

## Historic win for midwives

On the 19th May 2017 after 21 months of discussion the New Zealand College of Midwives reached a landmark agreement with the Ministry of Health to work together to jointly redesign a funding model that pays community LMC midwives equitably for the work they actually do. The redesign is intended to address the structural barriers that deny community LMC midwives pay equity and threaten the sustainability of the LMC system. The breakthrough is that the College now has a legally binding agreement to reach the equity goal we have sought for so long, by August 2018.

The following is a breakdown of why the National Committee reached agreement with the Ministry and how we got to that decision.

**Karen Guilliland, Chief Executive, Deb Pittam, President, on behalf of National Committee**

### The Claim taken

The College's case was that the Ministry of Health (MOH) had breached its obligation to comply with Section 19 (1) and 55 of the NZ Bill of Rights Act 1990 in deciding to issue the 2007 Primary Maternity services Notice and the 2012 and 2016 Amendment Notices under S88 of the NZ Public Health and Disability Act 2000, and in omitting or refusing to issue further notice under S88.

The College's case against the Crown was that these actions and/or omissions by the Ministry of Health directly and/or indirectly discriminated against midwives providing lead maternity care under the Notices on the basis of gender.

The College's legal advice was that the Bill of Rights was the fastest and most feasible option for a legal challenge as LMC midwives are 'self-employed' and therefore do not fall under the Employment Act or the Pay Equity Act.

The High Court was asked to undertake a judicial review to decide if the lack of equitable funding was the result of discrimination because midwives were women, and that these actions included systemic/historical factors.

### The Remedy sought

The College wanted the outcome of the High Court proceeding to be the Court

directing the Ministry to reconsider its decisions relating to LMC funding immediately, with the right of the College to seek further direction if there was delay. The Court was never likely to quantify the amount of fee increase but rather make it a legal requirement for the MOH to address the issues to midwives' satisfaction.

### The Process

Over the next year, thousands of hours and dollars went into researching and providing over 3000 documents giving evidence for the midwifery case. While it was easily proved that pay structures and fees for midwives were unfair and inequitable, it was more difficult to legally prove that this inequity was because of gender... especially as this was the first case of its kind in NZ (and most of the globe). This made testing the system difficult and the outcome of any Court action uncertain.

### Mediation

When the Ministry made an offer to mediate (without the unacceptable conditions they had imposed with a previous offer) just days before the hearing started, the National Committee accepted. They felt that given the workforce situation was urgent, mediation was seen by National Committee to be a more comprehensive alternative solution and a quicker route to the desired outcome.

### The Mediation Settlement

The mediation teams worked together to build a framework for resolving the issues and the Public Statements released by the parties kept midwives informed of progress. As part of this they proposed and developed a 2017 budget bid on top of the already agreed 2.5% fee rise given in December 2017 to allay some of the immediate LMC pay inequity whilst a new funding model is co-designed.

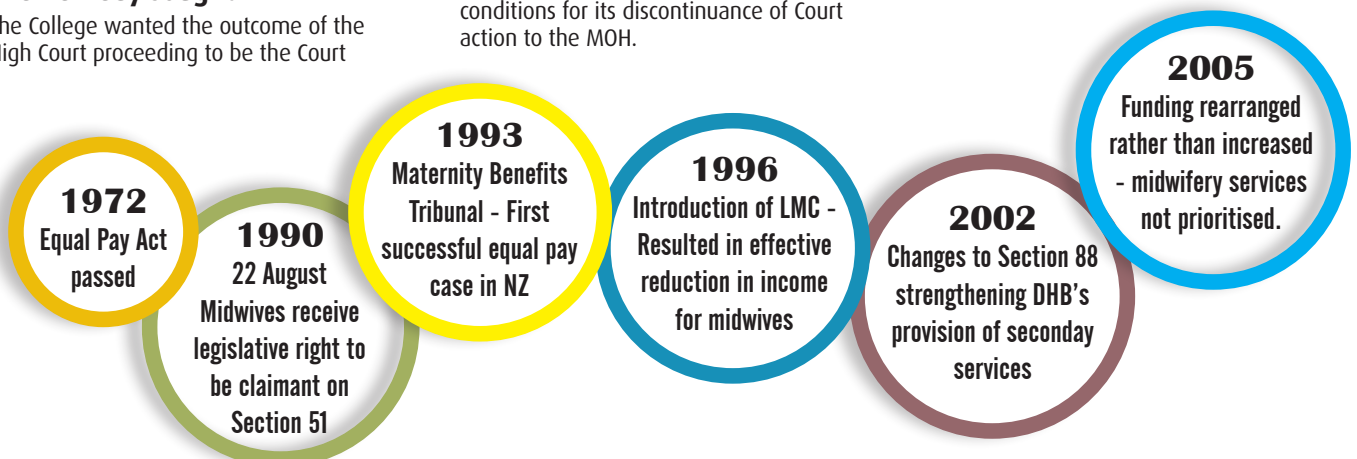
Treasury has now approved a further 6% fee rise in Section 88 fees in the June 2017 budget round for LMC midwives on the understanding that the court action was to discontinue. In addition to the continuation of the co-design process the Mediation team outlined the College's further list of conditions for its discontinuance of Court action to the MOH.

