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PRIVATE AND CONFIDENTIAL

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URGENT LETTER BEFORE CLAIM FOR JUDICIAL REVIEW

Response required by 10am on 24 January 2022

13 January 2022

BY EMAIL: cthb_claims@wales.nhs.uk

Dear Sirs

BIRTHRIGHTS: JUDICIAL REVIEW AGAINST CWM TAF MORGANNWG UNIVERSITY HEALTH BOARD'S POLICY ON VISITING RESTRICTIONS FOR ANTENATAL AND POST-NATAL SERVICES

LETTER BEFORE ACTION IN ACCORDANCE WITH PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW

We write pursuant to the Judicial Review Pre-action Protocol (the "Protocol") to give formal notification of a proposed claim for Judicial Review. We are instructed to act on behalf of the UK Charity, Birthrights, to challenge Cwm Taf Morgannwg University Health Board's ('the Health Board'; 'CTMUHB') policy on visiting restrictions regarding antenatal and post-natal services.

Please note that we request a response to this letter by **10 am on 24 January 2022**. This is a 10 day timescale for response (allowing for the fact that 10 days falls on a Sunday). We are departing from the standard response time of 14 days because this letter before claim follows our previous letter before claim sent on 12 November 2021, which led to a new decision being taken by the Health Board. The matters set out in this letter are therefore well known to the Health Board and the documents and information requested should be readily available to the Health Board.

In particular, most of the documents and information sought were requested in our first letter before claim but were not provided despite the extended time period taken to provide a pre action response.

In the absence of a satisfactory response within the specified timeframe, we are instructed to take steps to issue judicial review proceedings without further notice to you. Should such a step be necessary, we also place you on notice of our intention to seek to recover our costs in accordance with the case of *M –v- Croydon* [2012] EWCA CIV 595.

PROPOSED DEFENDANT

Cwm Taf Morgannwg University Health Board (the “Health Board”).

INTERESTED PARTIES

There are no interested parties in respect of the proposed judicial review. If you consider there are interested parties please let us know.

PROPOSED CLAIMANT

Birthrights is a UK Charity dedicated to improving the experience of pregnancy and childbirth by promoting respect for human rights. Birthrights registered address is Union House, 111 New Union Street, Coventry, CV1 2NT.

Birthrights are aware of / have supported a number of the Health Board’s service users who have been affected by the current policy. Birthrights has worked with and heard from a number of people who have described their experiences after giving birth, while unable to have visitors, and from partners denied the opportunity to care for and bond with their baby during the first few days of life.

Birthrights, by reason of its expertise and experience in maternity care matters has sufficient standing to bring a claim in its own name to challenge a relevant NHS policy in this area. However, Birthrights reserves the right to bring the claim jointly with an individual (or individuals), and reserves the right to do so (adjusting the grounds as required).

MATTER BEING CHALLENGED

The Claimant challenges the decision of the Health Board to implement a revised traffic light system approach to visiting arrangements across the Health Board’s sites/services, and to apply the AMBER criteria to maternity services, which has the effect of restricting visiting on the antenatal and postnatal wards to an hour per day from a single birth partner (the “Decision”). The Claimant also

challenges the revised policy (the “Policy”) of allowing a single birth partner to book a one hour visit per day. This is a change from the previous policy under which no visiting was permitted,

The Decision was taken on 8 December 2021 and the revised Policy was implemented on 13 December 2021. The Decision was communicated to Irwin Mitchell on 16 December 2021 in a formal pre action response to our previous letter before claim.

Background

The background to this matter is set out in our previous letter before claim dated 12 November 2021 is not repeated here.

In response to the first letter before claim we received a letter from Legal and Risk Services on 23 November 2021. The letter stated that they were instructed to act on behalf of the Hospital Board and that an outbreak control team meeting would take place on 24 November 2021, in order to review the current visiting restrictions and consider whether they needed to be changed. The proposals would then be sent to the executive team to consider, with a meeting due to take place before the end of November 2021 at which a final decision would be made in respect of visiting restrictions. The letter stated that it would be reasonable to await the outcome before responding to the letter before claim.

