**Contribution of the Office of the Commissioner for Fundamental Rights (Hungarian NHRI) in response to the call for submissions by the Special Rapporteur on violence against women**

**on cases examined by the Commissioner for Fundamental Rights related to the issue of mistreatment and violence against women during reproductive health care and childbirth in Hungary**

[AJB-2350/2016](http://www.ajbh.hu/documents/10180/2500969/Jelent%C3%A9s+az+otthon-sz%C3%BCl%C3%A9s+szab%C3%A1lyoz%C3%A1s%C3%A1r%C3%B3l+2350_2016/af95de52-e12a-4e4f-9e83-af35acde4c25?version=1.0)

**The funding of non-facility-based childbirth (home birth)**

The Commissioner conducted an inquiry in the field of childbirth outside institutions upon the request of a civil society organization. The petitioner complained that home births were not supported by the Hungarian social security system, due to which only affluent families could opt for this possibility provided by law. The Commissioner instituted proceedings on the basis of suspicion of impropriety in connection with the requirement of legal certainty inherent in the principle of the rule of law, with the right to physical and mental health, and the requirement of equal treatment. He concluded that childbirth outside institution was more than a simple healthcare, health policy or legal issue: rather, it was a crucial matter affecting fundamental rights and mentalities the appraisal of which was changing due to a paradigm shift. While exploring the dimensions of the issue of funding that motivated the petition, the Commissioner found that by creating the legal framework of home birth and decriminalizing the earlier illegal conditions, in theory, the state had undoubtedly provided for a choice – in theory – between home birth and institutional birth. He examined whether without providing state-level social security funding, the state substantially satisfied the requirement of providing full-scale support to citizens so that they could enforce their right to self-determination, or it is the case that without financial support it was only an illusory option. He concluded that the question of the funding of healthcare or social care often acted as the constitutional test on the principle of equal opportunities, and even – in many cases – of equality before the law, which may point beyond the financial capacities of the state and the possibility of loosely defined regulations.

As the Commissioner pointed out, the present situation, namely that of all the options available, facility-based childbirth is entirely state-funded whereas home birth is not funded at all, does not meet the constitutional requirement based on the institutional protection of self-determination, and it may lead to improprieties in connection with pregnant women’s freedom of self-determination.

The Commissioner requested the Minister of Human Capacities to remedy the improprieties uncovered and review the regulations of the decree in force (in cooperation with the Minister of the National Economy and with the involvement of the relevant professional and advocacy groups), and he suggested that the Minister consider making home birth a real alternative by assuring its inclusion in social security in an equitable manner for expectant women.

The Ministry concerned did not accept the Commissioner’s initiative.

[AJB-605/2019](http://www.ajbh.hu/documents/10180/2932608/Jelent%C3%A9s+egy+gyermek+%C3%A9s+anyja+k%C3%B3rh%C3%A1zi+elhelyez%C3%A9se+%C3%BCgy%C3%A9ben+605_2019/de144074-cb4e-138f-530d-b5c5e64e9b72?version=1.0)

**The lack of rooming-in care at maternity wards**

Two civil society organizations turned to the Commissioner in a joint petition for the purpose of changing the institutional practice and renewing the guiding professional protocols. According to the petition, it is still an accepted practice in Hungary to separate the mother and the new-born child in different rooms of the hospital during the period of stay in the hospital after giving birth. On the basis of international recommendations, the internal regulations, the overview of the fundamental rights and the reply of the secretary of state responsible of the field, the Commissioner underlined, among others, that giving birth has a special importance both in the life of the parents and the child as individuals, and in the life of the parent and the child as a family. In the period of giving birth, both the individuals and the families are in particular vulnerable; therefore, their position should enjoy protection for multiple reasons. The Commissioner holds that the protection of privacy and family shall not be limited to the territory of the home, and the individuals and families should be entitled to it in the period around giving birth also in healthcare institutions. The State is obliged to facilitate the development of an attitude focusing on respect for privacy also in the course of receiving healthcare services, including in the case of giving birth. According to the Hungarian statutory regulations in force, the mother and the child form a single unit, and the law acknowledges their continuous, stable and undisturbed community as a value to be protected. The only limitation acceptable in respect of restricting the community of mother and child shall be a health risk related to any part of this unity – the mother or the child. As held by the Commissioner, this interpretation is in line with the requirements based on the international law and the case law of the Constitutional Court of Hungary applicable to the rights of the child and the protection of privacy and families. Therefore, it is an unacceptable situation, also from the point of view of fundamental rights, where the internal rules or care practices of certain institutions empty out, relativize or derogate this guarantee provided by the law. The Commissioner established that the hospitals’ practice allowing for the separation of the mother and the child, against an explicit request for the contrary, without any reason related to healthcare, is a violation of the principle of the rule of law, it is incompatible with the principle of the procedure in the best interest of the child and it raises concerns regarding the right to respect for family life; the State is considered not to comply with its obligation of institutional protection related to child protection and to the respect for family life, when – taking into account the present situation where no full-scale rooming-in system is offered – it does not offer a real alternative for the woman giving birth: either to guarantee that she will not be separated from her child, or, in the absence of that, to offer any other alternative, obviously by providing for the possibility of giving birth as an outpatient, securing safe leaving of the hospital as soon as possible.

