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The Hon. Mr Justice Charles Meenan
Chair of the Expert Group on Tort Reform
and Management of Clinical Negligence Claims
The High Court
Four Courts
Dublin 7

7th August 2018

Re: Expert Group on Tort Reform and Management of Clinical Negligence Claims

Dear Mr. Justice Meenan

Further to your letter inviting submissions in relation to the work of the Expert Group undertaking a review of the law of torts and the current systems for the management of clinical negligence claims, please find enclosed observations on behalf of the Council of The Bar of Ireland.

We understand that a solicitor has been appointed to the Expert Group to fulfil the role of persons with more dedicated expertise and who have background knowledge/experience of managing clinical negligence cases.

We are surprised, however, that the legal professional bodies were not afforded the opportunity to have a nominee on the Expert Group. The Council of The Bar of Ireland would welcome this opportunity as such a nomination would add to the deliberations in a very significant way. We would be grateful if you could give consideration to this request.

Please contact me should you require any clarification or additional information in relation to the enclosed.

Yours sincerely,

Ciara Murphy

Ciara Murphy
CHIEF EXECUTIVE

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Submission by Council of The Bar of Ireland to the Expert Group on the Review of the Law of Torts and the current systems for the management of clinical negligence claims

3rd August 2018

INTRODUCTION

Council of The Bar of Ireland welcomes the opportunity to make a submission to the Expert Group undertaking a review of the law of torts and the current systems for the management of clinical negligence claims. Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Bar of Ireland is long-established and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar. A significant number of members practice in the area of tort law and clinical negligence litigation and their experience and specialist expertise has been drawn upon in the compilation of this submission.

The core principles that should be at the forefront of any analysis of the efficacy of the law of tort, or litigation, as a means of resolving claims for injuries arising from clinical negligence (whether from the perspective of the courts system, the Judiciary, the State Claims Agency or claimants) is that parties have a constitutional right of access to the courts and that justice is not only done but is seen to be done between the parties.

Council is of the opinion, and has repeatedly pointed out, that the long-standing recommendations of various stakeholders regarding reforms to the current system for the management of clinical negligence claims, such as periodic payment orders, the introduction of pre-action protocols and new rules of court facilitating case management in clinical negligence claims should be implemented prior to any consideration of other steps being taken in this area.

Council submits that consideration of other changes to the system appear premature until these recommendations, which resulted from extensive deliberative processes in the past, have been implemented in full and their effectiveness reviewed after an appropriate period of time.

SCOPE OF THE CONSULTATION

Council of The Bar of Ireland was invited by the Honourable Mr. Justice Charles Meenan, Chair of the Expert Group, to make a submission in relation to the work of the Group. The broad areas to be pursued by the Expert Group are to:

a) Review the law of torts from the perspective of the management of clinical negligence and personal injury claims in order to assess the effectiveness of the legal framework and to advise on and make recommendations on what further legal reforms or operational changes could be made to improve the current system (the Group needs to ensure that its work does not duplicate the work of the President of the High Court, Mr. Justice Peter Kelly, on the Review of the Administration of Civil Justice on behalf of the Minister for Justice and Equality);

b) Consider whether there may be an alternative mechanism to the court process for resolving clinical negligence claims, or particular categories of claims, particularly from the perspective of the person who has made the claim. To do this, the Group will examine whether a mechanism could be established which would deal more sensitively and in a more timely fashion with catastrophic birth injuries, certain vaccine damage claims, or with claims where there is no dispute about liability from the outset. It will also examine whether an alternative dispute resolution mechanism or a no-fault system would be effective in some cases;

c) Examine the role of the HSE in addressing the problems encountered by persons involved in clinical negligence claims and addressing the health needs of persons affected by clinical negligence, with consideration given to whether particular care packages could be made available for persons with specific injuries, e.g. cerebral palsy following birth;

d) Examine the role of the State Claims Agency in managing clinical negligence claims on behalf of the HSE to determine whether improvements can be made to the current claims management process;

e) Consider the impact of current tort legislation on the overall patient safety culture, including reporting on open disclosure.

ACCESS TO JUSTICE AND FAIR PROCEDURES

A constitutional right of access to the courts was one of the first un-enumerated rights recognised to derive from Article 40.3 of *Bunreacht na hÉireann*.[1] There are also separate rights to litigate[2] and to justice and fair procedures.[3] Thus, one has the right, not only to initiate legal proceedings, but also the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law.[4]

In personal injuries litigation, there is a further fundamental human right at play. Article 4.3.1 of *Bunreacht na hEireann* provides that the State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. Article 4.3.2 provides that the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate, *inter alia*, the life and person of every citizen. The right to bodily integrity is one of the fundamental rights of the citizen that flows from these express provisions.