On 2 December 2021, a further letter was received from Legal and Risk Services advising that a substantive response would be delayed until 9 December 2021. It was stated that the review process was taking longer than anticipated in part due to the emergence of the Omicron variant of Covid-19.

On 13 December 2021, a further letter was received from Legal and Risk Services advising that a response was in the process of being finalised and would be provided within the next 2 -3 days. On the same day, the Hospital Board’s website was updated and confirmed that visiting arrangements had been changed to allow one hour daily postnatal visiting slots for a single birth partner: [Changes to visiting for Maternity Services - Cwm Taf Morgannwg University Health Board \(nhs.wales\)](#)

On 16 December 2021, a response to the letter before claim was provided. No accompanying documents or evidence of the decision making process were provided with the pre action response, despite specific requests for disclosure included in the letter before claim dated 12 November 2021.

Decision

The pre action response confirms that the review of visiting arrangements undertaken between 24 November 2021 and 8 December 2021 led to a decision to alter the decision making process by which appropriate visiting arrangements are determined. Previously, a decision on visiting arrangements was taken for all sites within an Integrated Locality Group (“ILG”) on the basis of a

traffic light system which applied to all sites. This could lead to a prohibition on visiting in a particular service/ward, even if that service/ward did not have a Covid-19 outbreak. It is understood that in order to address this, decisions about visiting arrangements will now be taken by applying the traffic light criteria on a specific site/service basis.

The effect of the Decision is that where a ward or specific department is not in “declared outbreak status”, and Public Health Wales and the Welsh Government support visiting restrictions, it will have AMBER status under the Hospital Board’s traffic light system. In the context of maternity services, the following will apply under AMBER status [emphasis added]:

- Partner attendance at 12/20 week ultrasound scan is supported;
- As above with partners invited to labour assessment if accommodation allows for infection prevent measures (i.e. single room);
- Increased schedule of face to face appointments in the antenatal and postnatal period;
- Partner attendance at all standard appointments is supported;
- Birthing partners are offered the opportunity to visit mothers and babies on the postnatal wards for 1 hour each day on an appointment basis;
- Any obstetric procedure requiring single room accommodation, partners will be invited to attend;
- An assessment of restrictions of partners, visitors or other supports to maternity inpatient services – risk rating, as described in Annex 2 of the Welsh Government Guidance *Hospital visiting during the coronavirus outbreak guidance: June 2021*, must be undertaken for each site/location in which maternity services are provided;
- Currently, all maternity services are at high risk rating, as defined in Annex 2 of the *“Hospital visiting during the Coronavirus outbreak guidance: June 2021”*.

Should a specific ward or department have a declared outbreak, it will move to the RED level. In person visiting will be restricted to partner attendance in active labour and the immediate postnatal period only.

A ward/department will only reach GREEN status when the hospital is not in outbreak and the pandemic is declared over in Wales.

It therefore appears that for the foreseeable future, birthing partners will be restricted to visiting their partner and child on the postnatal wards for one hour per day providing there is no declared outbreak in the ward/service. If an outbreak occurs, visiting will be prohibited.

Approach of other Health Boards

As set out in our first letter before claim, the Health Board's position is at odds with the visiting arrangements in neighbouring boards.

Most boards are allowing 2 hours a day of inpatient visiting in maternity services. While Birthrights does not agree that this is sufficient, it is still double the amount of time allowed for women who are inpatients on the postnatal wards at CTMUHB.

Aneurin Bevan University Health Board is facilitating visits between 8am to 8pm for maternity services despite its geographical proximity to the Defendant.

GROUNDS

Ground 1: Departure from the Welsh Government Guidance - Hospital visiting during the coronavirus outbreak guidance: June 2021 (the "Guidance") without giving reasons for doing so

The Guidance appears to have been published under Regulation 18(1) Health Protection Covid No5 (Wales) Regulations 2020 and is therefore statutory guidance which must not be departed from without good reason.

