

## WHY INDEPENDENT MIDWIFERY MATTERS

### **Birthrights' response to the Department of Health consultation paper on the Healthcare and Associated Professions (Indemnity Arrangements) Order 2013**

#### **(A) About Birthrights**

Birthrights is a charitable organisation devoted to improving women's experience of pregnancy and childbirth by promoting respect for human rights. Our board members include senior lawyers and healthcare professionals with expertise in maternity issues.

Birthrights provides free legal information and advice on human rights and the law relating to childbearing women, offers advice and training to professional caregivers and campaigns on respect for women's rights in childbirth as fundamental human rights that maternity care providers are legally obliged to respect and fulfil.

We have an interest in the Draft Order which makes indemnity insurance a mandatory registration requirement for healthcare professionals because of the serious adverse impact that the arrangements will have on women's choice in maternity care.

#### **(B) Summary of our response**

The Draft Order will bring to an end the ability of Independent Midwives ('IMs') to provide care to women as self-employed practitioners outside the NHS. The mandatory registration requirement will force IMs to deregister as midwives because they have no means of securing indemnity insurance for self-employed practice.

We have serious concerns about the proposals for the following reasons:

- (i) The Draft Order will have serious adverse consequences for women's right to choose the circumstances in which they give birth, a fundamental right protected by Article 8 of the European Convention on Human Rights.
- (ii) The safety of women and their babies will be threatened as women resort to unassisted birth and unlawful midwifery.
- (iii) The Department of Health has unlawfully failed to identify or analyse the implications in its Equality Analysis and Impact Assessment.
- (iv) The assumption made by the consultation that women will continue to be able to access care outside the NHS is flawed.
- (v) The Department of Health has failed to take action to facilitate a solution that enables women to access midwifery care outside the NHS, as it promised that it would in response to the Independent Review.
- (vi) The proportionality of the proposal is open to question as a consequence of these concerns.



We make general submissions on the proposal below and address two particular questions raised by the consultation paper at the end of our response.

## **(C) Independent midwives**

Independent midwives ('IMs') are self-employed, private providers of maternity care who work outside the NHS. They receive payment directly from their clients and charge in the region of £2,000 - £4,500 depending on the area in which they practice. Women who hire an IM come from a wider range of socio-economic groups than those who use private obstetric care, which is considerably more expensive.

The consultation paper states that 170 midwives stated an intention to practice independently in 2011-2012, but the paper does not provide an estimate of the number of women cared for by IMs.

IMs provide care throughout pregnancy, birth and post-natally. They usually attend births at home – transferring to hospital with their client if necessary, but women may also hire an IM to provide support at their chosen hospital or birth centre.

IMs are often senior and highly experienced midwives, who have left the NHS in order to provide personalised care. They are considered an important repository of midwifery skills that are being lost within the NHS, such as delivery of vaginal breech births. On occasion, IMs cover a shortfall in NHS staff by taking over the care of pregnant women booked with NHS providers.

Since 2002, IMs have been required by the Nursing and Midwifery Council ('NMC') to inform clients of their lack of insurance on booking.<sup>1</sup> IMs generally ask women to sign a form stating that they understand that their IM is uninsured.

## **(D) Why do women choose an independent midwife?**

Women value IMs for providing continuity in their midwifery care and facilitating choice in childbirth.

The majority of NHS Trusts fail to provide continuity of care, despite the Department of Health's public commitment to guaranteeing every woman a named midwife.<sup>2</sup> As evidence has repeatedly shown, a critical factor affecting women's experience of childbirth is the nature of the support that

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<sup>1</sup> NMC, The code: standards of conduct, performance and ethics for nurses and midwives. 'If unable to secure professional indemnity insurance, a registrant will need to demonstrate that all their clients and patients are fully informed of this fact and the implications this might have in the event of a claim for professional negligence' (paragraph 64).

<sup>2</sup> In recent research undertaken by the Women's Institute and NCT, 88% of women in England and Wales who gave birth between 2008-12 had not met the midwife who cared for them in labour. National Federation of Women's Institutes, NCT (May, 2013) *Support Overdue: Women's experiences of maternity services*.



she receives from her professional caregivers.<sup>3</sup> Continuity of care has a positive effect on maternal and foetal outcomes.<sup>4</sup> In many parts of England hiring an IM is the only way a woman can guarantee that she will know the midwife present at her child's birth.

Many women seek out an IM after a previous traumatic childbirth. Rates of post-natal depression and PTSD related to experiences of childbirth are rising and IMs offer traumatised women the benefits of highly personalised care that help them avoid another negative experience.<sup>5</sup>

Women are routinely denied choice in maternity care. Hospital trusts operate restrictive policies that prevent women deemed 'high-risk' from accessing facilities. Women are sometimes also put under pressure to accept certain medical interventions which may not be based on sound evidence.<sup>6</sup> Many NHS Trusts refuse to guarantee women the choice of home birth on the grounds of staff shortages and women who have been offered a home birth are frequently informed in labour that there is no midwife available to attend them at home.<sup>7</sup> IMs enable women to make meaningful and effective choices about childbirth that will be honoured by a midwife they know and trust.