The Courts have held out the law of torts as the means by which the State guarantees in its laws to protect as best it may from unjust attack, to defend and, in the case of injustice done, to vindicate that right to bodily integrity.[5]

In ***W –v- Ireland (No 2)*** [1997] 2 IR 141 Costello P. observed that:

> *"[in] this country, there exists a large and complex body of laws which regulate the exercise and enjoyment of these basic rights, protect them against attack and provides compensation for their wrongful infringement. A few examples will suffice to demonstrate the point. ... And the right which is in issue in this case, the right to bodily integrity, is protected by extensive provisions in the law of tort".*[6] The right to bodily integrity is a right in respect of which there is *"a large body of law (both common law and statutory), which regulates its exercise, protects it against infringement and compensates its holder should the right be breached".*[7]

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[1] The State (Quinn) –v- Ryan [1965] IR 70

[2] Tuohy –v- Courtney [1994] 3 IR 1 at p 45

[3] See JM Kelly The Irish Constitution (Hogan & Whyte) (4th Ed) paragraph 6.1.52 et seq.

[4] Tuohy –v- Courtney [1994] 3 IR 1 at p 45

[5] Hanrahan –v- Merck Sharpe & Dohme [1988] ILRM 629; W –v- Ireland (No 2) [1997] 2 IR 141

[6] W –v- Ireland (No 2) [1997] 2 IR 141 at pp 164 to 165

[7] W –v- Ireland (No 2) [1997] 2 IR 141 at p 166

If the law of torts makes provision for an action for damages for bodily injury caused by negligence and if the law also adequately protects the injured person's guaranteed right to bodily integrity, then the State's constitutional duties have been fulfilled.[8]

Claimants also have a right, pursuant to Article 6 of the European Convention on Human Rights and Fundamental Freedoms, to the determination of civil rights and obligations by way of a fair and public hearing by an independent and impartial tribunal established by law. Organs of the State are required to perform their functions in a manner compatible with this obligation.[9] However, within the constitutional framework provided by *Bunreacht na hEireann*, which includes a fused legislature-executive,[10] the only truly independent organ of State for these purposes is the Judiciary.

It is also important to point out that the law of torts constitutes a system that promotes the efficient distribution of society's resources through the rights-based device of corrective justice. McMahon & Binchy observe that *"[tort] law can be regarded as a system of corrective, or 'commutative', justice, whereby courts award compensation to those who have been injured by a wrong for which the defendant is personally or vicariously liable"*.[11]

From the perspective of the claimant, whilst concepts of distributive justice may inform the adjudication of whether a duty of care should be imposed and even the level of general damages that should be imposed, once the wrongdoing and loss have been established and once the Courts embark on the assessment of actual financial loss (the largest element in catastrophic injury cases), it is corrective justice and not distributive justice with which the courts are concerned.[12] Tort law cannot be evaluated by purely economic considerations, such as rising costs, because corrective justice is not a purely economic construct.[13]

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[8] W –v- Ireland (No 2) [1997] 2 IR 141 at p 166

[9] Section 3 of the European Convention on Human Rights Act, 2003.

[10] O'Byrne –v- Minister for Finance [1959] IR 1; Murphy –v- Dublin Corporation [1972] IR 215; Abbey Films Ltd –v- Attorney General [1981] IR 158; Madden –v- Ireland 22 May 1980 and Laurentiu –v- Minister for Justice [1999] 4 IR 26; It is likely that any statutory body established as an alternative to the courts would have to report to the Executive which would then pass on that report to the Oireachtas. See, for instance, section 83 of the Personal Injuries Assessment Board, Act 2003 to 2007.

