MEMORANDUM

TO: **Mr. Justice Charles Meenan**

FROM: **Nicola Carroll BL**

SUBJECT: **Expert Group on Tort Reform and Management of Clinical Negligence claims – No-fault Compensation Schemes in New Zealand and Other Countries**

DATE: **8 October 2018**

1. This note addresses No-Fault Compensation Schemes in New Zealand and Sweden and some other comparable jurisdictions.

New Zealand

2. New Zealand's no-fault compensation system for medical injuries is available for citizens, residents, and also temporary visitors. Injured patients receive government-funded compensation, in turn relinquishing the right to sue an at-fault party for damages except in rare cases of reckless conduct where a claim can be brought for exemplary damages.

3. The universal no-fault accidental injury scheme is administered by New Zealand's Accident Compensation Corporation ("ACC") which is a crown entity responsible to a government minister via its Board of Directors. ACC has its origins in New Zealand's strong trade union tradition, in particular the 1900 Workers' Compensation Act, which established a limited compensation scheme for workers who had suffered injuries where there was no directly responsible party. In 1967, a High Court judge chaired Royal Commission recommended extending this compensation to cover all injuries on a no-fault basis and the ACC was established in 1974 pursuant to the Accident Compensation Act 1972.

4. Since then the scheme has been amended several times based on growing concerns about costs and unfairness. In the late 1990s, private insurers were let back into the market for work accidents in the hope of introducing competition and reducing costs but the government did a U-turn on this policy direction in 2000 and the ACC was restored as sole provider of accident insurance for all injuries. Further legislative change took place in the first decade of the new millennium.

5. While there are a range of entitlements, 82.9 percent of new claims in 2016–17 were

for medical costs only[1]. Other entitlements include weekly compensation for lost earnings (paid at a rate of 80% of a person's pre-injury earnings), the cost of aids and equipment, home or vehicle modifications for the seriously injured, home help and counselling and therapy sessions. The scheme offers entitlements subject to various eligibility criteria.[2] Only injuries that occur because of an accident *i.e.* a specific incident, event or series of events are covered but general illness, diseases, infections or age-related health conditions or mental injuries (except in very specific situations e.g. nervous shock) are not covered. Claims can be made up to 12 months after an injury and are generally made with the assistance of the treating healthcare provider.

6. Some key factors:

- ACC is primarily funded through a combination of levies and government contributions. Income collected from each source goes into predetermined account based on the source. Costs relating to an injury are paid from one of these accounts based on the type and cause of the injury.
- Claims are processed extremely quickly: in 2017, the ACC's average time to decide on cover was 1.2 days while the average time to make first weekly compensation payments was 7 days.[3]
- In 2017, 62% of New Zealanders have trust and confidence in ACC and 78% of ACC's clients were satisfied with the service provided.[4]
- Some critics argue that while the system in New Zealand has removed significant costs in seeking redress associated with a tort-based system, it has not provided an incentive to the medico-legal system—doctors, patients or administrators—to ensure high levels of care.[5]
- The tort-based system has a much higher cost overall, but as some have suggested, causes a "breakdown of trust between doctor and patient" and does not make the system any safer
- In 2009, the scheme was nearly NZ$4.8 billion in deficit after it was expanded in 2005 to include so-called "treatment injuries" (defined as including any injury arising out of medical treatment). This caused the number of claims brought under this heading to explode (a 63% increase in the years that followed) by

[1] Of 1,946,368 claims during 2016/2017, 1,614,028 were for medical expenses only. See ACC's Annual Report 2017 page 90. https://www.acc.co.nz/assets/corporate-documents/acc7811-annual-report-2017.pdf [Accessed 1 Oct. 2018]

[2] https://www.acc.co.nz/im-injured/support-recovery/ [Accessed 1 Oct. 2018]