## **(E) Indemnity insurance**

In principle, Birthrights supports the requirement to hold indemnity insurance as an important protection for both recipients of maternity care and healthcare professionals. It is legitimate for the government to pursue means of ensuring that there is adequate redress for mothers and children in the case of negligent practice that occurs in the course of providing maternity care. However, where fundamental rights are engaged the means that are adopted to realise the government's aim must be proportionate in accordance with the principles of both European Union and European human rights law.

As the consultation document recognises, IMs have been unable to secure indemnity insurance from the private insurance market for over a decade. The Flaxman Report into the feasibility and insurability of IMs found that private cover was unlikely ever to be available to self-employed midwives.<sup>8</sup> We understand that one of the principal difficulties that IMs have faced in the private insurance market has been the failure to analyse midwifery and obstetric risk separately, which

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<sup>3</sup> See, eg, Eliasson M, Kainz G, von Post I (2008) Uncaring Midwives. *Nusing Ethics* 15(4): 500-11; Hodnett Ellen D., Pain and women's satisfaction with the experience of childbirth: A systematic review. *American Journal of Obstetrics and Gynaecology* 186, S160-172.

<sup>4</sup> See McLachlan HL, Forster DA, Davey MA, et al. (2012) Effects of continuity of care by a primary midwife (caseload midwifery) on caesarean section rates in women of low obstetric risk: the COSMOS randomised controlled trial. *British Journal of Obstetrics and Gynaecology* 119(12):1483-92.

<sup>5</sup> See Alder J, Stadlmayr W, Tschudin S, et al. (2006) Post-traumatic symptoms after childbirth: what should we offer? *Journal of Psychosomatic Obstetrics Gynaecology* 27(2):107-12.

<sup>6</sup> See Bewley and Foo, 'Are Doctors Still Improving Childbirth?' In Ebtehaj et al (eds), *Birth Rites and Rights* (Hart 2011).

<sup>7</sup> The legality of this practice is questionable in light of the decision in *Ternovszky v Hungary* [2010] ECHR 67545/09.

<sup>8</sup> Flaxman Partners (2011) *The Feasibility and Insurability of Independent Midwifery in England*, 8.8.



affects the cost of the insurance premium in view of the particular risks that attach to obstetric practice.<sup>9</sup>

The Independent Review commissioned by the government recognised that as a consequence of making indemnity insurance a mandatory registration condition IMs will no longer be able lawfully to practice their profession because commercial insurance is not available to them. The Review made the following recommendation:

‘It is a well established principle that governments may need to intervene when the functioning of the market does not, or cannot, provide an affordable solution.

**Recommendation 20:** In relation to groups for whom the market does not provide affordable insurance or indemnity, the four health departments should consider whether it is necessary to enable the continued availability of the services provided by those groups; and, if so, the health departments should seek to facilitate a solution.’<sup>10</sup>

The Department of Health accepted the Review’s recommendations. In relation to Recommendation 20, it stated:

**‘Market Issues:** (recommendation 20)

We agree with this recommendation and will take forward work on a case-by-case basis where this is appropriate.’<sup>11</sup>

This promise has not been fulfilled: the Department of Health has not facilitated a solution that will enable women to continue to access the care of an IM after the Draft Order is passed.

The assumption that underpins the consultation paper is that IMs will continue to be able to provide services as employees of private companies or social enterprises, either on a private client basis or through commissioned arrangements with the NHS. The Impact Assessment states:

‘We know this model of maternity care delivery is viable because midwives operating such models have been able to purchase insurance for the whole of the midwifery care pathway and are delivering maternity services, both inside and outside the National Health Service.’<sup>12</sup>

As far as Birthrights is aware, neither of the two private midwifery organisations that have been established in England – One-to-One Midwives and Neighbourhood Midwives – is providing private maternity care. One-to-One has succeeded in contracting with NHS Trusts in the north-west of England to provide care. Neighbourhood Midwives has been unable to secure a contract to provide

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<sup>9</sup> Ibid, 3.4, 8.3.

<sup>10</sup> Finlay Scott (2010), *Independent review of the requirement to have insurance or indemnity as a condition of registration as a healthcare professional*, p.6.

<sup>11</sup> Department of Health, *Response to the Independent Review of the Requirement to have Insurance or Indemnity as a Condition of Registration as a Healthcare Professional*, p.2.

<sup>12</sup> Impact Assessment, p.14.



NHS care. It is clear that if the Draft Order is passed, the vast majority of women in England and Wales will not have recourse to midwifery care outside the NHS.

The sole action taken by the Department of Health in relation to availability of insurance has been to make the Clinical Negligence Scheme for Trusts available to private bodies delivering NHS care. The CNST is not to be made available to sole practitioners or to those providing private care. It is not a solution for IMs.

In the absence of any attempt by the government to facilitate a solution, and the serious consequences for women's rights (see further below), Birthrights believes that the proportionality of the Draft Order is in question.