[11] McMahon & Binchy The Law of Torts (4th ed Bloomsbury 2013) para 1.22

[12] Tameside and Glossop Acute Services NHS Trust v Thompstone; South West London Strategic HA v De Haas; Corbett v South Yorkshire Strategic Health Authority; United Bristol Healthcare NHS Trust v RH [2008] EWCA Civ 5 per Waller LJ

[13] See for instance Coleman, Jules L, "The Economic Structure of Tort Law" (1988) Faculty Scholarship Series, Paper 4196 where the author states: "The reason the victim brings to court his injurer, rather than bringing the world of potentially cheaper cost avoiders, is that his claim to compensation as a matter of justice is analytically connected to some facts he seeks to establish about the injurer's conduct. In particular, in most cases, his claim is valid only if he can show that his loss is the result of the injurer's fault. To the extent tort law is a forum for vindicating claims to repair, the victim's connection to his injurer is fundamental and analytic, not tenuous or contingent. That his injurer acted towards him in a way that gives rise to a legitimate claim in justice to compensation is the heart of the victim's assertion. This assertion connects the victim and his injurer in an

Against this background, it may be said that the rights outlined above find expression in the entitlement of a citizen to access the courts and to litigate an allegation of wrongdoing that has caused personal injury and associated financial loss. The vulnerability of such a claimant is clearest in cases of catastrophic injury where the injuries suffered can have a profound impact on the well-being of claimants.

There are dangers in acquiescing in any attempt by the State to dilute access to the courts for some perceived good or *"from the perspective of the management of clinical negligence and personal injury claims in order to assess the effectiveness of the legal framework"*.

Firstly, *"... utilitarian values will ultimately imperil human rights protection"*.[14] The constitutional rights of claimants must not be diminished. Secondly, the perspective of those managing the defence of these cases could be permitted to displace the concept of corrective justice and the individual rights of claimants.

OBSERVATIONS ON THE TERMS OF REFERENCE OF THE EXPERT GROUP

The Terms of Reference stipulate that the Expert Group will concentrate on clinical indemnity claims in the health system. Items (a) and (b) of the terms of reference are, putatively, directed towards the current landscape in which these kinds of claims are litigated.

As regards item (a), it is intended to review the law of torts *"from the perspective of the management of clinical negligence and personal injury claims in order to assess the effectiveness of the legal framework"*. Having considered the law of torts from this perspective, it is intended to assess the legal framework and to advise on and make recommendations on further legal reforms or operational changes that could improve the system. Individual claimants, indeed even groups of claimants, do not have to manage clinical and personal injury claims.

Therefore, the perspective of the *"management of clinical and personal injury claims"* could only be that of the Courts Service, the Judiciary or the State agency that manages the defence of these claims (the "SCA").

As regards item (b), it is intended to consider alternative mechanisms to litigation for resolving clinical negligence claims, or categories of claims, *"particularly from the perspective of the*

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analytic way: they are connected to one another and to no one else, in a way that makes a kind of sense of the structure of tort law that economic analysis simply cannot."

[14] McMahon & Binchy The Law of Torts (4th ed Bloomsbury 2013) para 1.21

person who has made the claim". Unlike item (a), the exercise proposed by item (b) is intended to take place from the perspective of the person who has made the claim.

From that perspective, it appears that there are two (2) perceived problems viz. (i) lack of sensitivity and (ii) the length of time required to resolve disputes.[15] It is intended to examine whether a mechanism of alternative dispute resolution ("ADR") or a no-fault system would be effective in some cases. It is not immediately clear why it is expected that ADR or a no-fault system are the obvious remedies to the mischief identified in item (b), namely lack of sensitivity and delays in the court system.

Whereas item (a) concerns all clinical negligence claims and personal injuries claims, item (b) is restricted to *"catastrophic birth injuries, certain vaccine damage claims, or with claims where there is no dispute about liability from the outset"*. This is an unusual collection of un-connected categories of claim. To those with knowledge of tort law, the court system and the legal framework that is under scrutiny, there is no obvious common feature to these categories of claim that explains their selection as the subject of this particular exercise.

The Position of the Government in Proposing the Terms of Reference

The Expert Group has been appointed by the Government. The Terms of Reference refer to the impetus for establishing the Expert Group, as follows:

The Programme for Partnership Government stated: *"we will tackle the rising cost of claims by establishing an expert group to report within 6 months on options for reforming the law of torts and the current claims process, particularly when it comes to birth injuries and catastrophic injuries, and injuries that can result from vaccination"*.

There is a structural problem at the heart of the objective expressed by the Government. The State, in clinical negligence cases, whether through enterprise liability comprising the rules and apparatus of the clinical indemnity scheme or otherwise, is the defendant in the preponderance of claims. Therefore, when the Government declares an intention to tackle the rising cost of claims, it does so, not only as the guardian of the common good, but as a defendant.