In making the Decision and implementing the Policy, the Health Board has departed from the Guidance without giving reasons for doing so, as set out below. Further, or alternatively, in doing so it has failed to take into account various relevant considerations.

- (a) The Guidance requires visiting restrictions regarding maternity services to be based on "*a risk assessed approach, following a meaningful and documented assessment*". Further, "*localised risk assessments should also be undertaken for individual maternity units/services*".

The pre action response states that the Health Board "*has carried out a risk assessed approach involving localised risk assessments*". However, no evidence of this has been provided.

In particular, no evidence has been provided that the Health Board assessed risk with reference to specific Covid-19 incidence rates or hospital case numbers, or that the Health Board assessed risks of Covid-19 transmissions within the specific maternity settings affected. If this has been done, please provide the evidence showing that the Health Board carried out a proper risk assessment in this instance (including a localised risk assessment for the Health Board's antenatal and postnatal wards). In particular, please provide evidence

which demonstrates why 1 hour has been selected as opposed to any other period of time and how the difference in risk between 1 hour and a longer period has been assessed.

- (b) The Guidance requires increased restrictions regarding maternity services to be made in liaison with Maternity Service Liaison Committees (“MSLC”). Despite the reference in the pre action response that the Health Board has “*acted in liaison with Maternity Service Liaison Committees*” no evidence or detail of this is provided. We are aware from the Board’s response on 1 November 2021 to a Freedom of Information Request (“FOIR”) made by Birthrights that a meeting was held with the MSLC (called My Maternity, My Way) Birth Partner sub-group on 14 September 2021, *after* the Operational Resilience meeting which agreed the traffic light system on the 8th September 2021. The extent to which the Health Board sought the views of the relevant MSLC before the initial decision was taken, or in the process of its recent review process is unclear.
- (c) The Guidance indicates that consideration should be given to “*the needs of women who require additional support to access maternity services and for whom reasonable adjustments may be required*” and also that a “*person-centred, flexible approach to visiting*” is required. Although Birthrights has received a response to a Freedom of Information request which suggests exceptional cases are considered, it is concerning that there is no written policy for this and that a record of these cases is not kept. This could lead to lack of knowledge between staff about the policy and cases where additional support is necessary being missed. Further, an employee of the Health Board following the policy may not be aware that the law requires them to consider each case on an individual basis, and whether departing from the policy is justified in the circumstances. Due to the failure to make clear that exceptional arrangements will be considered, service users would not appreciate that they are entitled to ask for the policy to be departed from.
- (d) The overarching principle set out in the Guidance is the need to balance public health concerns against “*the impact on patients and their loved ones caused by restricted access*”. There is no evidence, based on the disclosure provided to date, that the Health Board undertook this balancing exercise and/or that it has taken into account the impact of such restricted visiting slots on patients and their loved ones. In particular, despite the Guidance setting out an extensive list of possible mitigations – and the SBAR outlining a range of less restrictive options – no proper consideration was given to whether such mitigation measures could be used to assuage the public health concerns while also reducing the harmful impact on patients and their families.
- (e) The Guidance requires visiting restrictions regarding maternity services to be “*regularly reviewed*”. The new traffic light criterion appears to assume that, absent an outbreak situation, the AMBER status (and thus one hour visiting) will remain in place until the pandemic is over and visiting can return to normal. Given that the pandemic is unlikely to come to an end over the coming weeks and months, this is irrational and it is incumbent on the Health Board to review and give genuine consideration to increasing visiting times as the

health situation changes. The new policy fails to specify when the first formal review will be carried out and, if the restrictions remain in place, the frequency of further reviews thereafter.

- (f) The Guidance requires the decision-making process that led to the imposition of more stringent restrictions to be “clearly recorded”. To date, the Health Board has failed to disclose a clear record of the reasons for the Decision.

Ground 2: Breach of the Public Sector Equality Duty

We note that the pre action response states that the Health Board has complied with its public sector equality duty under section 149 of the Equality Act 2010, it has not discriminated on the basis of sex, but provides no reasons or evidence of how the duty has been complied with.