### The Ministry agreed to our list of conditions as follows:

1. That it must redesign the new funding model under the governments recently agreed Pay Equity Principles.
2. That there is the need for interim fee price increases during the co-design process and accordingly approved a 2.5% rise in December 2016 backdated to July 2016, which took effect on the 1st May 2017, and a further 6% rise to take effect from 1st July 2017.
  - The summary of Section 88 fee increases during the College's pay parity action is as follows:
    - o July 2015: 2% (backdated from April 2015)
    - o July 2016/17: 2.5% (backdated from December 2016)
    - o July 2017/18: 6% from 1st July 2017= (because this is cumulative (6% on top of the earlier increased fees) it equates to 6.65% in real terms).

**Total over 2 years: cumulated rises over this time equate to 10.82% from the rate prior to July 2015.** This level of increase is higher than the MECA fee rises over the last 7 years.

3. The Ministry agreed that the community LMC midwife role must be job sized and evaluated by a mutually agreed external evaluator and,
  - that this evaluation must consider systematic and historic undervaluation of the community LMC role.
  - that Court affidavits (which include extensive evaluation of the role of the LMC midwives in comparison with GPs) can go to the expert evaluator.
  - that the evaluator will report back by November 2017 so that the Ministry can make a budget bid for 2018 based on, and reflecting, the findings of the evaluator.
4. The Ministry agreed that if there are any delays in the co-design process, the parties will meet to agree an interim step.



5. The Ministry agreed that the co-design process will be open for consultation with College members.
  6. The Ministry agreed that the underspent money (approx. **\$1 million over three years**) in the MFYP contract can be redirected into another contract that enables the College to focus on emergency urban locum relief, travel and antenatal care. (This underspend results from fewer graduates registering and requiring funding than predicted over the three years).
  7. The Ministry agreed that in order to enhance the relationship with the College, it will enter into a Memorandum of Understanding (MoU) in relation to the clinical and workforce advice the College provides to the Ministry.
  8. The Ministry agreed that if any dispute mediation is required during the co-design process, it could be through the Human Rights Review Tribunal (HRRT). This keeps the focus on the Human Rights platform in which we mediated.
  9. Both parties agreed costs will lie where they fall. (ie. the Ministry will not seek costs from us or vice versa).
- Option 2) Remain in Court adjournment but continue with co-design:
- o No certainty around success / risk
  - o More difficult relationship with MOH and potential co-design failure
  - o No fee increases (after the July 2016 2.5% increase) until July 2018
  - o No other wins / MOH concessions
  - o Cannot consult openly with College members on the co-design process as Court Mediation process is confidential
- Option 3) Withdraw court action:
- o Midwives can be consulted as no longer confidential
  - o Midwives get a further 6% increase now
  - o Immediate legal certainty around wins and MOH concessions
  - o Better environment to progress co-design discussions with a more engaged MOH
- NB: In 2017 the world has woken up to Pay Equity and we may never get a better time for change. It is important to note that even if Options 1 or 2 were successful at a future date, any improved remuneration package and working conditions would also be dependent on global and national economic conditions at the time and government funding available.

The High Court mediation is complete and as a result we have an alternative but equally legally binding process to achieve pay equity through the co-design process which is due to be completed in July/August 2018. This means midwives face resolution of all the equity issues in three years as opposed to at least five years if still in Court. The costs of court action for that period would have been considerable. While this will seem longwinded to some midwives, what the College has achieved is significantly more than the Court could have delivered and over a far shorter timeframe than other claims of a similar nature. (Terra Nova, aged carers, took five years with still no pay out.)

### Other agreements outside the mediation process included

The position of Chief Nurse would no longer be the MOH media spokesperson for midwifery. The spokesperson will be Director; Commissioning, Jill Lane, or her immediate proxy.

Now comes more hard work as we make sure we use the full potential we have achieved for midwives to redesign a funding framework that supports midwives to provide a woman-friendly midwifery service that continues to achieve good outcomes and high levels of satisfaction with maternity care.

The College is developing a wide-ranging member consultation process to make sure that all midwives can contribute. We look forward to receiving your input during this exciting co-design process so we can reach the best possible framework for sustainable midwifery practice for years to come.

### Options considered by National Committee prior to agreement and consequences of each option:

Option 1) The College goes back to court:

- o No certainty around success / risk
- o Break down in the relationship with the MOH and as a consequence, co-design failure
- o No fee increases for some years
- o No other wins / MOH concessions

### The National Committee agreed to discontinue the Court case on the basis of the agreed conditions outlined. (Option 3)

This agreement significantly supersedes what could have been possible with the court action route the College started with and has therefore made the court action redundant.

## 2017

25 January: Third mediation meeting

March: Court case further adjourned to 30 May 2017

14 March: MOH notifies 2.5% agreed in December 2016 will be paid in May 2017, College discovers not all modules included and seeks mediation

5 April: Forth mediation meeting, funding co-design project agreed to, agreement membership will be involved in the process

6 April: First meeting of co-design team

2 May: As a result of mediation the MOH announces the 2.5% increase will apply to all modules and will be backpaid from 1 July 2016

10 May: Second co-design meeting

16 May: Mediated meeting in Wellington - Interim fee increase of further 6% agreed from 1 July 2017

19 May: Court action withdrawn, MOH accepted the College's conditions for a new funding model to meet pay equity principles. Historic win.

## 2015

\$4.88m budget allocation resulted in only \$2.1m to midwives

31 August: College filed Discrimination claim in High Court

## 2016

Court date secured

Early August: MOH offer to mediate accepted

15 - 16 August: First mediation meeting

16 November: Second mediation meeting

20 December: 2.5% interim increase during mediation for LMC midwives

## 2007

Right to negotiate fees and conditions removed from the College  
Midwifery Council increased the Midwifery degree requirements from a 3 year to a 4 year equivalent education