Australia's national maternity consumer advocacy organisation

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The Secretary
Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee,

Inquiry into the administration of health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA)

Maternity Coalition (MC) is Australia's umbrella organisation representing consumers of maternity services. This submission specifically seeks to represent the perspective of consumers of midwifery services in commenting on the workings of AHPRA and one of the boards that AHPRA supports- the Nursing and Midwifery Board of Australia (NMBA).

This submission will be focused on the following two terms of reference:

(c) impact of AHPRA processes and administration on health practitioners, patients, hospitals and service providers;

(h) AHPRA's complaints handling processes; and

(j) any other related matters.

About us

MC is engaged at a local level with the maternity care system throughout Australia, supporting consumer representatives who work with maternity care services to ensure that the care that they offer meets the needs of mothers. Since 1989 we have been representing our members who have experienced the diverse range of maternity services available in Australia – in both public and private healthcare settings and through both obstetric and midwifery led care.

Our experience in consumer representation, focused largely on improving women's access to continuity of midwifery care, gives us insight into the impact that AHPRA's processes and administration have on women. MC has taken a strategic, policy-focused role in our partnership with Australia's maternity consumer groups, lobbying state and Commonwealth Governments to drive systemic reforms which will deliver choice, continuity and control to all birthing women. We have also developed a partnership with the midwifery profession, aimed at building the profession's ability to deliver the care women are seeking. This has developed considerable consumer expertise in midwifery professional processes.

Background

There have been specific additional challenges that midwives and the NMBA have had to deal with in addition to the move to a national registration scheme. Two of the main issues that have imposed additional requirements on midwives and obligations on the NMBA are:

a) Insurance

Private midwives were the only health professionals to be covered by national registration who were unable to access a professional indemnity insurance product as required by s 129 of the *Health Practitioner Regulation National Law Act* (2009) ("the National Law"). Although the government facilitated the development of an insurance product for midwives this did not cover the services of midwives providing intrapartum care at home. Until 1 July 2012 such midwives are exempted from holding insurance for intrapartum care provided that they comply with a safety and quality framework that is seemingly yet to be finalised. The NMBA is responsible for finalising and administering this framework.

b) Maternity services reform

Running in parallel to the introduction of national registration has been the introduction of the Federal government's maternity services reforms which allow for "eligible" midwives to provide Medicare rebateable care, access the PBS and obtain government supported indemnity insurance. The NMBA is charged with the process of endorsing eligible midwives.

Summary of MC position

MC submits that AHPRA and the NMBA lack the resources to deal with national registration, finalising the details of the insurance exemption and the endorsement of eligible midwives in a timely and transparent manner. The delays and lack of clarity in these processes obviously has an impact on privately practising midwives. It also has a strong impact on consumers and potential consumers of private midwifery care.

MC is also of the view that the complaints handling procedures of AHPRA and the NMBA is in many cases failing to afford procedural fairness to midwives and failing to recognise basic consumer rights.

MC also has more general concerns around how the perspective of consumers is understood and considered by AHPRA and the NMBA in their work on all of the above issues.

Impact of AHPRA processes and administration on midwifery consumers (term of reference (c))

At present it is very difficult for consumers to get a clear picture of how AHPRA processes and administration are working and for consumers to communicate with AHPRA about how such processes are affecting them. MC has sought to engage with the NMBA on a number of occasions in writing and by phone and has received a very limited response. The NMBA's communication through its website is also limited and there is a lack of current information available. For example, the most recent communiqué from an NMBA board meeting is dated 28 October 2010.

The process of finalising the details of the insurance exemption for intrapartum homebirth care is having a significant impact on consumers. Consumers are unclear about whether it is legal for them to have a home birth attended by a registered midwife. MC is aware that some women are choosing to not to have midwifery care when they would otherwise wish to have it because they do not believe the option remains open to them.