The Public Sector Equality Duty (“PSED”) in section 149 of the Equality Act 2010 (“the Equality Act”) applies to Local Health Boards and NHS Trusts in Wales.

Under s. 149 of the Equality Act 2010, the NHS trust, is required to consider three equality objectives both when formulating policy and taking decisions. The three objectives are to:

- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

“Protected characteristics” as defined under section 149(7) of the Equality Act 2010 include sex, pregnancy and maternity, and disability.

Case law sets out the following principles on what a relevant body must do to fulfil its obligation to have due regard to the aims set out in the PSED: (*R (on the application of Brown) v Secretary of State for Work and Pensions* [2009] P.T.S.R. 1506)

- a. Those in public authorities who have to take decisions that do or might affect the protected classes – including women - must be aware of their duty.
- b. The “due regard” duty must be fulfilled in advance of a particular policy that will or might affect the protected classes being adopted. It is an essential preliminary to lawful public decision making. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision will not be enough to discharge the duty.
- c. Compliance with the duty involves a conscious approach and state of mind. Such can only occur where the decision maker is aware of the duty.

- d. It is good practice for the policy or decision maker to keep an adequate record showing that they had considered the PSED and any relevant questions. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed.

Despite the fact that the restriction on visits to antenatal and postnatal wards obviously has the potential to result in negative equalities implications for those with certain protected characteristics (namely sex, pregnancy/maternity and disability) there is no evidence to date (either disclosed in response to Birthrights' previous FOIA requests or publicly available) which indicates that the Health Board had "due regard" to these implications as s.149 Equality Act 2010 requires. Indeed, given the extreme nature of the policy – severe restrictions of antenatal and postnatal visits likely to be in place for a significant period of time - one would expect a thorough Equality Impact Assessment to demonstrate that the requirements of the s.149 Equality Act 2010 had been discharged. No Equality Impact Assessment has been provided to date.

Ground 3: Breach of section 183 National Health Services (Wales) Act 2006

Section 183 of the National Health Service (Wales) Act 2006 states that:

183 Public involvement and consultation

- (1) Each Local Health Board must make arrangements with a view to securing, as respects health services for which it is responsible, that persons to whom those services are being or may be provided are, directly or through representatives, involved in and consulted on–*
- (a) the planning of the provision of those services,*
 - (b) the development and consideration of proposals for changes in the way those services are provided, and*
 - (c) decisions to be made by the Local Health Board affecting the operation of those services.*

It is contended that there has not been sufficient involvement of service users, either directly, or through representatives, both prior to and since the decision was taken such that the Health Board is in breach of s183 (1) (a) and/or (b) and/or (c) above.

Compliance with the above statutory duties – and therefore the involvement of and consultation with those affected prior to the making of the Decision - is plainly particularly critical given the increasing and significant evidence about the adverse impact of visiting restrictions during the pandemic (set out in the FOIA request from Birthrights dated 22 September 2021).

Please provide evidence of the extent to which representatives or service users were involved in the review of the policy (which took place over a period of several weeks) and in advance of the Decision taken on 8 December 2021, including specific information on the involvement of and engagement with the MLSC.

Ground 4: Breach of Article 8

The restrictive approach to antenatal and postnatal visits amounts to an unlawful interference of the Health Board's service users' rights in accordance with Article 8 of the European Convention of Human Rights.

The effect of the Policy, as revised on 8 December 2021, to restrict visits to 1 hour per day is that fathers/ birthing partners will be separated from the mother/birthing person and from the child prior to and following the birth. It follows that the "family" limb of Article 8 is plainly engaged. Moreover, the interference:

- (a) is not in accordance with the law as there is no legal basis for the implementation of such a stringent policy – on the contrary, it is not in accordance with the flexible approach required by the Guidance. The "*protection of public health legislation*" referred to (but not specified) in the pre action response does not require or justify such stringent restrictions, as demonstrated by the other Health Boards in the country who have more flexible/generous policies.
- (b) is disproportionate in circumstances where it has a significant detrimental impact on the families affected and is not based on a proper risk assessment (which draws on case numbers, hospitalisations and death rates arising from Covid-19, and which explains why less drastic mitigation measures could not manage the public health risk appropriately).