As already stated, even if one views the Government's motivations from a purely utilitarian perspective, that ideal is not necessarily consistent with the protection of the fundamental rights of a claimant and the concept of corrective justice that underpins the law of torts. When one considers the role of the State as the most prevalent defendant in clinical negligence

[15] "To do this the Group will examine whether a mechanism could be established which would deal more sensitively and in a more timely fashion with catastrophic birth injuries, certain vaccine damage claims, or with claims where there is no dispute about liability from the outset."

claims, one must be careful about implementing changes to a system that are proposed from the perspective of those charged with the *"management of clinical and personal injury claims"*. The personal rights of the citizen as a claimant in these cases must be protected.

The ultimate aim of the State generally may be to advance the common good but, as the most common defendant in medical negligence cases, the State (in the latter guise) may be most interested in a system that is the most immediately cost effective. If such a system contains no incentive to identify and rectify fault and no deterrence in terms of corrective justice, the ultimate result may be significantly more costly in that the health system may fail to correct error, fail to prioritise best practice and may gradually decline in quality.

Further, any radical changes in procedures will involve inevitable costs. Some of these are considerable and are identified below under the heading: *Operation of no-fault systems in other jurisdictions*. Such changes must also have regard to the inequality between the resources available to claimants and those available to the State as a defendant to the proceedings.

Sensitivity

The Terms of Reference mandate the examination by the Expert Group of whether *"a mechanism could be established which would deal more sensitively"* with the three identified classes of claim. The Expert Group must be careful to identify actual evidence which supports the view that accessing the courts and litigating these kinds of claims is perceived by claimants as insensitive or intimidating instead of a concern held by claimants that such claims are defended and not resolved in an expeditious manner in the courts. There are alternative means of addressing any distress to claimants, principally by commencing reforms which have already been enacted by the Oireachtas and in combating delays in cases being heard.

It appears to Council that there is a mischaracterisation that claimants harmed by clinical negligence are in some way further harmed by vindicating their rights in public. Their reputation is not at issue in these cases and they are, in fact, in many cases determined to have their story told in public and the tortfeasors compelled to respond in open court. Claimants in these cases often reject standard mediation confidentiality clauses or waive s.27(1) *Civil Law (Miscellaneous Provisions) Act 2008* Orders prohibiting identification.

There need not be a tension between the aim of dealing sensitively with a vulnerable claimant and vindicating that litigant's right to information and to a satisfactory resolution of the claim. Offers of financial compensation coupled with the condition that the offer is made without admission of liability are often refused. This is the very basis on which a no-fault scheme is proposed. Such a scheme ignores the motivating factor for many claimants, which is to find out what went wrong and how such an error may be avoided in the future. Sensitivity towards

a claimant in expediting the claim or ensuring that the process is less confrontational is misplaced when the core aim is to discover information and prevent repetition.

There is a further phenomenon evident in many court hearings, which is that of the claimant's voice being heard. Currently, it is most commonly in litigation that this catharsis can be achieved. While not every litigant expresses this objective, it is a common feature of medical negligence cases and repeatedly identified as a reason to pursue a case into court. The most effective remedy in many cases, from the point of view of the claimant and society generally, is that the tort-feasor hears of and understands the harm that has been caused, expresses remorse and takes action to ensure that it will not be repeated.

There are simple steps that can be taken to increase the sensitivity with which cases are dealt with. These include dedicated facilities for litigants in such cases in a manner akin to the dedicated rooms available to victims of crime in the Criminal Courts of Justice, proper case management so that the issues to be tried in cases are narrowed and well-defined for the purposes of the trial itself and measures to reduce delays in cases being heard. Submissions on these matters are outlined hereunder.

Delay

The Terms of Reference mandate the examination by the Expert Group of whether "*a mechanism could be established which would deal ... in a more timely fashion*" with the identified classes of claim.

There are delays in the court system. However, these delays are not the inevitable consequence of a system of tort law or the legal framework that is under discussion and such delays can be tackled by appropriate case management and rules. The work being undertaken by the President of the High Court, Mr. Justice Peter Kelly, on the Review of the Administration of Civil Justice may recommend changes which would assist in this general area and Council notes that in the context of the Expert Group's assessment of these issues.

Case management has proven to maximise efficiencies in the litigation process and Council of The Bar of Ireland has long supported and advocated its implementation in clinical negligence claims with a view to streamlining and expediting the conduct of these cases.

Reference can be made to the well-publicised comments of Mr. Justice Cross of the High Court regarding a number of cases that have been accepted into case management since January 2018, most of which have been dealt with (including very complex cases) within a period of two months.