[AJB-1292/2017](http://www.ajbh.hu/documents/10180/2602747/Jelent%C3%A9s+egy+terhesgondoz%C3%A1s+%C3%BCgy%C3%A9ben+1292_2017/b75f6849-90fb-0889-9273-0d07cce86555?version=1.0)

**The systemic cause of a professional mistake experienced in the course of providing care for pregnant women**

A family submitted to the Commissioner a petition complaining about a malpractice of an obstetrician-gynaecologist of a healthcare institution that resulted in the birth of their daughter with a very serious genetic abnormality.

The Commissioner started a comprehensive inquiry, as in the particular case challenged in the petition and *in the context of the practices of ultrasound tests carried out in the course of providing care for pregnant women*, a suspicion of impropriety has been raised with regard to the requirement of legal certainty resulting from the rule of law as well as the right to human dignity and to fair procedure.

The inquiry verified that the professional regulation of ultrasound screening tests to be carried out in the course of providing care for pregnant women is ambiguous. Despite of the opinion formed by the secretary of state for healthcare, stating that *“As there had been no professional guideline available on the professional requirements applicable to carrying out obstetrics ultrasound tests (it has already been completed by now), the detailed professional recommendation to be followed is the one published by the Hungarian Obstetrics and Gynaecology Ultrasound Society (hereinafter: MSZNUT) with the approval according to the rules of procedure of the Professional College.”*, this is, nevertheless, not fully clear for the affected persons. The physician affected in the particular case failed to obey in many respect the professional recommendation of MSZNUT. The professional superintendent chief physician in charge of examining, in the framework of a supervisory procedure, the professional compliance of the care provided also referred, in his expert opinion, to the MSZNUT-recommendations as non-mandatory rules, thus he has not established during his procedure any professional malpractice.

In the particular case, in the context of ultrasound screening tests, *the medical forensic expert’s opinion contained several comments* related to the authorisation of the person who carried out the test as well as to the documentation of the test completed. His objections and his expert opinion are based on several textbooks used in medical training and on the professional recommendation by MSZNUT referred to above.

Thus, the judicial practice and the practice of forensic experts use a much wider body of professional rules in the course of deciding in professional questions as compared to the practice of professional supervisory procedure. Therefore, in the context of the current case, a systemic problem can be detected due to the development of the “double standards” applied in practice. The courts and the authority’s professional supervisory procedure decide about the existence of a professional medical malpractice on the basis of significantly different criteria, although this differentiation is not justified by any reason. This may raise concerns for two reasons: on the one hand, the protection of patients’ rights by the authority, and on the other hand the elimination of mistakes by way of measures taken by the authority are carried out insufficiently, and together they act against performing the State’s obligation of protecting rights.

As emphasized by the Commissioner in his report, the screening tests to be carried out in the course of providing care for pregnant women as well as *the information provided to such women* on the basis of the results of these tests form the basis of exercising the right to self-determination based on informed decision-making. Accordingly, from the point of view of the enforcement of the pregnant women’s right to self-determination and the parents’ right to family planning, the exact methodology of the test, the professional competences of the person in charge and the scope of the data recorded are important guarantees.

