for misconduct.
**Nursing and Midwifery Council (2007)** Midwife struck off NMC register for professional misconduct (Paul Beland).
**Nursing and Midwifery Council (NMC 2013)** Midwife struck off for performing male circumcision without due care (baby died following a haemorrhage) (Grace Adeleye).

# Preface

## Why should midwives be interested in ethics and ethical theory?

Midwifery is an old and honourable profession, which meets the needs of childbearing women and their families. While the physical act of childbirth itself is fundamentally the same as it ever was, childbirth practices, women's wishes, medical techniques, culture and our understanding of interventions are constantly evolving and changing. Midwifery has also changed and while midwives remain predominantly female, it is unethical to exclude males from joining the profession and the term midwife is not gender-specific. Midwifery practice is changed and shaped by values, beliefs and cultures, which impact upon the relationship between women and midwives. Midwives encounter ethical dilemmas on a daily basis and to ignore or fail to consider the relationship between ethics and midwifery is impossible. Midwifery education is grounded in ethics; from clinical skills through codes of conduct to professional development, NHS Constitution to evidence-based practice, mentorship to preceptorship, birth plans to care pathways, the midwife is immersed in ethical issues. In 1994, a 62-year-old Italian lady became the oldest mother, raising the ethical dilemma: just because something is possible to achieve should it be undertaken? Professor Servino Antinori has subsequently pursued other assisted reproductive techniques which may be morally questionable. Midwives are and will continue to be ethically challenged and a personal midwifery ethic needs to be identified and understood.

Ethical theory is the term given to the explanations of and application of reasoning based upon personal values, morals and behaviours. Midwifery care and maternity services are founded upon an ethical basis regarding childbirth. Attitudes and behaviours may be personal, such as honesty, compassionate and professional. Maternity services can also be ethically based, such as evidence-based, equitable and safe.

Women-focused care is a priority for midwives, and constraints of services, managers' requirements for data (evidence of efficiency and effectiveness) and the need for evidence to support practice challenges midwives to remain focused upon the basics of care. Saving mothers' lives during childbirth necessitates midwives paying attention to five aspects of care (five Cs): continuity, communication, compliance, constraints and complacency (Mander, 2011).

## Why should midwives be interested in law?

Midwives should be interested in legislation because it affects all aspects of the role and responsibilities of a midwife. Regardless of where a midwife works or the type of practice the midwife is engaged in, it is necessary to understand the legal framework for practice. Midwives are accountable for their personal and professional conduct and practice. Midwives are required to have an understanding of appropriate ethical, legal and professional frameworks. In the interests of the public, purchasers and providers of services, other healthcare professionals as well as the users of maternity services, it is necessary for midwives to fully understand the implications. The NMC (2008b) identify that 'In order to provide appropriate care for women and their families midwives need to act within the law and help women to make choices, find solutions to care and consent to care.'

If it was not for the tenacity of our forebears, midwifery legislation in the form of the Midwives Act 1902 would not exist, and the right to practise midwifery as we know it today would not be possible. The Midwives Act 1902 gives protection to the name, role and responsibilities of midwives. The system of supervision in midwifery is 'enshrined in legislation'; other professions do not share this requirement. Midwifery supervision serves many purposes, but fundamentally it is intended to protect the public, enable all midwives to continue to develop following registration, and receive support when struggling to fulfil their professional role. The annual notification of intention to practise (NoP) enables the regulating body (Nursing and Midwifery Council – NMC) to fulfil its legal duties, namely protection of the public, by maintaining a live register of all midwifery practitioners (clinical, educational, research and midwifery consultants). Changes to legislation can alter and amend existing statute and midwives need to be proactive in the legislative process.

### *Control and regulation of midwives*

Midwives and midwifery practice are currently regulated and controlled by the NMC. Most midwives, when asked, will say that the NMC is a statutory body, whose function is to protect the public. It is uncertain how many midwives would be able to identify the relevant legislation or the ethical theory and principles which underpin the role and responsibility of either the NMC or midwifery. It is a personal concern of mine as to how many midwives incorrectly think that the Royal College of Midwives (RCM) fulfils the above role. Confusion regarding regulation, professional practice, education and responsibilities need resolving. The RCM and the NMC are very different and distinct organisations: statute defines the NMC, while the RCM attempts to influence statute. A better understanding of English Law may clarify the issue. Midwives and midwifery are controlled by regulations enshrined in legislation. Primary legislation in the form of statute, such as the Midwives Act 1902, identifies how midwives and midwifery practice is controlled. While some controls of midwifery (registration) are in common with other professions, others, such as supervision, are unique. In addition the Health Care Professions Act (2002, §25) identifies the establishment of an overarching regulatory body: the Council for Healthcare Regulatory Excellence (CHRE), whose function is to regulate the regulators.