[3] ACC Annual Report 2017 page 3

[4] *Ibid.*

[5] Paul, 'Whose Fault is it Anyway?' *Medico-Legal Journal of Ireland* 2017, 23(2), 52-54 citing D.P Kessler, *The Economic Effects of the Liability System* (Hoover Institution Essay in Public Policy, Stanford University, 1999); B. Howell, J. Kavanagh and M. Marriott, "No-Fault Public Liability Insurance: Evidence from New Zealand" (2002) 9(2) *Agenda: A Journal of Policy Analysis and Reform* 135–149.

effectively removing any requirement for the applicant to prove substandard care by the doctor. [6]

- Since 2009, the ACC has taken a number of steps to improve the solvency of the scheme by a more active claims management/rehabilitation regime, attempting to restrict the definition of "injury" and raising levies. In 2017 (the most recent year for which figures are available), the ACC generated a surplus of NZ$607 million.
- ACC works by spreading the cost of all accidents across the community – so prevention and rehabilitation are vital. ACC invested NZ$55 million in injury prevention in 2017 while the system is designed to get injured people treated and rehabilitated as early as possible. According to the ACC's Annual Report 2017, more than 93% of people return to work within nine months, and 80% of people who returned to work were still in work a year later. [7]

7. In his article published in the Irish Medico-Legal Journal, Dr. Sharad P. Paul, surgeon, lecturer and medico-legal advisor to ACC, usefully compares cases of misreporting of cervical smears in New Zealand and Ireland as an example of the differences in operation of the two systems.

8. During the 1990s and early 2000s, a doctor who was contracted to provide cervical screening pathology services for the New Zealand Cervical Screening Programme was found to have misread cervical smears, leading to many invasive cervical cancers being missed. A ministerial inquiry known as the Gisborne Inquiry found that Dr Bottrill had acted negligently however it was also apparent that the cervical screening system was inadequate in that the system could not identify trends or rates at which a specific pathologist's patients went on to develop invasive cancer. Dr. Paul believers that this over-dependence on efficient administration may be one of the biggest flaws in the no-fault system and that there was no incentive for the College of Pathologists to identify errors early.[8] According to Paul, members of the College "closed ranks" by testifying in the High Court that Dr Bottrill's level of reading errors fell within an acceptable margin for competent pathologists (a claim that was later found to be untrue by an Australian collegial review) and while Dr Bottrill was found negligent, his fine was only $400. Barred by ACC law from pursuing Bottrill in court for ordinary damages for her suffering, a plaintiff, A, had to sue him for exemplary damages, which was a far higher standard

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[6] Boylan, 'Medical Accidents: Is Honesty the Best Policy? Time for a Legal Duty of Candour?' *Medico-Legal Journal of Ireland* 2012, 18(2), 62-67 at page 66; ACC Annual Report 2010 page 2 http://www.parliament.nz/resource/0000129627 [Accessed 1 Oct. 2018]

[7] ACC Annual Report 2017 page 10

[8] Paul, *op. cit.* page 52

to meet, and both the High Court claim in 1999 and the subsequent Court of Appeal cases were dismissed. After a retrial was directed, the case eventually ended in an undisclosed settlement in 2003.

9. In Ireland, a plaintiff in a similar case of a missed malignancy underwent a cervical smear in 1998 and was informed that the results of same were normal; as in the Gisborne inquiry, the cytology report was misread. In contrast to the New Zealand situation, trial settlement negotiations took place (in advance of the hearing scheduled for 4 December 2013) between the parties and a significant settlement offer was made to the plaintiff, and this "substantial settlement" was accepted. Paul observes that this "substantial" amount was far greater than the NZ $400 fine (approximately €250) even if it took over a decade to be resolved.[9]

10. The scheme in New Zealand is universal and probably the most comprehensive example of a no-fault compensation scheme but there are elements of no-fault compensation in other countries such as Australia, the United States, Canada and some European Countries including Sweden.