Whereas this is extreme, it shows how delay is avoidable and how delay, in any legal system, is not always the product of one side to any dispute. An issue-to-conclusion period of two months is, of course, far too restrictive to propose as a general proposition but delay is not a necessary consequence of litigation. It is a consequence of improperly ordered litigation and that is inherently capable of pragmatic solution.

Further efficiencies could be achieved through increased resources, including appointing a sufficient number of trial judges, and this ought to be highlighted by the Expert Group in its consideration of this matter.

Ireland has one of the lowest number of judges per capita in Europe. Increasing the numbers of judges and providing additional judicial supports such as judicial assistants, Courts Service staff and upgrading and investing in technology and the physical facilities for courts are vital factors to be considered in addressing delays and inefficiencies in the system. As mentioned above, such investment also greatly increases the sensitivity with which claimants' needs can be met within the system.

What is the Legal Framework and the Legal System that is under Scrutiny?

Item (a) of the Terms of Reference mandates an appraisal of the legal framework and the legal system of tort law. Since 2004 a number of statutory measures have altered this legal framework and legal system. Many of these changes have been advocated by The Bar of Ireland. Regrettably, although legislation has been enacted in some areas in a manner that achieves the laudable objectives of those advocating change the legislation has not been commenced thereafter by the relevant Government Ministers.

Further, in the notable instance of periodic payment orders the legislative measure passed by the Oireachtas were not what was envisaged by those advocating change. Nor has it been enacted in a way that reflects tried and tested legislation in England and Wales.[16]

The following legislation has either brought about, or would, if commenced, bring about major changes in the legal framework and system that is being scrutinised by the Expert Group:

(a) The *Civil Liability and Courts Act 2004* introducing reforms in relation to, inter alia, pleadings and verification of pleadings;

[16] In particular, the legislation fails to implement the total recovery principle on which the Damages Act 1996 Act as amended by section 100 of the Courts Act 2003 were enacted because the Courts will have no role in formulating the appropriate index to be applied to the annual payments the subject of the PPO leading to the possibility that annual payments will not meet the actual future cost of care etc.

(b) The *Legal Services Regulation Act 2015*, in particular Part 2A introducing pre-action protocols and Part 10 of that Act concerning reforms to legal costs;

(c) The *Civil Liability (Amendment) Act 2017* introducing periodic payment orders and open disclosure;

(d) The *Mediation Act 2017* introducing reforms relating to mediation.

The Terms of Reference acknowledge that the changes brought about by the *Civil Liability (Amendment) Act 2017* in the form of periodic payment orders have not been commenced and will require time to become embedded in the legal framework and the system.

This calls into question the utility of the exercise mandated by the Terms of Reference when that exercise is to be carried out without the benefit of knowing, or even understanding, the impact of these fundamental and vast reforms to the system of tort law and the legal framework that is under scrutiny.

ALTERNATIVE MECHANISM TO THE COURT PROCESS

Council of The Bar of Ireland does not believe that an adequate case has been made out that an alternative mechanism is required to resolve clinical negligence in a more sensitive or timely fashion. Recent experience has shown that the court system can deal with complex multi-party clinical negligence matters in a timely and sensitive fashion while at the same time ensuring just and equitable relief for the litigant. Particular reference is made to the disposal of recent (and highly complex) misdiagnosis of several cancer cases within a period of roughly 2-3 months from issue to resolution.

The Council submits that what is required to replicate this in all clinical negligence claims is not an alternative to the court process but a strengthening of the procedures already in place together with the implementation of the long-standing recommendations of various stakeholders regarding reforms to the current system for clinical negligence claims.

In that regard the Working Group on Medical Negligence and Periodic Payments made a number of recommendations between 2010 and 2015 regarding the enactment of legislation to empower the courts to make periodic payment orders, the introduction of pre-action protocols in clinical negligence claims and the introduction of new rules of court facilitating case management in clinical negligence claims.

While legislation implementing the first two recommendations was eventually enacted in the form of the *Legal Services Regulations Act 2015* and the *Civil Liability (Amendment) Act 2017* the relevant parts of both Acts have yet to come into force.

No provision has yet been made for case management in clinical negligence cases. This also applies to the introduction of a statutory duty of candour/open disclosure, although same is due to come into force on the commencement of the relevant section of the *Civil Liability (Amendment) Act 2017* in September 2018.

Council of The Bar of Ireland is conscious that the term "*alternative dispute resolution*" can be used to refer to a very wide range of mechanisms for resolving matters other than by way of court decision. One such mechanism, mediation, is already utilised as a means of dispute resolution in clinical negligence claims and in appropriate cases can provide a range of additional outcomes to an award of damages by the courts, including the provision of apologies/expressions of regret, face to face discussions and explanations for adverse clinical events.

