



New Zealand
College of Midwives

TE KĀRETI O NGA KAIWHAKAWHANAU KI AOTEAROA



Orientation document: Class Action on behalf of New Zealand College of Midwives

New Zealand College of Midwives

376 Manchester Street
PO Box 21106, Christchurch 8140
Phone: (03) 377 2732
Email: nzcom@nzcom.org.nz
www.midwife.org.nz

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Introduction

The New Zealand College of Midwives | Te Kāreti o ngā Kaiwhakawhānau ki Aotearoa (the College) is leading a Class Action against the Crown, scheduled to be heard at the High Court in Wellington, commencing 5 August 2024. The College represents some 95% of New Zealand midwives, providing and promoting quality standards and providing a collective voice for midwives and women.

The Class Action alleges the Crown has breached its obligations to ensure self-employed midwives receive fair and reasonable remuneration and working conditions and considers it has been left with no alternative but to submit this matter to the New Zealand courts.

The claims relate to the work carried out by Lead Maternity Carer (LMC) midwives, the midwives who work in the community, providing essential pregnancy, birth and postnatal care to over 55,000 women and over 55,000 babies each year.

The current structure under which self-employed LMCs are paid is set out in the Primary Maternity Services Notice, issued as a Section 94 notice under the Pae Ora (Healthy Futures) Act 2022, (formerly known as a Section 88 notice). This legislation allows the Crown to unilaterally set the terms and conditions under which these midwives work, meaning the midwives have no right to negotiate their remuneration and working conditions including the amount of work the Government expects them to carry out. Midwives are expected to fund their business costs from the monies paid under the notice, however, unlike other self-employed workers, LMCs cannot negotiate, or set, their own fees to cover their overheads or take into account annual and sick leave.

The College remains committed to working constructively with the Government towards improving outcomes for mothers and babies. However, to achieve this aim a sustainable workforce to deliver midwifery services is also essential. Health New Zealand's workforce plan has estimated that midwifery has the most critical shortage out of all of the regulated health professions, with a 40% shortage.



Timeline



At a glance

Approximately how many midwives are affected by this case?

Nearly 1,500 midwives are members of the representative group.

What is the New Zealand College of Midwives' case claiming?

The case involves signed settlement agreements entered into between the College and the Ministry of Health pursuant to formal mediated processes and alleges, among other things:

- ▶ breaches of contract by the Crown;
- ▶ unconscionable conduct through the failure to honour commitments made to LMC midwives;
- ▶ unlawful gender-based discrimination under the New Zealand Bill of Rights Act 1990;
- ▶ that LMC midwives are entitled to damages, restitution and declaratory remedies as a result of the Crown's alleged unlawful conduct.

What does the community-based midwifery profession seek?

It is the midwifery profession's view that the pressing and systemic issues facing the LMC midwifery workforce remain unresolved. They include:

- ▶ The need to establish a new primary midwifery contract model that gives LMC midwives contractual entitlements similar to those enjoyed by other contracted primary health care professionals (such as GPs and community pharmacists).
- ▶ The need for nationally consistent investment in structural supports to assist community-based midwives to achieve equitable outcomes, promote workforce sustainability and manage the demands of 24/7 service delivery.
- ▶ Fair and reasonable remuneration.



History

In August 2015, due to concerns about the sustainability of primary midwifery services, the College commenced judicial review proceedings in the High Court against the Ministry of Health, alleging gender-based discrimination under the New Zealand Bill of Rights Act 1990.

Before the case could be heard the Ministry offered mediation, which the College accepted. The judicial review proceedings were adjourned to allow mediation to occur. A series of mediation meetings occurred between August 2016 and May 2017, mediated by the Chief Mediator from the New Zealand Human Rights Commission. At the conclusion of mediation, the College agreed to withdraw its judicial review proceedings.

As the mediation progressed, Public Statements were issued jointly by the College and the Ministry informing the public of some, but not all, of the written agreements reached in mediation. As the mediation processes were otherwise confidential, verbatim extracts in italics from those public statements are quoted below. Some key agreements were that:

- *The current modular structure and payment system inadequately reflects the challenges of modern midwifery practice.*
- *The sustainability of Lead Maternity Care midwifery is central to the national primary maternity services and requires national support.*
- *Any new funding model will support the provision of equitable, high quality midwifery care and services to women that are available, accessible, acceptable and of no cost to the woman.*
- *Any new community LMC midwifery service funding model should eliminate gender discrimination, ensure equity and fairness for midwives in line with the government's workforce equity principles.*
- *[A Co-design Project would be carried out by the Ministry and College]. The new co-design funding model will support sustainability of community LMC midwives and include the right to negotiate terms and conditions.*
- *The co-design process and resulting funding model will be in line with the principle that equal pay has no element of gender-based differentiation and is free of systemic under-valuation, as outlined in the Government's response to the Joint Working Group on Pay Equity Principles.*
- *The Ministry also agreed to prepare a bid for the 2018 Budget that reflected the findings of the co-design report and job evaluation process [per subsequent Public Statement December 2018].*

Breach of 2017 Settlement Agreement by Ministry of Health; Second Settlement Agreement (2018)

Although a new funding model was co-designed, the Ministry of Health publicly admitted it did not complete all of the actions it had committed to undertake. This led to further formal mediation between the parties in 2018, which resulted in a signed second settlement agreement. The joint

Public Statement following this 2018 Agreement recorded some, but not all, of the matters agreed. A number of other matters agreed are also the subject of the Class Action and until the case is heard, remain confidential. Verbatim extracts in italics from those public statements are quoted below:

- *...the Ministry acknowledges that it breached the May 2017 agreement that it had reached with the College.*
- *The Ministry apologises to the College and its members for breaching the May 2017 Settlement Agreement. Having expressly and formally agreed to do so, the Ministry did not prepare a Budget bid reflecting co-design. The Ministry acknowledges that its breach was through no fault of the College.*
- *The Ministry has reaffirmed its commitment to the co-design principles, including a Blended Payment Model for LMC midwives. The Ministry has also reiterated its support for the continuity of midwifery model of care as central to maternity services in New Zealand.*
- *The Ministry has agreed to a process to ensure a 'fair and reasonable' service price for LMC midwives. The College and the Ministry will work on this together throughout 2019.*
- *The Ministry and the College have agreed to work together in early 2019 on structural changes to the way LMC midwives are funded and contracted.*
- *The Director-General of Health, Dr Ashley Bloomfield, reiterates that strengthening and stabilising maternity services is a priority for the Ministry. The Ministry and the College have renewed their commitment to work together in good faith.*

Alleged Breach of the Second Settlement Agreement

The Class Action alleges that the Ministry also failed to honour its commitments under the 2018 Agreement, and funding and contracting of LMCs remains under the same structure and model as before.

The systemic issues continue to worsen without being addressed and midwives continue to leave the workforce.

It is within this context that the Class Action has been submitted.