As a responsible and law-abiding public body, the Health Board is obliged by s.6 of the Human Rights Act 1998 not to act incompatibly with Convention right. If the Health Board does not consider there to be a breach, we repeat the request in our first letter before claim: the Health Board is asked to explain its reasoning so that the point may be taken by a service-user (or users) acting as a co-Claimant with Birthrights. For the avoidance of doubt, the broad denial at 1.14 of the pre action response is not considered to be an adequate response. Please set out in full which public health legislation the Health Board relies on, the justification for the one hour visiting (as opposed to any other period of time for visiting such as 2 or 4 hours).

Ground 5: Irrationality

Regulations 15 and 16 of the Health Protection (Coronavirus Restrictions) (No.5) (Wales) Regulations 2020 permit contact between two people from the same household in regulated premises, including hospitals, provided that reasonable measures are implemented to minimise exposure to Covid-19. There is therefore no legislation which precludes visiting taking place.

In making decisions on what constitutes a reasonable measure, a decision maker must have regard to guidance issued by the Welsh Ministers, including the Guidance.

Though the Guidance does not sanction a 'return to normal' approach, it is clear from the Guidance that Health Boards can make local decisions, should consider innovative approaches and that

visiting with a purpose is a legitimate and important factor in the wellbeing of hospital users. It is submitted that reasonable measures, such as evidence of a negative lateral flow test and use of personal protective equipment, can and should have been implemented in maternity settings, alongside detailed risk assessments, or, at the very least that robust risk assessment and impact assessments should have been undertaken prior to making a decision.

There is a clear benefit in permitting a partner to visit the hospital during both antenatal and postnatal appointments and mounting evidence of the detrimental impact that lack of visiting is having on postnatal mental health and wellbeing and family life¹. In addition partners are denied the opportunity to care for and bond with their own baby during the first few days of life.

It is not clear why a decision has been taken to allow one hour visiting slots instead of a longer period or more frequent visits. No evidence has been provided in respect of the decision which justifies one hour instead of unlimited visiting, for example, or at the very least 2 hour visits in line with a number of other Health Boards. The policy is at odds with the policies of other Hospital Boards/Trusts in Wales and England.

Further, the policy appears to ignore the specific circumstances of users of inpatient maternity services for support from visitors. For example, it is people with more complicated pregnancies and births who need to stay in hospital around this period. Partners can provide valuable care and support to meet both baby and mother's needs in the context of severe staff shortages where there is evidence that there are shortfalls in basic care across hospitals in the UK due to staff absences and unfilled posts.

The policy is also unlawful by reason of irrationality because the reliance on the traffic light system is flawed. Rather than provide the Hospital Board with the flexibility to vary the policy according to risk, the three criterion of GREEN, AMBER and RED mean that it is inevitable that the status quo will be AMBER (one hour visiting) unless there is an outbreak. The criteria for GREEN (pandemic over) is unachievable in the near future and therefore amounts to an unlawful fettering of the Hospital Board's powers which precludes visiting returning to normal unless and until the pandemic ends. This is at odds with medical and scientific commentary that indicates that Covid-19 will become endemic and will not disappear.

DETAILS OF THE ACTION THAT THE DEFENDANT IS EXPECTED TO TAKE

A one hour visiting slot per day is insufficient and unlawful for the reasons set out above. The Defendant is again asked to revert immediately to the previous practice of allowing two hours per day inpatient visiting in maternity services pending full consideration and review of the Policy with a

¹ | [BPAS](#);
<https://bmjopen.bmj.com/content/bmjopen/12/1/e051965.full.pdf>; [Hunter RM. The Role of Maternity Services in Reducing the Prevalence and Cost of Perinatal Depression and Anxiety during COVID-19 in England. J Qual Healthcare Eco 2021, 4\(4\): 000234. \(medwinpublishers.com\)](#)

view to whether visiting arrangements can be relaxed further and your response to this letter and the information requested below.