For the purpose of *preventing future* anomalies in the context of the concerns related to fundamental rights as explored in the report, the Commissioner *requested* the Minister of Human Capacities to provide an overview of the present situation and take appropriate steps as necessary for facilitating legal certainty and calculability, in order to guarantee that in the course of the authority’s professional supervision of certain healthcare providers, the verification of the compatibility of care shall be carried out on the basis of the full-scale examination of all professional criteria; the Minister should take the necessary steps in order to facilitate the official publication of the still missing professional guideline on carrying out obstetrics ultrasound tests and on the professional requirements (it has already been completed meanwhile).

[AJB-640/2018](http://www.ajbh.hu/documents/10180/2805034/Jelent%C3%A9s+a+v%C3%A1rand%C3%B3sgondoz%C3%A1s+jogszab%C3%A1lyi+k%C3%B6rnyezet%C3%A9nek+vizsg%C3%A1lat%C3%A1r%C3%B3l+640_2018/1dfd81e0-0cfa-daa6-150d-ff8a5cbe575c?version=1.0)

**Is non-mandatory care for pregnant women mandatory?**

A civil society advocacy organization turned to the Commissioner regarding the problems related to interpreting and applying the law experienced in the course of their work in the context of providing care for pregnant women. According to the petitioner, it is a general practice among the members of the child protection warning system, in particular among health visitors (district nurses), that they consider the examinations specified in the decree on the provision of care for pregnant women as mandatory health tests for pregnant women. As experienced by the petitioner, it regularly happens that if the pregnant woman fails to participate in the tests specified in the framework of providing care for pregnant women, then the members of the warning system qualify it as a serious threat to the child to be born, and – in the framework of their statutory obligation – they make a warning to the competent child welfare service provider for the termination of the serious endangerment. These warnings often result in measures by the guardianship authority and the non-participation in the care provided for pregnant women may even finally result in the restriction of parental responsibility or it may justify the displacement of the child from his or her biological family. The petition claims that it is not clear whether or not the applicable laws and regulations make the participation in the tests mandatory.

As explored in the Commissioner’s report in the interest of clarifying the concerns raised in the context of the regulatory anomalies of the subject, the fact itself that the pregnant woman does not use a service prescribed for her without a mandatory force – i.e. she does not participate in the prescribed screening tests – may not justify a warning about the serious endangerment of the foetus (the to-be-born child) or the initiating of a procedure of the authority due to the serious endangerment of the child. As established by the Commissioner, the right to self-determination and the requirement of legal certainty are deemed to be violated if the health visitors make a warning to the child welfare service about the serious endangerment of the foetus (the to-be-born child) merely due to the fact that the pregnant woman fails to participate in the medical, laboratory tests specified in the applicable decree and not mandatorily prescribed for her.

Based on the above, the health visitor may not dispense with making a notification, but – according to the position taken by the Commissioner – this notification should not be automatically identified as a warning on the serious endangerment of the foetus (the to-be-born child). After receiving the health visitor’s notification, it shall be the duty of the notified professionals to decide whether or not further measures by the authority are needed for the purpose of the healthy development of the affected foetus. For example, if, in the opinion of the health visitor, the way of living of the pregnant woman (e.g. the consumption of alcohol or drugs) or her circumstances (e.g. housing conditions detrimental to her health, nutrition) pose a threat to the healthy development of the foetus, then the health visitor shall be obliged to warn the family- and child protection service.

It should be pointed out in this respect that according to the Health Visitors’ Professional Supervision Guideline for the elaboration of the local rules of procedure of the regional health visitors’ duties related to the protection of pregnant women and the children[[1]](#footnote-1)[1] issued on 27 June 2017 by the deputy secretary of state of the Ministry of Human Capacities, in charge of the chief medical officer’s duties, the using of the services specified by the law is voluntary in general, and the parent or the legal representative of the child may only be obliged to use a certain service of care in the cases specified in an Act of Parliament.