### *Change and ethics and law*

Keeping up to date with legislation and case law is challenging. However it is important that the law evolves and changes. New legislation may be necessary to meet a developing issue such as the

commercialisation of surrogacy, physical abuse or where there is an ethical dilemma (rights of the mother versus the rights of the fetus). Sometimes, court cases do not come to or reach a good outcome, or reach a verdict which if followed would not be considered ethical. An example is the brief venture into forced Caesarean sections, whereby women were subjected to a court order to undergo a Caesarean section delivery due to fetal compromise and likely intrauterine death. A court order requiring a woman to undergo major surgery against her wishes, for the purpose of 'saving' an unborn baby, is removing her basic human right to determine what happens to her (autonomy). Pivotal cases such as *Re S (Adult-refusal of treatment)* [1992] ordered a Caesarean section against the woman's wishes, breached her fundamental human rights, increased her risk of subsequent ill health and provided opportunity for other cases to follow suit. If this case set a precedent, then other similar cases would need to come to the same result. This example illustrates how potentially ethically unsound case law can be. A poor decision should not be applied to another situation. Subsequent case law has not gone down the route of enforced Caesarean section. Even if the facts of the case share some similarity, it is not ethical to set a precedent in such complex cases, each must be considered individually, especially when complicated by other variables such as age, mental health and use of medication.

Another reason for students to be interested in ethics, legislation and case law is the context of maternity services. It is one of the most highly litigious areas (in terms of cost) of healthcare. Of cases held at the National Health Service Litigation Authority (NHSLA), currently 20 per cent concern obstetrics and childbirth cases. The NHSLA identified an expenditure of £729.1 million in 2010–2011. Care should be taken when considering this figure as the amount includes damages paid to claimants (patients, staff and members of the public) as well as legal costs incurred on both sides (claimant and defence lawyers). The NHSLA (2011) also identified a continued rise in the number of claims recorded under the Clinical Negligence Scheme for Trusts (CNST) and Liabilities to Third Parties Scheme (LTPS). While it can be argued that the number of cases for some trusts have not increased, the costs incurred in investigation, preparation for court, fees and payments ensure that NHS trusts cannot afford not to invest in providing high standards of clinical care and effective and efficient services with a good approach to user satisfaction.

## *Historical aspects of law and midwifery education*

Law was introduced into the midwifery curriculum in the late 1980s (Jones and Jenkins, 2004). Students were usually given an overview of the English legal system, including the courts and specific legislation such as the Abortion Act 1967, and focused on professional issues (regulations, rules, codes and supervisors of midwives) as well as legal obligations of a midwife attending a home delivery (Flint, 1986). During the 1980s midwives who were fortunate enough to undertake professional development in the form of an Advanced Diploma in Midwifery (ADM) were provided with the opportunity to critically analyse midwifery regulation and were further educated in other legal aspects, such as independent midwifery and indemnity insurance. Mary Cronk and Caroline Flint captured the specific legal issues relevant to the midwives working in the community in 1989. After a brief overview of the legislation, the authors focus on the Midwives Rules (available from the then United Kingdom Central Council at a cost of £1) and professional conduct. A section of the *British Journal of Midwifery* was dedicated to the national bodies to enable midwives to improve their understanding of the regulation and control of midwifery (Henderson, 1995). The first book dedicated specifically to the legal aspects of midwifery was published in 1994 (Dimond, 1994). The foreword, by Dame Margaret Brain (at the time president

of the RCM), identified that 'it is essential that all midwives, regardless of their place of work or type of practice, fully understand the legal framework within which they practice' (Brain, 1994: vi). Since 1994 a succession of legal textbooks for midwives have been produced (Dimond 2002, 2006a, 2013; Jenkins 1995; Jones and Jenkins, 2004), all of which reinforce the message that midwives need to be familiar with the legislative process, have an understanding of litigation and accountability, comply with the statutory provisions associated with childbirth and uphold professional practice. Having an understanding of law and ethics is important, then, but being able to apply this to all aspects of midwifery practice is associated with professional development. Midwives need to develop skills for ethical and legal decision making. Hence the need for *Law and Ethics for Midwifery*!

## Why this book, *Law and Ethics for Midwifery*?

The report of the Public Accounts Committee (2014) identifies that

> Having a baby is the most common reason for admission to hospital in England and, in 2012, there were almost 700,000 live births. The number of births has increased by almost a quarter in the last decade, placing increasing demands on the NHS maternity services. Maternity care is thought to have cost the NHS around £2.6 billion in 2012–2013.

Maternity cases account for one-third of total clinical negligence payments and maternity clinical negligence claims have risen by 80 per cent over the last five years. Nearly one-fifth of trusts' spending on maternity services (some £480 million in total, equivalent to £700 per birth) is for clinical negligence cover. The NHS Litigation Authority has recently produced helpful research on the causes of maternity claims, looking at data from the last ten years. The most common reasons for maternity claims have been mistakes in the management of labour, or relating to Caesarean sections and errors resulting in cerebral palsy.