DETAILS OF INFORMATION AND DOCUMENTATION SOUGHT

Please note that most of the following information was previously requested in our first pre action letter but not provided. You are reminded that the duty of candour requires you to be open and honest in disclosing the facts and information needed for the fair determination of the issue in responding to this letter before claim.

- i) Please confirm who was consulted and/or involved in the decision making process in advance of the Decision being made and to what extent, including the dates of any consultation or involvement and specific details of the action taken;
- ii) Any relevant minutes of meetings or documents which record the involvement of the Maternity Liaison Committee including the full minutes of the My Maternity, My Way sub-group meeting on 14 September 2021, and minutes of any further meetings which have taken place to discuss visiting restrictions, any correspondence with and any written representations received from the MLSC in this regard;
- iii) Any and all risk assessment/s on which the Decision was based (these should be disclosed in full) and any Equality Impact Assessment undertaken;
- iv) Evidence or reasons for the decision to end the prohibition on visits but restrict the duration of visits to one hour only. For the avoidance of doubt this should include the evidence of the other options considered and ruled out and the reasons why;
- v) Whether the birth partners/visitors of inpatients can contact the midwife in charge to ascertain whether a specific risk assessment can be undertaken and a visit permitted if the risk assessment allows. If so, how this made known to service users and their families;
- vi) How often reviews will take place and whether this will include specific consideration of whether to increase the length of visits as part of the review;
- vii) Please also provide copies of all other relevant documents, correspondence and minutes in respect of the decision taken on 8 December 2021 to include: minutes/discussions/emails between the Defendant's executive team, infection and prevention control team, Public Health Wales regarding the policy and/or restrictions to maternity visiting arrangements.

DETAILS OF THE LEGAL ADVISER DEALING WITH THIS CLAIM AND THEIR ADDRESS

Faith Salih, Irwin Mitchell LLP, Riverside East, 2 Millsands, Sheffield, S3 8DT. Telephone: 0370 1500 100, E-mail: Faith.Salih@IrwinMitchell.com

ALTERNATIVE DISPUTE RESOLUTION (“ADR”)

Your pre action response stated that the Health Board would be happy to consider any concrete proposals for ADR.

The first letter before claim stated that Birthrights would welcome the opportunity to engage with the Health Board in open discussions about the Defendant’s policy and how the process of agreeing any future changes to visiting in maternity services will be conducted to ensure human rights considerations are taken into consideration as well as infection control. This was a concrete proposal which the Health Board did not avail itself of. The offer is repeated in this letter before claim and is a genuine proposal which Birthrights considers would positively impact the decision making of the Health Board and the experiences of service users.

Birthrights are experienced in working with healthcare professionals on right-respecting care and are experienced in delivering collaborative and rights based training, as well as advocating for the rights of those using maternity services and working with maternity liaison committees. Birthrights would be happy to support the Health Board to consider whether a less restrictive approach can balance the right to safety and the need of maternity service users.

PROPOSED REPLY DATE

Please provide a substantive response to this letter no later than **10am on 24 January 2022**.

Please note that although this is an expedited period for response, the background to the claim, the grounds and information sought are largely the same as the first letter before claim. In view of the fact that the initial pre action response was significantly delayed and lacking in any real substance, we require a full response to this letter before action within the timescale specified. The documents and information requested should be readily available given the recent decision and pre action response and are not onerous to compile.

In the absence of a satisfactory response within that timeframe, we are instructed to take steps to issue judicial review proceedings without further notice to you. Any application for judicial review is likely to seek expedition and interim relief.

We will not be able to agree extensions of time beyond the limitation deadline.

We look forward to hearing from you.

Yours faithfully

Irwin Mitchell LLP

IRWIN MITCHELL LLP