Sweden

11. Sweden has provided no-fault compensation since the introduction of its patient compensation program, the Landstingens Ömsesidiga Försäkringsbolag (LÖF)[10], in the mid-1970s. The scheme is intended to cover the negative results arising from medical treatment, so long as the injuries were preventable. In Sweden, there are other insurance schemes covering labour accidents and pharmaceutical side-effects as well as compulsory national social security insurance.[11]

12. In the patient compensation model, the cost of compensation is covered by an insurance paid by the health professionals themselves. Initially, participation was voluntary; however, it became mandatory in 1996. The scheme covers acts committed by physicians working in public hospitals, as well as those in private practice who have an agreement with the State.

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[9] Paul, *op.cit.* pages 52 and 53. See account of settlement obtained by Augustus Cullen Law at http://www.aclsolicitors.ie/news-events/current-news/augustus-cullen-law-secure-substantial-settlement-for-woman-arising-out-of-misreporting-of-cervical-smear-test

[10] Löf is a mutual insurance company which is owned by its policy holders, the Swedish counties and regions, who provide publicly financed health care. For more information, see https://lof.se/other-languages/ [Accessed 8 Oct. 2018]

[11] See Strömbäck, 'Personal Injury Compensation in Sweden Today' (2018) published online in Stockholm Institute for Scandinavian Law http://www.scandinavianlaw.se/pdf/38-16.pdf [Accessed online 8 Oct. 2018]

13. Patients who believe they have been injured as a result of medical care are encouraged to apply for compensation using forms available in clinics and hospitals. After a claim is made, the treating doctor submits a written report about the injury. An adjuster makes an initial determination of eligibility and then forwards the case for final determination to one or more specialists who judge compensability. Approximately 40% of claims receive compensation with Löf saying that if a patient does not receive compensation, the reason is usually that the injury was unavoidable.[12] Patients who are dissatisfied with the outcome may pursue a two-step appeals process consisting of review of the determination by a claims panel[13] followed by an arbitration procedure. A patient may go directly to the court; however, generally, a judicial process is only chosen when the injury is not covered by the compensation fund.

14. Successful claims are paid using a fixed benefits schedule and include compensation for both economic and non-economic losses. Before patients are eligible for compensation, they must have spent at least 10 days in a hospital or have used more than 30 sick days. This threshold eliminates minor claims.

15. The Patient Insurance Compensation Fund, from which all claims are paid, has undergone reforms since it was created in 1975. Legislation has been enacted to rein in expenditure by replacing the scheme's injury thresholds. Another reform imposed an upper limit on damages of 200 times the base sum for each loss event. The base sum is a unit amount that allows funds that are redistributed by Sweden's various social insurance programs to be adjusted annually for inflation and changing certain medical eligibility criteria narrowed categories of compensable injury. For example, wound infections had been compensated from the outset of the program. But, adjusters have become strict about the type of infections that are eligible, specifying that infections caused by a patient's own bacteria do not meet avoidability criteria and will not be compensated. In effect, this removes "dirty" wound infections from consideration.[14]

16. Apparently, the overriding consideration in efforts to control costs through eligibility and benefit reductions is the need to recognise the interconnectedness of social insurance schemes in Sweden: because medical injury compensation covers the gaps in compensation provided through other schemes, reductions in benefits under these other schemes requires increased outlay from the Patient Insurance Compensation

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[12] *Op cit.*

[13] See generally https://www.patientskadenamnden.se/system/in-english/

[14] Harleston, J. OLR Research Report on No-Fault Medical Liability Compensation System (2003) 2003-R-0386. Available online at http://www.cga.ct.gov/2003/olrdata/ins/rpt/2003-R-0465.htm [Access 8 Oct. 2018]

fund unless commensurate changes are introduced.[15]

Scotland

17. In Scotland, an expert group was convened in 2009 to consider the possibilities of no-fault compensation for medical injury but not specifically related to birth. They recommended the adoption of a scheme based on the Swedish model. A consultation on their proposal was held in 2012, with the government's response published in 2014. Further consultation is also in progress on an avoidable harm scheme for lower value medical injury claims. So far, the Scottish Government has not implemented no-fault liability.