Pre-registration midwifery education currently consists of a combination of theory and clinical practice. Student midwives are unable to graduate if they cannot meet requirements for both theory and practice. While the midwifery curriculum is heavy, ethical thinking and decision making are fundamental to the role and responsibilities of a midwife. *Law and Ethics for Midwifery* defines the subject, considers medical and other ethical theory, and with the use of case studies illustrates the ethical decision-making process. The use of case studies is a practical approach to enabling students to understand theory and practice. For many healthcare practitioners consideration of the law and legal cases is a daunting prospect: 'It does not interest me', 'Its too difficult' or 'If I wanted to be a lawyer I would have done a law degree' are common comments made by students who have yet to recognise that clinical practice does require a good understanding of law and the legal system. Wheeler (2012) considers the English legal system to be the drier notion of law, but recognises that students do require an understanding of the English legal system and how it can affect them and their practice as both students and registered practitioners. Initial student protestations are often followed by a gradual interest when students realise that ethics and law permeates every aspect of their lives (personal and private, as well as professional and within the wider society). Law is a complex subject and requires an appetite and motivation for thought, memory and critique – all higher-level academic skills. Law and legal proceedings are not for the faint-hearted, those lacking stamina or experiencing headaches. The main reasons that midwives may find the law difficult is the use of legal jargon and terminology, hierarchical structure, sections, and finding

statutes and cases. Just like labour, English law can be progressive, arrested and complicated. This book is unlike other texts concerning law and ethics for healthcare in that it is specifically intended to focus upon the difficult, different and debatable aspects of midwifery. It has relevance to modern midwifery practice, interests the reader in current issues, and enables midwives to look through a different lens.

*Law and Ethics for Midwifery* uses the format of identifying the core aspects of ethics and law, and the use of case studies enables students to critically analyse them in relation to specific 'real' dilemmas. The method of using case studies to broaden knowledge and understanding of legal and ethical issues was undertaken by Jones (2000a). She suggests that this approach is useful to both undergraduates and postgraduate students. Case studies also enable the midwife to broaden and develop professional discussion. The case study approach will help midwives and students to ground midwifery practice and use ethical decision making when faced with dilemmas in the changing maternity services. Of particular importance is the emphasis on the legal aspects, which help to focus the midwife regarding statutory requirements. The cases are chosen to enable the linking of theory to practice, and their grounding in real dilemmas will help to bring law and ethics for midwifery to life.

*The Legal Aspects of Midwifery* (Dimond, 1994) was the first law textbook specifically aimed at midwives (she had previously published *Legal Aspects of Nursing*). Dimond is a prolific writer and has also published law textbooks for physiotherapy, occupational therapy, and radiology and radiography, as well as specifically focusing upon medicines, consent, pain management and mental capacity. In her introduction to *The Legal Aspects of Midwifery* she states that 'the midwife cannot practice her profession in ignorance of the law' (Dimond, 1994: xi). Judging by the content of the first edition, Dimond meant that it was necessary to have an understanding of professional issues as well as statute and accountability. Since 1994 there have been many changes in maternity services: to legislation, clinical practice, and expectations of women, work environments and education. To be a modern midwife, one needs to be able to fulfil the role and responsibilities of a midwife while remaining cognisant of the effects the above changes have on practice. In addition, the modern midwife also has to ensure that whenever he or she delegates any aspect of the responsibilities that he or she supervises, and that standards are maintained.

My experiences of working in midwifery education for the last 25 years suggest that there is a need for midwives to not only have an understanding of law, ethical theory and principles, but to be able to reflect and apply these to midwifery practice. Developing skills of ethical reasoning and the provision of ethical-based care is just as important as providing evidence-based practice.

# Abbreviations

| | |
|---|---|
| ADM | Advanced Diploma in Midwifery |
| AQP | any qualified provider |
| ARM | Association of Radical Midwives |
| ARM | artificial rupture of membranes |
| ART | assisted reproductive technology |
| BECG | Birthplace in England Collaborative Group |
| BFI | baby friendly initiative |
| BNF | British National Formulary |
| CAM | complementary and alternative medicine |
| CCGs | Clinical Commissioning Groups |
| CHRE | Council for Healthcare Regulatory Excellence |
| CMB | Central Midwives Board |
| CNST | Clinical Negligence Scheme for Trusts |
| COTS | Childlessness Overcome Through Surrogacy |
| CPD | continuous professional development |
| CPS | Crown Prosecution Service |
| CQC | Care Quality Commission (England's healthcare regulator) |
| CTB | Children's Trust Board |
| ECHR | European Court of Human Rights |
| ECJ | European Court of Justice |
| ECV | external cephalic version |
| ED | European Directive |
| EEC | European Economic Community |
| ELS | Existing Liabilities Scheme |
| EPR | electronic patient record |
| EU | European Union |
| EWO | education welfare officer |
| FGM | female genital mutilation |
| FGS | female genital surgery |
| FFT | Family and Friends Test |
| GDC | General Dental Council |