Council supports the use of mediation in appropriate clinical negligence cases and members who practice in the area report an increasing number of successful resolutions of claims by this means. However, mediation as currently employed by litigants to clinical negligence cases does not prevent a claimant from initiating proceedings and does not impede a claimant's right of access to the courts. In general terms, Council submits that whatever mechanism might be envisaged under the heading of ADR for use in the management of clinical negligence claims, it should not fetter this important right and should only be used as an adjunct to, and not in substitution of, a claimant's right of access to the courts.

Insofar as an alternative mechanism to the court process, as opposed to a mechanism such as mediation used in conjunction with the existing court process is concerned, any as yet undefined mechanism would have to comply with the constitutional right of access to the courts and Article 6 of the ECHR and guarantee the rights arising therefrom. That includes the need for public hearings, resolution by an independent and impartial adjudicator and the provision of legal advice and representation. On a simple analysis any such alternative mechanism risks adding an extra layer of procedure to clinical negligence claims rather than streamlining and expediting the process where the chief concern should be a fair, cost-effective and expeditious system that protects the rights of all concerned.

NO-FAULT SYSTEM

Insofar as there is a proposal that a no-fault compensation scheme be considered for some cases, Council believes that it would be premature to consider such a radical alternative to the established tort system in Ireland prior to the reporting of the Review Group on the Administration of Civil Justice. It has been tasked with making recommendations for changes to the current administration of civil justice, which includes within it clinical negligence claims.

Experience in the UK has shown that in the three years following reforms to civil litigation in general and medical negligence claims, an evaluation by the Lord Chancellor's evaluation of the Civil Justice Reforms showed that more than 90% of medical negligence claims were not reaching court. Research showed that protocols and so-called Part 36 payments were working well and having the desired effect of earlier and more cost-effective resolution of claims.

Even without that reporting however, the Council is of the opinion and has repeatedly pointed out that the long-standing recommendations of various stakeholders regarding reforms to the current system for the management of clinical negligence claims referred to above should be implemented prior to any consideration of an alternative system.

Council of The Bar of Ireland and its individual members who practise in the area have long supported and advocated the need for pre-action protocols and case management in clinical negligence claims with a view to streamlining and expediting the conduct of these cases. Council of The Bar of Ireland submits that consideration of an alternative process is premature until these recommendations have been implemented and their effectiveness reviewed.

The success of case management and pre-trial supervision by an experienced judge has been demonstrated by the success of the High Court Commercial List and by recent experience in the Personal Injuries List in ensuring that cases are heard in an expeditious manner.

There is every reason to believe that a robust and resourced system of case management, which provided for sanctions for default and encouraging the timely and efficient resolution of pre-trial issues leading to a narrowing of the issues in dispute between the parties, would be equally successful in clinical negligence cases. Again, Council notes the work of the President of the High Court, Mr. Justice Peter Kelly, on the Review of the Administration of Civil Justice in this regard. Recommendations may emerge from that review which would assist in this area.

The need for another review on the management of clinical negligence claims is not helped by the fact that the Government has not acted on the recommendations of those who have previously been asked to look at similar issues. The repeated requests from the Judiciary, Council of The Bar of Ireland, other practitioners involved in clinical negligence claims and litigants to implement those recommendations or commence the legislative measures which have been passed by the Oireachtas in recent years have not been heeded. The Expert Group might consider that measures already recommended might be activated or commenced before other changes are considered and suggested.

Operation of no-fault systems in other jurisdictions

While an in-depth analysis of a no-fault system in general, or no-fault systems as they operate in other jurisdictions, is beyond the scope of this submission and the time frame in which it must be prepared, it is noted that affordability of existing no-fault schemes over time remains a problematic issue with ongoing financial and institutional reforms required to ensure affordability.

In general terms, Council of The Bar of Ireland is concerned that the introduction of a no-fault scheme would not be an effective or fair alternative to a properly resourced and reformed court process in Ireland. Further, Council believes that such a system may be unworkable and is not a system which could be financed sufficiently so as to produce fair and just awards for all injured persons.

Council notes that commentators in the area of no-fault schemes have stated that the existence of a well-funded and comprehensive national social security system appears to be an important complementary element to any no-fault scheme. In addition, a predominantly publicly funded health system is usually important. In such circumstances the no-fault system acts effectively as a 'top up' to the social welfare/health system already in place.