MC is concerned at the length of time it has taken to finalise the exemption details and the conflicting and confusing information that has been provided by the NMBA throughout the process. The insurance exemption was first announced by Minister Roxon in August 2009. The exemption required midwives to comply with a quality and safety framework and was due to commence on 1 July 2010. The work of developing a quality and safety framework

was delegated to representatives of the Victorian Department of Health who conducted an extensive national consultation process and provided a final document to the NMBA in about July 2010 for the NMBA to approve. Approximately 8 months later an unedited version of this document was placed on the NMBA's website with no information about whether it had been approved by the NMBA (in fact it still contained references to the fact that it was not in force until approved by the NMBA).

The quality and safety framework is also dealt with in a document that the NMBA is currently seeking feedback about (the draft of the Professional Indemnity Insurance for Midwives Guideline). However that document contains additional requirements that were not in the original framework. This has lead to further uncertainty and confusion for midwives and consumers.

MC understands that some midwives are waiting for significant periods of time to learn whether their applications for endorsement as eligible midwives have been successful. The process for determining eligibility is often unclear and appears to be inconsistently applied. This means that while Medicare for midwifery services has technically been available since November 2010, women have largely been unable to access it due to the NMBA's administration.

MC submits that AHPRA should ensure that the NMBA is adequately resourced and supported to carry out its additional functions.

AHPRA's complaints handling processes (term of reference (h))

Investigations against individual midwives have a large impact on women and the choices that they are able to make for their maternity care. This is particularly the case in rural and regional areas where there are few midwives providing private midwifery care. MC is concerned that in some cases AHPRA and the NMBA are failing to afford midwives procedural fairness and failing to recognise the fundamental health care rights of consumers.

MC is aware of a number of individual cases where a midwife has been suspended or had substantial limitations placed on her professional practice pending an investigation into her conduct. MC submits that taking such steps before a matter is finalised is a very serious matter and has the potential to destroy a midwife's livelihood. As the National Law recognises, such a step should only be taken when the practitioner poses a serious risk to persons and it is necessary to take immediate action to protect public health or safety (section 156). When taking such a serious step it is imperative in the interests of natural justice that the complaint be prioritised and dealt with in an expeditious manner. MC is aware however of at least one case where a midwife has been suspended pending the investigation of her matter for nearly 11 months. This is simply unacceptable.

Prior to national registration MC was conscious of the huge inconsistency between state based medical and nursing regulators when responding to complaints. Midwives with unsubstantiated complaints were often suspended without a hearing, while doctors with multiple serious complaints were not even investigated by the state medical board. During the preparations for national registration, consumers were assured that complaints handling processes would become consistent between the professions. This does not appear to be happening. MC submits that AHPRA should monitor the complaints handling processes of the various national boards and take steps to ensure that the legislative provisions are being applied in a consistent manner. Particular attention should be given to the application of section 156 and whether this process is being appropriately and consistently utilised.

Consumers are impacted in such cases because their choices are limited. In some areas there may only be one midwife operating and if she is suspended or has conditions placed on her practice then the women in that area have no alternatives for receiving midwifery care. It has a particularly devastating impact on women who have already engaged the midwife who then, potentially at a very late stage of their pregnancy, find themselves without a care provider. The uncertainty affects other consumers too. The sheer number of complaints that have been made in recent times against privately practising midwives means that many women are fearful that they may lose their own midwife in similar circumstances.

MC also understands that many of the complaints made against privately practising midwives are around scope of practice where a midwife is alleged to have failed to comply with the Australian College of Midwives, National Midwifery Guidelines for Consultation and Referral (2nd Edition) ("the Guidelines"). In such cases it often appears that the mere fact that a midwife has provided care for a women in a situation where consultation or referral is recommended is enough to lead to an investigation (and possible upfront suspension of registration during the course of this investigation). Little consideration appears to be given to the fact that the consumer in question has in all likelihood made a deliberate and considered choice as to where she wishes to give birth and that the Guidelines actually recognise that women can and do make such choices. As the disclaimer at the start of the Guidelines provides:

> *The Guidelines should in no way be interpreted and/or be used as a substitute for an individual midwife's decision making and judgment in situations where care has been negotiated within the context of informed decision making by the individual woman.*

Midwives are being punished for respecting women's decision making autonomy and refusing to withdraw care. In other situations midwives (fearful of losing their registration) are withdrawing care from women in the final stages of their pregnancy because a woman refuses referral. The decrease in the number of available midwives (due to suspension) and the increasing number who feel forced to withdraw care from women does not necessarily lead to these women then making a choice to birth in hospital settings. MC is aware that a number of women who would otherwise choose to have a registered midwife present at their birth find themselves in a situation where they feel they have no choice other than to birth unassisted or with unregistered attendants. This surely runs contrary to the intention of the national registration scheme.

