



Protection of Midwifery Practice
Policy and Legislation Unit
Department for Health and Ageing
PO Box 287, Rundle Mall SA 5000

By email: policy&legislation@health.sa.gov.au

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Dear Policy and Legislation Unit

Please find attached submission from Homebirth Australia to the consultation on the proposal to protect midwifery practice in South Australia.

Yours Sincerely

Michelle Meares
Secretary

HBA is the peak national body for Homebirth in Australia. For over thirty years, HBA has worked to support consumers and midwives who choose homebirth. The organisation is run by volunteers – consumers and midwives.

Homebirth Australia aims to:

- **support the rights of homebirth parents to choose how, where and with whom they give birth**
- **increase public awareness and acceptance of homebirth.**
- **provide communication and support to members of Homebirth Australia.**
- **provide information to parents planning homebirth.**
- **provide information, support and networking to service providers.**
- **convene an annual national conference.**

Submission to the South Australian Department of Health

Proposal to Protect Midwifery Practice

Homebirth Australia supports all women having access to a registered midwife for homebirth. In order for consumers to be protected, registered midwives must be available in the community to support women who choose to give birth at home. This is currently not the case in many areas, especially regional and remote areas. If women are unable to access care from a registered midwife, some women will seek care from unregistered care providers if the system does not provide services for their needs.

Therefore in our view, it is critical for the private midwives in the community to be more supported by the health care system, fully funded and insured. As long as homebirth is treated differently and access to registered midwives is restricted, women will seek care outside the system and other women will continue to provide that care. To penalise those who provide that care to the women that the system is failing to support, will lead to a further marginalisation of homebirth and homebirth moving more underground.

If we want women to choose a registered midwife for a homebirth, then we must have a registered midwife available in their community to choose from, who is both affordable and accessible.

Consumer Information and Protection

Women have a right to choose who they involve in their maternity care.¹ A woman 'requires up-to-date, unbiased information about her full range of options from all health care providers to enable her to make appropriate choices and, subsequently, major decisions about her care.'² This includes where she give birth and who her care provider is.

Excerpt from the National Guidance on Collaborative Maternity Care:

'A woman decides who she involves in this decision-making process, be it a health professional, partner, doula, her extended family, friends or community, and should be free to consider their advice without being pressured, coerced, induced or forced into care that is not what she desires (McLean and Petersen 1996).

¹ National Health and Medical Research Council, National Guidance on Collaborative Maternity Care (2010) <<http://www.nhmrc.gov.au/guidelines/publications/cp124>>

² Ibid, 20.

Women have the right to decline care or advice if they choose, or to withdraw consent at any time. Therefore, if a woman declines care or advice based on the information provided, her choice must be respected (UNESCO 2005). Importantly, women should not be 'abandoned' because of their choice (FPA Health and Read 2006, Faunce 2008; NHMRC consultations 2009).³

Homebirth Australia believes the women and her family must be fully informed of the registration status of the practitioner they choose to employ as a care provider. Unregistered birth workers holding themselves out to be midwives and/or registered should of course face regulatory action. However, women have the right to choose who will be with them during birth and if a woman knowingly engages an unregistered birth worker to support her this is her choice.

Women with risk factors

Of special concern is women with risk factors that may exclude them from a hospital run publicly funded birth service. In a survey of 1063 women conducted by Homebirth Australia in 2012 women were asked about risk factors they may have that would preclude them from having a publicly funded homebirth and 54% identified a risk factor. We know that many of those women will seek care outside the system if the system does not support their choice or listen to their concerns.

The data confirms how important it is that policies with regards to risk and homebirth are flexible and responsive to women's needs. If the health care system does not provide the professional care that women need for homebirths, and listens to their concerns and provides care that is responsive to their needs, then there will be others outside the system who will support the woman's choices.

The consultation paper states: 'In these instances it is important to ensure that the person assisting in the homebirth has been educated and trained in an approved program of study and is competent to identify and provide advice on the best way of dealing with these risks.'⁴ Yet when registered midwives support these women they are frequently reported and face disciplinary proceedings.

³ Ibid, 14.

⁴ SA Health, *Proposal to protect midwifery practice in South Australia*, 8 <<http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/resources/protecting+midwiferyconsultationpaper-policylegislationunit-hsd-20130108.pdf>>

Threats of regulatory action on midwives who support women with risk factors

Registered midwives who support women with risk factors to give birth at home are frequently reported and this has created a climate of fear and persecution. This has led to more and more women (a proportion of whom will choose to birth at home regardless of their risk profile) seeking care outside the system. It is essential that midwives are not threatened with professional disciplinary proceedings who support women with risk factors. This creates significant stress for the midwives, impacts on safety for women and babies as it is a disincentive for transfers to hospital when required if women and midwives fear they will be reported. Women should not feel like they have to lie to protect their midwives from disciplinary action for supporting them in their birth choices.

For women with additional risk factors who do make a choice to birth at home, they and the midwife who supports them must be provided with additional support as needed. Midwives should not be forced to abandon the care of a woman who has or develops risk factors and chooses to make an informed decision to give birth at home.

Some women will choose to remain outside a hospital environment regardless of risk, as their previous birth experience in hospital was so traumatic, they refuse to return regardless. It is critical for the safety of these women and their babies that they are properly supported by registered midwives who access additional support services as needed, listen to the women and her concerns, properly inform her of all risks in any choices she makes and can remain with her without the midwife having to risk their professional registration to support her.