| | |
|---|---|
| GMC | General Medical Council |
| GP | General Practitioner |
| H&SC | Health and Social Care |
| HCPAC | House of Commons Public Accounts Committee |
| HCPC | Health and Care Professions Council |
| HEE | Health Education England |
| HPC | Health Professions Council |
| HRA | Human Rights Act |
| HSCIC | Health and Social Care Information Centre |
| ICM | International Confederation of Midwives |
| INP | independent and supplementary nurse prescribers |
| LME | Lead Midwife for Education |
| LSA | Local Supervising Authority |
| LSAMO | Local Supervising Authority Midwifery Officer |
| LSB | Local Safeguarding Boards |
| LSCS | lower segment Caesarean section |
| LTPS | Liabilities to Third Parties Scheme |
| MCA | Medicines Control Agency |
| MDA | Medical Devices Agency |
| MHRA | Medicines and Healthcare products Regulatory Agency |
| NAD | no abnormality detected |
| NHS | National Health Service |
| NHSLA | National Health Service Litigation Authority |
| NICE | National Institute for Health and Clinical Excellence |
| NM&HV | Nurses, Midwives and Health Visitors (Act) |
| NMC | Nursing and Midwifery Council |
| NoP | notification of intention to practise |
| NPSA | National Patient Safety Agency |
| NRLS | National Reporting Learning Service |
| PGD | patient group directive |
| PIL | patient information leaflet |
| PM | pharmacy medication |
| POM | prescription only medication |
| PPP | Personal Professional Profile |
| PREP | post-registration education and practice |
| PTSD | post-traumatic stress disorder |
| QCC | Quality Care Commission |
| RCA | root cause analysis |
| RCM | Royal College of Midwives |
| RCN | Royal College of Nursing |
| RCOG | Royal College of Obstetricians and Gynaecologists |
| RMP | registered medical practitioner |
| RTP | return to practice |
| SBAR | Situation, Background, Assessment, Recommendation |
| SCBU | special care baby unit |

| | |
|---|---|
| SI | Statutory Instrument |
| SI | serious incident |
| SoM | supervisor of midwives |
| UKCC | United Kingdom Central Council for Nursing, Midwifery and Health Visiting |
| UNICEF | United Nations International Children's Emergency Fund |
| WHO | World Health Organization |

# Part I

# Theory

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# 1 Introduction to *Law and Ethics for Midwifery*

Knowledge and understanding of ethics and law are paramount to the midwife working in all environments and throughout the world. The purpose of the book is to assist midwives to have an understanding of appropriate ethical, legal and professional frameworks for caring and supporting childbearing women and their families. Of particular importance is the emphasis on the links between theory and practice. It aims to help health and social care practitioners, and specifically pre-registration midwives, understand how ethical dilemmas which occur during clinical practice can be explained by ethical theories and principles and how legislation and litigation has contributed and shaped practitioners' responses and actions.

*Law and Ethics for Midwifery* is not intended as a traditional textbook. This book is different in that it uses a case study approach (Stake, 1995). The intention is to identify relevant ethical and legal theory and principles, consider through the use of case study analysis an exploration of the ethical dilemmas and the legal implications faced by midwives, and explore the outcomes. The four spheres of accountability (Griffith *et al.*, 2010: 1) are fundamental to the case study chapters. Clinical midwifery practice is a part of an increasingly complex maternity care that is not based solely on routine, guidelines or procedures. Midwifery is an art and a science and as such requires midwifery care to be ethical and lawful, as well as evidenced-based. Relationships between women and midwives are based upon trust and sharing of knowledge, these ethical aspects of the role of the midwife are fundamental to the maternity services. Each case study chapter (6–18) will identify ethical issues and legal aspects, and provide a case study followed by a practice check and useful websites. This case study approach is intended to maximise learning. The book is intended primarily for undergraduate student midwives, but students across health and social care disciplines and other healthcare professionals in clinical practice will be familiar with the specific dilemmas and the experiences identified.

The author has chosen to consider issues which are controversial (abortion and surrogacy); inherently troublesome (assisted reproduction, termination of pregnancy, surrogacy, emergency Caesarean section); and contemporary issues (vulnerable women, birth environment, Caesarean section on demand, criminality of home birth). Ethical and legal aspects (as opposed to clinical care) of midwifery practice are also addressed (medicines, records and confidentiality). Ethical issues will be mainly addressed from a principles-based approach, with the exception of Chapter 17 which will be from a virtues approach. Frequently, textbooks steer away from controversial and complicated issues due to the complexity of the situation or fear of controversy of addressing 'sensitive' issues. Those authors who do tackle controversial or troublesome topics often prefer to address theoretical concepts only. The combining of theory and practice facilitates understanding of ethical concepts and an appreciation of how different people may approach a situation (Jones, 2000a). Midwives have historically been brave and tackled difficult situations, supported women's rights, fought for independence and found themselves to be

different from other healthcare professionals. In many situations the midwife has been a lone voice in a variety of settings (social care, education, politics and finance). *Law and Ethics for Midwifery* should help midwives to raise ethical issues and support legislation which addresses the complexity of childbirth. There is a need to debate and discuss difficult or complex issues, to prepare midwives for the variety and complexity of the situations women and midwives experience throughout childbirth.