But the reality is that such a system does not operate in Ireland with injured persons receiving little, if any, ancillary support from the current social welfare system. It is questionable whether on that ground alone a no-fault system would be workable. It is also noted at this juncture that a *"care not cash"* compensation model would not be appropriate either in circumstances where the Irish healthcare system is not adequate to support the needs of injured persons.

Ireland effectively operates a private based system, where an award results in the loss of benefits such as a Disability Allowance and a Medical Card, and where the State seeks to transfer onto the private sector the sums necessary to support a person who has a claim. This explains the higher value of claims in this jurisdiction. In contrast, the UK system operates a universal healthcare system and Special Damages (i.e. care) can thereby be provided by the State resulting in considerably lower awards as a consequence.

Often, litigants may seek damages to reflect the cost of private care because they are not satisfied with either the quality or availability of care otherwise available, whether that is through agency or public service. If a "no fault" approach is considered then the reasonable expectations of Plaintiffs will be to the reasonable standards and quantum of care that are claimed (and the subject of awards) in the Courts.

For any no-fault system to be conceivably viable it would necessarily require commitment for a multiple of the current cost of these claims. That is necessarily the case in that the claims

in court in, for example cerebral palsy cases, do not reflect nearly the totality of cerebral palsy cases that are not the subject of litigation.

Moreover, unless any scheme proposed was to provide for compensation to every person who attended hospital and was dissatisfied with their outcome, in any no-fault system there would still be a requirement to prove causation. Experience shows that this is often the most difficult aspect to be established in traditional clinical negligence cases. Consideration of the threshold requirements to be met before compensation would be paid requires careful scrutiny with commentators in the area noting that, in practice, existing schemes have a significant rate of rejection due to failure to satisfy eligibility criteria.[17]

The Council notes that a review similar to that currently being considered was undertaken in the UK in 2003. It rejected the option of a comprehensive no-fault compensation scheme on a number of grounds including:

- That a true 'no-fault' system would lead to a potentially huge increase in claims and overall costs would be far higher than the present tort system;
- To be affordable, compensation would need to be set at a substantially lower level than current tort awards and would not necessarily meet the need of harmed patients;
- It would be difficult to distinguish harm to a patient from the natural progression of disease and no-fault schemes of themselves do not improve processes for learning from error or reduction of harm to patients.[18]

Similar sentiments were expressed by the Medical Protection Society ("MPS") in their submission to the Joint Committee on Health and Children on the Cost of Medical Indemnity Insurance in June 2015. In considering the submissions made from a number of stakeholders regarding the introduction of a no-fault claims system, it was noted by the Committee that the MPS did not advocate the use of a no-fault system stating that:

> *"no fault schemes do not incentivise improvements in patient safety, may result in lower compensation levels, and may impose significant costs on the taxpayer".*

Equality of Coverage and Protecting Vulnerable Claimants

Insofar as it is suggested that such a system would apply to a discrete and defined class of cases or claims, important issues regarding equality of coverage would have to be carefully considered. Three discrete and defined classes of claim or case have been identified as

[17] *No-Fault Compensation Scheme for Medical Injury: A Review Interim Report* (Scottish Government Social Research) 2010, page 10

[18] *Making Amends, A consultation papers setting out proposals for reforming the approach to clinical negligence in the NHS (2003)*

meriting further consideration. But the reason for separating these claims from the general cohort of clinical negligence claims is not clear.

By definition however, a no-fault system directed to *"certain cases"* would require an injured patient to meet particular eligibility and/or threshold disability criteria. In general terms, it would appear that different treatment of persons injured by reason of clinical negligence risks treating vulnerable individuals unequally. In addition, careful consideration is required as to whether it is just or equitable to differentiate between categories of injured persons based solely on the manner in which the injury was sustained.

In the absence of detailed information regarding how such a scheme would work in practice, Council of The Bar of Ireland is not in a position to make full submissions on this point. Council would not, however, support a scheme which excluded non-pecuniary losses such as pain or suffering or restricted access to the courts or set levels of compensation/entitlement at a lower level than would be case in a successful clinical negligence claim brought under the current tort-based system.

Insofar as concern is raised regarding the level of court awards, the discretionary element of general damages is currently capped at a figure of c. €450,000 - €500,000 with the balance of awards made up of special damages. Further, there are essential and inherent elements to any contested claim for damages such as the recent reduction in the real rate of return, the cost of care and medical costs. Some of these factors have resulted in higher awards in recent cases. But these are not factors that arise by reason of the involvement of the court but will arise no matter what system is used to address claims.