Women have a legal right to make decisions about their maternity care including where they will give birth and who will care for them when they do. This right is meaningless if the NMBA operates in an overly punitive manner when dealing with midwives who respect this right and fails to acknowledge the provisions of the Guidelines dealing with informed decision-making.

The fact that a woman is carrying a baby has no impact on her legal right to accept or refuse treatment. While there have been no Australian cases on this issue, the UK Court of Appeal has made this very clear in two cases. In *Re MB* [1997] 38 BMLR 175 CA the Court said:

> The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reasons at all, choose not to have medical intervention, even though ... the consequence may be the death or serious handicap of the child she bears or her own death ... The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth.

In the case of *St George's Health Care NHS Trust v. S, R v. Collins and others ex parte S* [1998] 3 All ER 673 the court held that:

> An unborn child, although human and protected by the law in a number of different ways, is not a separate person from its mother. Its need for medical assistance does not prevail over her rights and she is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it.

The legal position is backed up by the international human rights instruments which recognise the fundamental autonomy of the individual and the right to respect for private life. The human right to choose home birth was recently recognised by the European Court of Human Rights.

The lack of concern for the consumer perspective is highlighted by the fact that the vast majority of investigations against private midwives arise from hospitals and other health care providers and not the consumer affected by the alleged conduct. MC is also aware that in many cases the consumer in question is not contacted by investigators and in some cases has had to write to the NMBA to explain their point of view. It is understandably extremely

stressful for a family to have the circumstances of their child's birth subject to an investigation and even more stressful when their trusted midwife has had her registration suspended due to respecting their choices.

MC also submits that APHRA should ensure that the NMBA should be proactive in identifying when notifications are vexatious, frivolous or lacking in substance (section 151 of the National Law) and take appropriate action to deal with them promptly and appropriately.

Consumer representation and AHPRA/ NMBA (term of reference (i))

MC submits that it is vital that AHPRA support individual boards to meet a high standard of consumer engagement and consultation. Consumer perspectives and expectations must be taken into account in complaints handling processes and the development of guidelines and standards (two key functions of the national boards).

The primary purpose of health regulation is to protect the public who are consumers of health care. National boards are granted very significant powers, on the basis that these powers are used to benefit the public. As a consumer representative organisation, actively engaged in the national health consumer representative conversation, it would appear obvious to us that practitioner boards should maintain engagement with consumers of the care they regulate, to inform the board's work protecting these consumers.

Previous state-based boards had, in our opinion, a poor record in engaging effectively with consumers, and we have no evidence yet that a more consumer-focussed culture has been developed in the National Boards. Although "community members" sat on boards, these members were not generally enabled to maintain effective engagement with consumer groups. In Queensland, the Qld Nursing Council was explicit that it would not allow consumer members of its Council to meet or communicate with consumer groups, due to the risk of creating a "conflict of interest". Consequently, consumer concerns that the QNC was not protecting consumer's rights to informed choice were unable to be addressed through dialogue, resulting in open conflict in the media.

Since the establishment of the NMBA, MC has attempted to engage with it in the hope of initiating a dialogue on significant matters of consumer concern (as outlined above). To date our attempts have been unfruitful and we are unclear as to how NMBA intends to approach consumer engagement.

MC submits that AHPRA should develop guidelines providing for clear and transparent avenues for consumer engagement. All national boards should be supported to develop processes by which consumers receiving care from a particular health profession group are able to have their perspectives considered as each board carries out its duty to protect the public.

Yours faithfully

Sarah Kerr
National President
Maternity Coalition