This book is intended to consider ethical as well as legal issues that are relevant to midwifery practice and to utilise a case study approach to enable the reader to develop understanding of the issues. Traditionally, a case study approach has helped midwives, doctors, midwifery and medical students to explore principles, pathology and skills surrounding childbirth. Clinical skills training has adopted a case study approach to emergency training or skills drills. Rayner *et al.* (2012) used a case study approach to explore maternity emergencies and critical illness. Students may find the case study to be an alternative learning tool, helping them to consider healthcare from different perspectives. The case is instrumental in enabling students to understand how ethical reasoning and different approaches may be adopted. Jones (2000a) suggested that undertaking discussion around constructed cases encourages additional student activity, enables ethical issues to be identified and possible actions to be taken. Case study analysis is a safe approach to explore complex issues. Some students will be familiar with a case study approach and this book adopts such an approach using 'real' incidents from clinical practice. All of the cases are based upon a real incident from clinical practice. The names, location and characters used in the case studies are fictitious to maintain the confidence of individuals, healthcare providers and health services. With regard to legal cases, these are in the public domain and their sources are attributed. The intention is to identify main theory, statute and principles and to then apply these to a clinical case (incident or experience). The author will provide illustrations of possible outcomes and identify relevant legislation and case law. It is recognised that the focus is UK centric; however, midwifery education and practice is informed by European Directives (EDs), which will be identified where relevant. It is not intended to provide an international legal approach at this time, although the author acknowledges the need for such an approach – maybe another book in the future? The learner will have the opportunity to reflect and evaluate their understanding. Throughout this approach professional regulation, conduct and performance will be considered and applied.

The development of law and ethics into the midwifery curriculum has been gradual. Student midwives currently undertake approximately 50 per cent of their programme (NMC, 2008b) in clinical practice and are exposed to and experience situations which challenge their own beliefs and attitudes, cause anxiety and trouble the students (ethical dilemmas). Clinical guidelines (NICE, 2014) increasingly control practice yet they may not be in keeping with a childbearing woman's wishes or expectations. It is understandable that midwives feel caught between providing evidenced-based care (professionally considered to be the goal) and responding to pressures of individualised or personalised care. Traditional education and training does not necessarily address these dilemmas. Midwifery textbooks such as *Mayes' Midwifery* (Sweet, 1982; Henderson and MacDonald, 2004) and *Myles Midwifery* (Fraser and Cooper, 2009) have identified midwifery regulation and rules. In 1994, Brigit Dimond published the first textbook specifically considering the legal aspects of midwifery, and further editions have followed (2002, 2006, 2013). Subsequently, Jones and Jenkins (2004) and Griffith *et al.* (2010) focused on the law and considered legal frameworks, while others (Jones, 2000a; Frith and Draper, 2004) identified ethical theory. In recent years midwifery interest in law and ethics has increased and been evident. Master's courses in medical ethics have been popular with midwives, especially those which encourage multidisciplinary approaches. Midwives (Symon, 1998, 2006a,b,d; Clarke, 1993) have also written about legal issues, published in midwifery journals as well as other publications. The Royal College of Midwives (RCM), in conjunction with Bond Solon (www.bondsolon.com), run annual legal conferences

which are well supported and attract midwives who are keen to engage in debate around the legal issues surrounding childbirth. It is timely that a midwife writes *Law and Ethics for Midwifery* using a combination of theory and practice. There is a need for discussion and consideration of ethical and legal issues by midwives. A major conference on Childbirth and the Law (November 2012) at the Royal College of Surgeons in Edinburgh was billed as 'a series of presentations with case studies' which was inspiring and thought-provoking, thus reinforcing the notion that a case study approach is an appropriate way to consider legal and ethical issues.

While this book does not purport to be able to prevent midwives being the subject of legal proceedings, its intention is to discuss the dilemmas and concerns that challenge midwifery practice. It may also serve as an alert to future concerns and dilemmas for midwives. The attempts to criminalise home birth in the Czech Republic and threat to prevent home birth in other countries cannot be ignored. With new processes for commissioning of health services in England, home birth may also be in danger if midwives are unable to maintain skills and promote choice.