The Commissioner requested the minister of human capacities to consider the clarification of the Decree No. 26/2014. (IV. 8.) EMMI on providing care for pregnant women and the Act CXXIII of 2015 on Basic Healthcare Services in order to clearly define the addressee of the legal obligation beyond doubt for the persons affected. The Commissioner initiated that the minister should take measures – through the deputy secretary of state in charge of the chief medical officer’s duties – to provide access to the Commissioner’s report for regional health visitors within the child protection alarm and warning system as well as for the family- and child protection centres and services, and to secure that health visitors perform their work of providing care for pregnant women in accordance with the criteria laid down therein, and, as necessary, consider amending the Health Visitors’ Professional Supervision Guideline as appropriate. Although the ministry reported about a planned amendment of the law, this has not been taken place until now.

[AJB-793/2019](http://www.ajbh.hu/documents/10180/2932608/Jelent%C3%A9s+a+SOTE-n+foly%C3%B3+gy%C3%B3gy%C3%ADt%C3%B3+gyakorlatr%C3%B3l+793_2019/ac20dfe3-572a-734d-acf2-07d1af159500?version=1.0)

**Inequalities in perinatal care**

The petitioner mother asked for the Commissioner’s inquiry because of the differing practices of care in the perinatal care intensive departments of Budapest (Perinatal Intensive Centre, PIC). After the negative experiences obtained while giving birth to her child, she studied the practice of providing perinatal intensive care and she found that the circumstances she had found disturbing and problematic were not part of the routine care of all PIC units. The petitioner complained about the fundamental practical differences between two publicly funded healthcare institutions of Budapest that affect children and parents as well. Based on the petition, raising comprehensive problems, staff members of the Office of the Commissioner held an on-site visit to verify the circumstances of providing care and to compare the practices followed by the two institutions mentioned in the complaint as differing ones: Military Hospital PIC Department and SE No. I Clinic of Obstetrics and Gynaecology, Neonatology Intensive Centre. The Commissioner identified significant differences regarding the child-visiting possibilities, the involvement of the parents into providing care and the feeding of children.

As laid down in the Commissioner’s report, in the course of providing care for premature babies, the best interests of the child cover more than merely keeping the child alive and providing care for the child to allow taking him or her home. In addition to the State’s objective duty of protecting life and providing professional medical care for the premature child, the best interest of the child shall only be served if the expectation is fulfilled concerning injuring further fundamental rights of the child only in the cases absolutely necessary, proportionately and to the least possible extent in the course of providing care. The report underlined that the provision of healthcare shall only be held as child-centred and compliant with the requirements related to the rights of the child, if extra attention is paid to all fundamental needs and the special situation of the particular child and the parent.

According to the findings of the on-site verification, in the Hungarian practice the Military Hospital succeeded in implementing child- and family-friendly care. The functioning of the PIC department of Military Hospital proves that it is possible to implement these conditions without putting the children’s health at risk. In contrast with the above, the SE No. I Clinic of Obstetrics and Gynaecology, Neonatology Intensive Centre cannot enforce the best interest of the child during providing care. The PIC department has been facing constant lack of professional staff for many years, the minimum personnel requirements are not fulfilled, the existing doctors and nurses are overloaded.

The report lays down: the fact that the present healthcare system is unsuitable for providing the continuous presence of the parents at all of its PIC departments is contrary to the rights and the best interest of the child and it causes serious impropriety. In this regard, the Commissioner also pointed out that the hospitals’ practice depends not only on the material conditions of the relevant healthcare provider, but also on the attitude related to patient-care of the persons managing the provision of care and of the ones actually providing it. The Commissioner emphasized that the lawmaker has to take steps on a continuous basis to lay down the legal foundations for a change of attitude in the context of facilitating the enforcement of child’s right of contact, the standardisation of the conditions of stay in the hospital and an environment that supports the provision of high quality care.

The Commissioner requested the Director General of the SE No. I Clinic of Obstetrics and Gynaecology to consider the potential measures to be introduced for the purpose of serving the best interest of the children in need of the provision of healthcare, in particular regarding the breastfeeding of the babies placed in the PIC department, the encouragement and the prioritizing of breast-milk feeding, the continuous and more intense presence of parents and their involvement into providing care. The Commissioner requested the Minister of Human Capacities to make a survey on the availability of the minimum requirements of operation at each PIC department, whether or not the capacities are sufficient and whether the premature children are in fact provided care on the level of progressiveness justified by their condition.Furthermore, he asked the ministry to provide an overview of the situation of donor breast-milk supply as well as the operation of breast-milk collection stations, and to elaborate an action plan on the institutional guarantees to be laid down in order to secure the provision of child- and family-centred care at the PIC departments in the future, including the appropriate enforcement of the right to contact.