The language of risk should not define a woman's access to birth services and her experience of birth. All birth is inherently risky and it is for the well informed woman to decide what risk she is willing to bear. All women should have access to registered midwives regardless of risk and referral to obstetric services as needed. The majority of women who give birth at home want access to the whole spectrum of maternity care professionals as needed in their particular situation. It is critical that all health care professionals involved in a woman's care listen to a woman, and respect her autonomy and her concerns, provide the care she can accept while not withholding services based on risk profiling.

Homebirth and Human Rights

A Hungarian woman, Anna Ternovszky, intended to give birth at home and alleged that the ambiguous legislation in Hungary had dissuaded health professionals from assisting her.

Home birth is not illegal in Hungary but there are laws which mean that any health professional assisting a home birth runs the risk of conviction for a regulatory offence.

The court found in a 6 – 1 judgment⁵ that there had been a violation of Article 8 (respect for private and family life) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The Court found that the circumstances of giving birth “incontestably” form part of one’s private life. The vulnerability of health professionals to prosecution effectively deprived expectant mothers of the right to medical assistance for home births.

The Court considered that where choices relevant to the exercise of the right to respect for private life occurred in a legally regulated area, the State should provide adequate legal protection of the right in the regulatory scheme, by ensuring the law was accessible and foreseeable. There was a right to legal certainty that the choice was lawful and not subject to sanction, directly or indirectly.

The Court found that legislation which arguably dissuades health professionals, who might otherwise be willing, from providing the requisite assistance constitutes an interference with the exercise of the right to respect for private life by prospective mothers such as the applicant. It was found that the situation was incompatible with “foreseeability” and hence with that of “lawfulness”. Sajo and Tulkens JJ discussed in their joint judgment why the autonomy aspect of the right to respect for private life relates to the right to become or not to become a parent and the need to respect the conditions of exercising that right and why it required a minimum of positive regulation. Sajo and Tulkens JJ said, ‘In a densely regulated world what was once a liberty and matter of uncontested private choice becomes unusual and uncertain’ And ‘In a system where everything is regulated: regulation becomes the default and only what is regulated is considered safe and acceptable.

Sajo and Tulkens JJ recognised the increasing difficulty to find midwives and supportive obstetricians might result in an environment which is ‘hostile to the freedom in question.’ They noted that a freedom may necessitate ‘a positive regulatory environment which will produce the legal certainty providing the right to choose with effectiveness.’ In their judgment they rightly recognised that ‘without such legal certainty there is fear and secrecy and this could have fatal consequences for the mother and child.’

⁵ *Ternovsky v Hungary*, 67545/09 [2010] ECHR (14 December 2010), 24.

In their discussion on private life they noted this 'includes a person's physical and psychological integrity and the State is under a positive obligation to secure its citizens their right to effective respect for this integrity.' 'Its positive obligations may involve the adoption of measures designed to ensure respect for private life such as the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights'.

This decision shows that courts internationally are prepared to ensure that the State does not create a threatening regulatory environment for midwives supporting women who choose to give birth at home. Legal certainty that a choice is lawful is critical.

Definition of Midwifery Practice

It is unclear in the document provided for consultation how midwifery practice will be defined. We are concerned there is a lack of clarity about the role of doulas and others who provide important emotional support to women in labour and birth. Some of the support provided by doulas is also provided by midwives and this needs to be clarified to ensure that they are not negatively impacted by this proposal.

Costs and Affordability of Registered Midwives

Some women may choose unregistered care providers as they cannot afford to pay the cost of a private midwife (\$3000-\$6000) and may not meet the criteria for a publicly funded homebirth program or live in a geographical area where one is available. The high costs of insurance, lack of insurance for birth and lack of public funding for homebirth all impact on the costs of homebirth to women and lead some women who choose to homebirth to employ an unregistered care provider who they can afford or to freebirth with no support whatsoever. It is important that the services of registered midwives for homebirth are affordable to women and women should have equity of access to medicare funding wherever they choose to birth. The current system discriminates against women who choose registered midwives for homebirth.

Inconsistent approach across jurisdictions

Midwives and women are already experiencing inconsistency in the implementation of the National Registration and Accreditation Scheme and the reporting and disciplinary procedures between different jurisdictions. This creates confusion and legal uncertainty. To implement legislation such as this in only one jurisdiction will cause further uncertainty and lead to women travelling interstate to seek care.

Privacy and respect for families

Women and their families have been harassed and hounded by the media and the Australian Communications and Media Authority⁶ has found one family had their privacy breached by a commercial news channel during and after a homebirth. Women and their families have experienced having their home's turned into crime scenes, their possessions, computers and photos seized by police as evidence and not returned following a fetal death at home. This is extremely distressing for all those involved and we are concerned that this practice could increase if the proposed legislation was implemented without adequate safeguards.

- **Will women's homes become places where evidence can be collected to prosecute those allegedly practicing as unregistered care providers?**
- **What safeguards will there be to protect the privacy and rights of families?**

⁶ ACMA Investigation Report no 2183 <http://www.acma.gov.au/webwr/_assets/main/lib410172/nws-report-2813.pdf>