Teaching undergraduate students for a large number of years has shown me that for many students legislation does not start off as an interesting aspect of midwifery education. Students may feel that they want a midwifery focus and fewer 'other subjects', and often the relevance of §1.2.32 of a specific statute escapes them. I would suggest that law and ethics is a midwifery focus as ethical principles form fundamental aspects of our relationship with childbearing women. Legislation has an application relevant to midwives, midwifery and the maternity services. As an educator, legal matters are significant; very often students still find legislation and legislative process difficult to learn or apply. Apathy and disinterest in law making is counter-productive. The argument here is that if you do not engage in debate and discussion, and contribute to the legislative process, how could you criticise legislation if it does not then reflect or uphold your views? Gardner (2012c) suggests that midwives should be getting out there and making a difference. Midwives can help change and influence legislation and guidelines, which in turn allows mothers and babies to continue to receive the best possible care. Laws must carry the consensus of the people (Symon, 2011). At the time of writing this chapter, the Health and Social Care Bill is being debated in Parliament. This new legislation will have significant effects upon all health and social care workers (as well as patients). The RCM, along with others, is calling upon the government to scrap the Health and Social Care Bill. The concept of 'any qualified provider' (AQP) is not considered by the RCM to be appropriate for maternity services (Popay, 2012). There is concern that an open market approach does not promote collaboration, may fragment services and destabilise the National Health Service (NHS). In these austere times, savings and efficiencies are important and no one is sure that AQP will be cost-effective or safe, responsive and high quality. Midwives must, and should, contribute to the debate in an attempt to achieve legislation which safeguards maternity services and midwifery care. The right to choose to have a baby at home has been a subject of concern. Symon (2011) suggests that it is necessary to also look to other countries, as an insular attitude will not help and situations (he uses the example of the threat to choices for childbearing women) are not so different from those of the UK. Engagement and participation in the discussion, debates and arguments are vital if midwifery is to ensure that legislation supports the needs of childbearing women. The legal landscape is constantly changing and all healthcare practitioners need to keep up to date with the legislation and engage, contribute and shape it.

It is against this backdrop that *Law and Ethics for Midwifery* is written. Having justified the necessity for a new text, consideration will now be given to the content and layout of the book.

The book is divided into two parts. Here, we consider the structure of each chapter; a background/contextualisation of the themes; and justification of a case study approach. Part I provides: basic

theoretical concepts such as ethical theory, principles and values; an introduction to statute and statutory instruments; and the statutory framework for midwifery. The specific formats for the chapters in Part I are: pre-requisites for the chapter, an introduction, theoretical content, conclusion, activities, opportunity for reflection and useful websites or further reading. The format for Part II chapters is similar: pre-requisites, introduction, the focus, during which main ethical and legal aspects are identified, followed by a case study, practice check, reader activity and useful websites.

## Chapter 1: introduction to *Law and Ethics for Midwifery*

This chapter consists of an introduction to law and ethics, which is followed by an explanation of the case study approach. Key concepts are identified, namely autonomy, accountability and advocacy. Justification of the need for such a book is provided. **Reflection:** Driscoll's (1994, 2000, 2007) model of reflection.

## Chapter 2: ethical theory, an introduction to ethical dilemmas and decision making

Chapter 2 provides an introduction to ethics and ethical theory. This chapter identifies that midwifery practice is complex and requires midwives to understand women's rights regarding care during childbirth. An ethical principle-based approach is considered in relation to decision making. Ethical principles of autonomy and advocacy will be considered. **Reflection:** Gibbs' (1988) model of reflection.

## Chapter 3: legal theory, an introduction to English law and the English legal system

Building on legal theory (bills, statutes and breach), consideration is given to differences between criminal and civil law. **Reflection:** a new Midwives Act?

## Chapter 4: ethical and legal theory: human, patient and maternity rights

This chapter considers how fundamental human rights are demonstrated and supported in maternity healthcare. It will identify how regulatory bodies support and protect basic human rights. Supervisors of midwives are identified as human rights defenders. Midwives as advocating human rights are explored. **Reflection:** Rolfe *et al.* (2001) reflective writing.

## Chapter 5: ethical and legal theory: the legislative framework for midwifery

Ethics and law for midwives demonstrates how midwives are controlled and accountable for care provision. The specific statutory framework for midwifery practice and control of the midwifery

profession is discussed. This chapter brings together theory and practice in that registration, regulation and midwives rules are explained. The four pillars of accountability (Griffith, 2012b) will be identified and explored. Midwifery regulation, registration and supervision of the midwife will also be addressed. Midwifery education and the role and responsibilities of the Lead Midwife for Education (LME) are considered. Accountability is reinforced and explained. **Reflection:** Professional portfolios.

## Part II: case study chapters – midwifery practice

In Part II there is a change to the chapter structure, and subsequent chapters all have a case study approach. There are a number of chapters addressing ethical and legal issues around accountability and professional practice. Key issues regarding ethical-based midwifery care are considered (medicines, record-keeping and consent), followed by chapters which consider ethical and legal aspects of midwifery and maternity services. Chapters 6–18 all have a case study approach.

## Chapter 6: consent and refusal

Consent is an ethical and legal issue. Respect for other human beings is demonstrated in a number of ways. Ensuring that individuals are able to make informed choices regarding their care is fundamental to respectful care. Obtaining consent is a professional requirement and a defence against an allegation of assault or battery. **Case study:** Consent.