Council of The Bar of Ireland notes the requirement to consider the question of possible alternatives to the court process from the perspective of the person who has made the claim. A fundamental element of any consideration to such a question must be that claimants in clinical negligence litigation very often, by virtue of the injury suffered, are extremely vulnerable. The legal system, as currently comprised, protects those individuals and ensures that the rights of those individuals are paramount.

Following the introduction of the Clinical Indemnity Scheme, responsibility for managing virtually all clinical negligence claims including the issue of indemnification was transferred to the State, via the Health Service Executive, hospitals and other healthcare agencies. That essentially means that the State is the defendant in the vast majority of clinical negligence claims in Ireland with the State Claims Agency managing those claims on its behalf.

Currently, litigants are protected in the claims they make against these state bodies through access to courts where their claims are determined by a strong and entirely independent judiciary. Any alternative where claims of injured and vulnerable persons were to be

determined would require careful examination as there is a concern that the right of access to the courts was being curtailed in a manner that is not consistent with the public interest.

In addition, court processes such as the ruling of settlement awards ensures these vulnerable individuals obtain necessary and appropriate levels of compensation. The wardship system ensures those rights are protected in full and continue to be protected. The court process is administered in public and is therefore transparent. The current system ensures the constitutional rights of these individuals are protected. Council is concerned that there should be no diminution to the protections and rights afforded to such claimants in accessing the courts to litigate their claims.

Finally, any change to the current system will require additional resources which the Council believes should be directed towards the establishment of a dedicated clinical negligence list with specialist judges empowered to case manage litigation in a flexible and effective way. Such an addition to the current system, alongside the commencement of the longstanding recommendations made in previous reviews in this area would, in the opinion of the Council of The Bar of Ireland, provide the necessary tools to streamline the current system.

These simple workable changes can achieve many of the perceived objectives of an alternative mechanism and would avoid the risk of diluting the rights of the litigant and/or adding a further and unnecessary layer to the current system with associated extra costs and delay. This has been positively proved by the experience since January 2018 in the handling of cervical (and other) cancer cases on an urgent and case managed basis.

SUMMARY OF AREAS FOR CONSIDERATION

Council submits the following key areas for consideration by the Expert Group:

- Long-standing recommendations and reforms to the current system, some of which have been enacted but not commenced, should be implemented in full and without further delay along with an assessment of their effectiveness after an appropriate period of time. Consideration of an alternative process for the management of clinical negligence claims may not be appropriate until those measures already recommended after previous reviews in this area are properly implemented.

- Allied to the foregoing submission, consideration should be given to increased investment and resources, including the appointment of more judges, providing additional judicial supports and the establishment of a dedicated clinical negligence list, to address delays and inefficiencies in the system. The appropriate resourcing of the court system to ensure the timely determination of such claims would alleviate much distress for claimants in this area.

- Caution is advised in seeking to implement changes through a government appointed Expert Group to a system in which the State is the most prevalent defendant. Any changes in the procedures must have regard to the inequality between the resources available to a claimant and those available to the State as a defendant to the proceedings. The rights of the citizen to access to the courts to challenge state action where injury is alleged to have been caused must be protected.

- Council also believes that it would be premature to consider a radical alternative such as a no-fault compensation scheme to the established tort system in Ireland prior to the reporting of the Review Group on the Administration of Civil Justice. It has been tasked with making recommendations for changes to the current administration of civil justice, which includes within it clinical negligence claims.

- Any alternative mechanism envisaged under the heading of ADR would have to subject to further careful examination and scrutiny. The constitutional right of access to the courts and Article 6 of the ECHR must be borne in mind in that regard. Alternative mechanisms should be used as an adjunct to, and not in substitution of, a claimant's right of access to the courts.

CONCLUSION

The Council of The Bar of Ireland is happy to provide further details on more technical and practical aspects should this be requested or required.

Furthermore, with regards the membership of the Expert Group to oversee this review, the Council notes that the Expert Group will give consideration to appointing a person or persons with more dedicated expertise onto the Group, who have background knowledge/experience of managing clinical negligence cases. Council understands that a solicitor has been appointed to the Expert Group to fulfil this role.

However, Council is surprised, considering the wealth of experience available in this area, that the legal professional bodies were not afforded the opportunity to nominate a representative to the Expert Group. Council would therefore welcome the opportunity to nominate an appropriate person(s) as such a nomination would add to the deliberations in a very significant way.

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