## **(F) What are the potential consequences of the loss of independent midwifery?**

There is no recognition in the consultation paper of the potential consequences that the loss of IMs would have for pregnant women who wish to use their services. The Equality Analysis identifies 'minor negative impact on pregnant women', but does not spell out how this negative impact might manifest itself.

We identify the following issues that should be taken into account by the Department of Health.

### *(a) Childbirth rights*

The right of women to decide the circumstances in which they give birth has been recognised by the European Court of Human Rights as a fundamental aspect of the right to autonomy protected under Article 8 of the European Convention on Human Rights.<sup>13</sup> The state is under a positive obligation to ensure 'a legal and institutional environment that enables her choice'.<sup>14</sup> If women become unable to access midwifery care outside the NHS there are very serious consequences for the exercise of their choices in childbirth. In particular, the patchy and unreliable provision of home birth by NHS Trusts in many parts of the country will mean that women will be left without any means of securing a midwife to attend them at home.

The assumption that is made in the Equality Analysis that women will be able to access private services contracting into the NHS fails to appreciate the important distinction between private and NHS care in the maternity context. If a private enterprise contracts with the NHS, it will be required to adhere to the Trust guidelines that apply within the contracting Trust, which will restrict the nature of the care that the private provider will be able to provide. Women often hire IMs because they fall outside Trust guidelines that for example, limit women with high BMI from using water for pain relief, or recommend induction at a specified period post-dates. In the many areas where the provision of home birth by local Trusts is unreliable, women hire an IM to ensure their choice of

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<sup>13</sup> *Ternovszky v Hungary* [2010] ECHR 67545/09.

<sup>14</sup> *Ibid*, [24].



place of birth is honoured. If the Draft Order is implemented, women will be forced to accept NHS care that does not respect their autonomous choices.

The implications of the Draft Order for women's rights, and for the government's compliance with its obligations under Article 8, have not been appreciated by the Department of Health.

## *(b) Unassisted birth*

Birthrights is regularly approached for advice by women who intend to birth 'unassisted', i.e. without the presence of a health professional. Women who chose to birth in this way often do so as a consequence of profound fear and distrust of NHS maternity services. There can be no doubt that some of the women who would have hired an IM will turn to unassisted childbirth in their absence with consequent risks for the women and their babies.

## *(c) Unlawful midwifery*

We are also concerned about the creation of a blackmarket in maternity services, in which trained midwives provide maternity care without insurance. After the Order takes effect, there will be areas of the country where women are unable to access a midwife to attend them in labour at home due to inadequate service provision by NHS Trusts. Women may well choose to engage a midwife who is not on the NMC register as a result of lack of insurance. Such a midwife will be entirely outside the jurisdiction of the NMC and will not be subject to any regulatory oversight or sanction. It is currently a crime under Article 45 of the Nursing and Midwifery Order 2001 for an unregistered midwife to attend a woman, except in an emergency, and thus a midwife attending a woman unlawfully may well be reluctant to transfer a woman to hospital when necessary.<sup>15</sup> The risks for women and their babies are all too obvious.

## **(G) Consultation questions**

*Q1: Do you agree that the requirement for healthcare professionals to have an indemnity arrangement in place should match the requirements set out in the Directive and place an obligation on healthcare professionals themselves to ensure that any indemnity arrangement in place is appropriate to their duties, scope of practise, and to the nature and the extent of the risk?*

Birthrights is concerned that if healthcare professionals are to be responsible for determining the adequacy of their insurance cover themselves, guidance should be provided by the NMC to ensure that the requirement for 'adequate and appropriate' insurance is clear. Women and their partners must be able to make an informed decision about whether the insurance cover is adequate and it will be impossible for them to do so without clear guidance on the issue from the regulator.

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<sup>15</sup> The current maximum sanction is a fine of £5,000 (Article 45(3)).



*Q8: Are there any equalities issues that would result from the implementation of the Draft Order which require consideration?*

As we have set out above, the Draft Order has serious potential implications for pregnant and birthing women. The Equality Analysis of the impact on this protected group is remarkably brief and does not contain basic information (such as the number of women who might be affected) that is necessary for consultees to make an informed response, or for the Department of Health to make an informed decision. It is predicated on the false assumption that independent midwifery care will continue to be available to women in some form after the implementation of the Order. As a result there has been no meaningful analysis of the potential impacts.

In order to comply with the requirements of the public sector equality duty in s.149 of the Equality Act 2010 the assessment of the impact of a proposed decision must be based on a proper examination of evidence of the prejudice which a particular decision may impose upon the protected group. A purported 'assessment' of prejudice which is inadequately informed and is driven by the hopes of the advantages to be derived from the new policy rather than focussing on a genuinely open-minded assessment of the degree of disadvantage to existing users will not comply with the public sector equality duty.<sup>16</sup>

Birthrights is concerned, therefore, that in failing properly to confront the impact of the proposals, the legality of the consultation is in doubt.

## **Birthrights**

**17 May 2013**

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<sup>16</sup> See *R (Rahman) v Birmingham CC* [2011] EWHC 944 (Admin), [35].