## Chapter 7: record-keeping

Record-keeping is a fundamental skill of all midwives. Role and responsibilities of a midwife with regard to demonstrating professional practice are considered. Different types of record-keeping and standards are addressed. **Case Study:** Fraud.

## Chapter 8: medicines, midwives and the law

The midwife has a clear duty regarding the administration of medicines during childbirth. Ethical aspects are around the human rights, and legal aspects focus upon the relevant legislation and guidelines. The administration of medicines during pregnancy, labour and postnatally can be a dilemma especially when rights may be compromised. The use of drugs and medicines during pregnancy, labour and the postnatal period is a complex issue. Students may find it difficult to understand the responsibilities of the midwife as a prescriber. This chapter enables the reader to consider a variety of aspects of medicines. **Case Study:** Human factors approach.

## Chapter 9: safeguarding vulnerable women and babies

Safeguarding is another difficult aspect of the role of the midwife. The health and wellbeing of women and their babies are fundamental to the maternity services. Inequalities, complexities and complicated lives impact upon the provision of midwifery care. Midwifery professional practice often encounters situations whereby the safety of the woman and her baby may be compromised. Women sometimes confide in midwives, offering information which may alert to the possibility of abuse and harm. Midwives themselves may also be at risk or subjected to harm as a result of their occupation. **Case study:** Removal of baby at birth.

## Chapter 10: supervision of midwives

Supervision is enshrined in statute, yet midwives may be unsure, confused and suspicious of supervisors of midwives. This chapter explores the ethical and legal basis for supervision and illustrates how supervision promotes the human rights of childbearing women. **Case study:** Emily's waterbirth.

## Chapter 11: birth environment

Home or hospital? Dangerous or safe? Clean or dirty? Public or private? Peaceful or noisy? Dull or vibrant? Free or expensive? Freedom to move or restricted movement? There are many birth environments in which women birth babies. This chapter considers the ethical (rights) and legal issues (requirements) regarding the environment of birth in the UK. **Case study:** Scott, Sherrie and the home birth.

## Chapter 12: abortion

Many people, owing to religious, moral and personal beliefs, reject abortion. Abortion will always be controversial as personal beliefs, attitudes and values are not universally shared. Ethical principles will be considered. Abortion is illegal in the UK, yet the number of abortions carried out for women resident in the UK in 2011 was 189,931. This chapter explores how and when abortions may legally take place. The case study demonstrates application of ethical reasoning. **Case study:** Sara and termination of pregnancy.

## Chapter 13: female circumcision, cutting and genital mutilation

Female genital mutilation (FGM) is illegal in the UK. Women accessing maternity services require holistic and sensitive midwifery care. This chapter explores the ethical dilemmas and legal situation regarding the 'circumcision of females'. **Case study:** Sylvie and her baby daughter.

## Chapter 14: episiotomy

Episiotomy is a common intervention during childbirth, which involves a surgical procedure to the female perineum. Episiotomy is controversial but has been performed by midwives for years. Midwives are able to undertake this procedure and consequently need to be clear regarding their duty of care as well as their legal responsibilities. Controversially, this chapter will consider if or when episiotomy is FGM. **Case Study:** Sophie and midwifery skills.

## Chapter 15: Caesarean section

This chapter explores both elective and emergency Caesarean sections. Should Caesarean sections be available on demand, and is it ethical to use the court to order a Caesarean section? With rising rates of Caesarean sections it would seem that more women will experience a surgical introduction to motherhood. Perhaps it is time to consider how midwives could be advocates for the woman with complex health needs. The concept of 'best interests' is discussed. Autonomy and advocacy are considered in relation to Caesarean section. **Case Study:** Sienna and elective Caesarean section.

## Chapter 16: surrogacy

Surrogacy is not a new concept, yet UK legislation only came to the fore in 1996. Midwives need to be careful to ensure that they fulfil their role and responsibilities and avoid inadvertently breaking the law. Safeguarding and ethical aspects (duty of care) are considered in relation to surrogacy. Concerns are often around the surrogate's ability to 'give up' a baby that she has carried for the last nine months. Disputes are also thought to occur when there are concerns regarding the normality of the baby or specific behaviours of the surrogate mother. Organisations (for example Childlessness Overcome Through Surrogacy (COTS), British Surrogacy Centre and Surrogacy UK) have been established to support the process of surrogate motherhood. These organisations also enable women to contact potential surrogates. Midwives should be careful to ensure that their role and responsibilities in this situation are clear. This chapter considers the many ethical issues as well as considering the legality in the UK of abortion. **Case Study:** Siân, a surrogate mum.

The final chapters of *Law and Ethics for Midwifery* focus upon ethical and legal issues which other healthcare professionals can also find challenging. A quick glance at the national newspapers or listening to television or radio commercials will illustrate the nature and extent of complaints and blame attributed to healthcare professionals. Yet comparatively little time is dedicated in the NHS to training and management of complaints, particularly for midwives.

