Submission No 237

INQUIRY INTO BIRTH TRAUMA

Organisation: Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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8 August 2023

The Hon. Emma Hurst MLC
Chair, Select Committee on Birth Trauma
Legislative Council
Parliament House, Macquarie Street
Sydney NSW 2000

By email: law@parliament.nsw.gov.au

Dear Ms Hurst

Inquiry into Birth Trauma

The Law Society is grateful for the opportunity to contribute to the Select Committee on Birth Trauma's inquiry (**Inquiry**). The Law Society's Injury Compensation Committee, together with other Law Society members, have contributed to this submission.

The terms of reference of the Inquiry are framed broadly to enable a wide-ranging discussion on birth trauma. The Law Society notes that other stakeholders are better placed to respond to the wider terms of reference, and we provide this response only in respect of the term of reference directed to the role and importance of "informed choice" in maternity care which, from a legal perspective, closely aligns with the doctrine of informed consent.

The Law Society's comments are informed by our members whose practice includes medical negligence in gynaecology and obstetrics matters.

In our view, patients' expectations could be better managed, and better decision-making might be supported in some instances if there was clearer communication between patients and their treating practitioners on the merits versus risks of particular interventions early in the antenatal period. Organisations such as the Australian Birth Trauma Association, for example, have noted that hospital birth education classes may not sufficiently cover interventions such as caesareans and forceps deliveries, which can cause confusion and distress when complications arise during labour.[1] Evidence-based conversations on risk (in respect of the immediate, and ongoing, health and well-being of both the child and the mother) should occur during the antenatal period, given the quality of consent is likely to be diminished if sought during an extended labour.

We do not underestimate the very real challenges for medical practitioners in obtaining valid, informed consent given the highly individualised nature of a patient's decision-making processes, different values systems and varying levels of comfort with risk. It may therefore

[1] See Nicola Heath, 'We need to change the way we deal with informed consent during childbirth', SBS Online, 12 July 2019.

be of assistance for medical colleges and bodies, in association with legal practitioners, to offer specialised training on informed consent. Such training should not simply set out the legal requirements, including the principles in *Rogers v Whitaker* 1992 175 CLR 479, as modified by the *Civil Liability Act 2002* (NSW), but should also include training for maternity providers in how that information could be effectively communicated. In our experience with supporting continuing professional development, it would be important to emphasise what effective communication involves, including clarity and cultural safety. It must also be emphasised that supported decision-making that respects the individual does not simply equate to providing a long list of clinical risks in anticipation of future litigation, but rather involves meaningful conversations that are tailored to the needs of the patients and properly understood by them.

One issue that has arisen in other jurisdictions, including the United Kingdom, is the challenge of information provision regarding alternative treatment options, not merely on the risks associated with the treatment or management recommended by a maternity care provider. This issue may also warrant attention as part of the focus on informed consent training.

Thank you for the opportunity to contribute to this inquiry.

Yours sincerely,

Cassandra Banks
President