[AJB-524/2016](http://www.ajbh.hu/documents/10180/2500969/Jelent%C3%A9s+egy+pszichi%C3%A1tri%C3%A1n+levezetett+sz%C3%BCl%C3%A9s+vizsg%C3%A1lat%C3%A1r%C3%B3l+524_2016/2caecdc8-5940-429d-98ec-df0157294ba2?version=1.0)

**Childbirth in the psychiatry department**

The inquiry established that the staff members of the mental ward of the psychiatry have not noticed the labor and the start of giving birth, despite of the placement of a woman in delirium in the crisis observation room and of the mandatory strict observation. According to the medical documentation, the woman had a diaper on and she could not remove it as she was tied down when the childbirth started; because of the delay of noticing, the nurses only came to help the woman at the end of the childbirth, when the child’s head and hands were already visible. The fact that the pregnant woman was tied down during labor until the delayed noticing of her state and she gave birth to her child this way caused an impropriety related to the prohibition of torture, inhumane and degrading treatment. The Commissioner underlined: it is beyond his competence to assess whether or not the protocols, rules of procedure, minimum requirements are professionally adequate and sufficient.

However, based on the results of the forensic autopsy, it has been established that the child was born alive and the child’s death was due to the inappropriate circumstances of the childbirth (the immediate cause of death was vascular and respiratory deficiency that could have been developed because of the lack of care after birth). According to the expert opinion of the superintendent chief physician psychiatrist: “the present case justifies the need to review the current practice in Hungary. The department appropriate for providing care to the patient should be chosen by paying more attention to the severity of the illness, the risk of complications and the need to monitor the condition of the patient. To achieve this, the staff members working in the affected medical fields should show more admittance and tolerance towards disturbed and anxious patients.” In the light of the events – and of the earlier institutional practice – the Commissioner holds it justified to elaborate rules of procedure that take into account the safety and the interest of both a pregnant woman in need of psychiatric treatment and the foetus, new-born child. It should be developed with the contribution of experts and it should include the guarantees that secure the enforcement of the affected persons’ fundamental rights.

Filling out inaccurately and incompletely the data sheet applied for documenting the restrictive measures, and the failure to inform (in due time) the patient rights advocate shall cause an immediate risk related to the practical enforcement of the right to human dignity and self-determination in the field of healthcare and of the prohibition of inhumane, degrading treatment, and – due to the unforeseeability of the practice – it shall imply an impropriety related to the requirement of legal certainty that follows from the principle of the rule of law. The Commissioner also verified on the basis of the information available that the content of the patient’s documentation does not reflect, in an unambiguous and clear manner, the process of the care provided, in line with the course of the events and with the patient’s state, and this way, in the particular case, the healthcare provider caused an impropriety related to the complainant’s right to fair procedure.

As pointed out in the report, it is in particular worrying that neither the hospital’s internal investigation, nor the investigation of the complaint by the healthcare administration organ detected the deficiencies of notification and documentation related to the restrictive measures as well as the controversies of certain elements of the medical documentation. Based on the above, the Commissioner established that the deficiencies of the investigation explored in the particular case raise concerns in the context of performing the State’s objective obligation of institutional protection, and thus the resulting situation causes an impropriety related to the patients’ rights to human dignity and health.

For the purpose of *preventing the future occurrence* of potential improprieties related to the fundamental rights concerned in the Commissioner’s report, the Commissioner made a recommendation to the Minister of Human Capacities, the Chief Medical Officer, the Director General of Szent Imre Hospital as well as to the Director General of the National Centre for Patients’ Rights and Documentation. The recommendations included the elaboration of complex rules of procedure that takes into account the safety and the interest of both the pregnant women in need of psychiatric treatment and their foetus, new-born child, the review of the territory and the allocated number of beds of the Department of Psychiatry as well as the legislative regulation of the minimum living space per patient in in-patient treatment.

1. [1] See: http://feszgyi.hu/letoltesek/GYV\_SZGYIR\_a\_teruleti\_vedonok\_szamara.pdf [↑](#footnote-ref-1)