## Chapter 17: professional malpractice, misconduct and negligence

Some may consider that negligence should be earlier in this book. The author, while acknowledging its importance, does not consider that professional malpractice and negligence should be the primary focus

of a text on law and ethics for midwifery. Indeed, providing prominence to the topic of negligence would seem to reinforce the notion that midwifery care and maternity services are in a dreadful state and that it is dangerous to birth babies in England today, which is certainly not the case. The placement of this chapter on negligence is deliberate.

Having a baby is the most common reason for admission to hospital in the UK. When things go wrong the financial and emotional costs are high. Ethical and legal frameworks concerning healthcare generally were the focus of Chapters 1–5; this chapter will focus on professional malpractice, misconduct and negligence. Professional regulation, clinical negligence investigations and litigation are used to measure the safety of a service. **Case Study:** Sasha and midwifery competence.

## Chapter 18: whistleblowing and complaints

The expectations of women accessing maternity services are high. *Changing Childbirth* (Department of Health, Expert Maternity Group, 1993) identifies choice, continuity and control as being expectations. *Delivering Expectations* (Department of Health, 2010c) outlines how childbirth should be safe but also emotionally satisfying. Maternity services have been stretched and diluted to the point whereby midwives are stressed and women's choices reduced. Blowing the whistle on malpractice and raising concerns are ways in which midwives can safeguard standards: the dilemma for the midwife is how to go about this. **Case study:** Sharon and a busy shift on the labour ward.

Throughout a programme of midwifery education (NMC, 2009b), the care and concern for childbearing women will be the focus of your studies. All activities centre upon the health and wellbeing of the woman and her baby. The NMC make it clear that at all times this is paramount. For some students the acquisition of EU criteria identified by the European Parliament (EEC Midwives Directive 1980) during the programme may be challenging. Without compliance to the EU criteria the student is not considered eligible for registration or working in other EU countries. Students may feel caught between the necessity to achieve EU criteria (e.g. number of deliveries) and the need to provide sensitive and compassionate midwifery care. The dilemmas around vaginal examination are a good illustration of the conflict between women's experiences and the gaining of experience to be confident and competent as a midwife.

## Chapter summary

This introductory chapter has set the scene for *Law and Ethics for Midwifery*. Throughout the book the reader will find a series of case studies. These case studies are not fictitious. Some are based upon incidents experienced in clinical practice and clinical cases which have been published; others are cases which have gone to court (legal cases). The case study approach is considered to be useful to enable students to consider a number of perspectives and to support critical thinking. Students may also find the case study provides a trigger for further exploration. For example, Chapter 12 deals with abortion and the case study focuses upon a woman's decision to seek a termination of pregnancy. Students may like to explore termination of pregnancy further and the chapter may trigger an interest in international aspects, women's experiences, inheritance, or a whole host of other aspects. The chapter titles are

relevant to modern midwifery and their content considers key ethical midwifery issues of autonomy, advocacy and accountability, and key legal issues such as regulation, registration and supervision. It is important for midwives to be cognisant of the law, but it is equally important for midwives to be participants in law making. Current midwifery education addresses the legal and ethical issues around childbearing, and students are exposed to a variety of situations and complexities which require them to comply with the law. Midwife-led care may save the NHS money (Dabrowski, 2012), but midwives still have to ensure that quality, safety and choice are delivered. The introduction and introductory chapters have not used the case study approach, which will be evident in subsequent chapters; an opportunity to reflect is provided instead.

## Reflection

Using Driscoll's (1994, 2000, 2007) model of reflection based around the three stem questions of 'what?', 'so what?' and 'now what?', consider the following:

- **What** opportunities exist for midwives to engage in law and ethics?
- **So what** are the experiences of midwives who have been involved in litigation? Consider the experiences of midwives who have experienced court, attended an NMC professional hearing or been an expert witness.
- **Now what?** Identify any gaps in your knowledge or understanding around legislation. Plan to engage in consultations with the NMC. Consider how you could influence and shape future legislation.

## Activities

1. Ask midwives if they have any experiences of going to court. Find out what it feels like to witness the law in action.
2. Keeping up to date with regulations, legislation and current issues can be difficult. Take some development time to access the useful websites found at the end of every chapter.
3. To keep up to date with current ethical and legal issues, check out the Parliamentary reports in each edition of the *RCM Midwives* magazine.

## Useful websites

Legislation and Bills: www.legislation.gov.uk
Nursing and Midwifery Council (NMC): www.nmc-uk.org
Royal College of Midwives (RCM): www.rcm.org.uk

To find out more about basic human rights, reproductive rights and children's rights, the following websites are suggested:

Amnesty International: www.amnesty.org.uk
UNICEF: www.unicef.org.uk
White Ribbon Alliance: www.whiteribbonalliance.org
World Health Organization: www.who.int/en

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