Models in other countries

18. The UK Department of Health consulted in 2017 on creating a 'Rapid Resolution and Redress Scheme' for obstetric cases which is modelled on the Swedish system.[16] The scheme is described as a voluntary administrative compensation scheme for families affected by severe avoidable birth injury. The proposal is that eligible babies and their families would have the option to join an alternative system of compensation that offers support and regular payments without the need to bring a claim through the courts. This would be a voluntary scheme which would not affect an individual's right to litigate. The scheme would apply to harm associated with treatment under NHS maternity services in England only. According to the UK Department of Health's National Maternity Safety Strategy published in late 2017, the Department will look to develop a scheme ideally from 2019. [17]

19. A useful table summarising some of the no-fault compensation schemes operating in different countries and their parameters is included in the Appendix. [18]

Nothing further occurs.

Nicola Carroll

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[15] See generally, Raposo, 'The unbearable lightness of culpability: the compensation for damages in the practice of medicine' Saude e Sociedade, Volume 25, Issue 1, pp. 57 - 69 (2016) published online: http://www.scielo.br/scielo.php?pid=S0104-12902016000100057&script=sci_arttext&tlng=en#fn2 [Accessed 8 Oct. 2018] and Harleston, *op cit.*

[16] See https://www.gov.uk/government/consultations/rapid-resolution-and-redress-scheme-for-severe-birth-injury

[17] This is the timeframe given in the UK Department of Health's National Maternity Safety Strategy dated 28 Nov. 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/662969/Safer_maternity_care_-_progress_and_next_steps.pdf [Accessed 7 Oct. 2018]

[18] Dickson and Ors, 'No-fault compensation schemes: A rapid realist review' London: EPPI-Centre, Social Science Research Unit, UCL Institute of Education, University College London (2016). This is an independent report commissioned and published by the UK Department of Health. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595817/RRR_Dickson_et_al_2016_No_Fault_Compensation_Schemes_a.pdf [Accessed 8 Oct. 2018]

Appendix[19]

Table B: Overview of compensation schemes for medical injury*

Key components	United States† (since 1990)	France (since 2002)	Nordic countries†† (since 1975)	New Zealand (since 2005)
Eligibility criteria for compensation	No-fault: Proof that the neurological birth injury occurred as a result of the birth process	No-fault standard: Serious and unpredictable injuries, without relation to their previous state of health and foreseeable evolution Fault standard: Failure to act in accordance with current scientific data or 'gross or intentional conduct'	Avoidability standard: Injuries could have been avoided if the care provided had been of optimal quality Unavoidable injuries (Denmark): Rare and severe consequences of treatment that exceeds what a patient should 'reasonably be expected to endure'	Unexpected treatment injury - for those in employment
Continued access to courts	No	Yes	No - they only become available if appealing a decision	No
How schemes are funded	Annual financial contribution made by participating doctors and hospitals	No-fault: ONIAM (A tax-based, government-funded administrative body) Fault: Providers/insurers	Patient insurance schemes funded by a range of public and private health care providers	Government via tax revenue and employer financial premiums
Financial cap	Yes	No	Yes	Yes
Financial entitlements	Economic and non-economic damages	Economic and non-economic damages	Economic and non-economic damages	Economic damages

* Schemes operating in Australia are omitted as they report non-medical compensation schemes
†Drawing on two no-fault birth injury schemes available in Florida and Virginia
†† Nordic countries include Sweden, Denmark, Norway, Finland and Iceland

NFCSs specifically for neurological birth injury are in place in two US states: Florida and Virginia; other countries operate NFCSs for a range of medical treatments.

The US-based birth injury schemes insist that, to be eligible, the birth injury has to be the result of the birth process and they exclude injuries caused by genetic or congenital abnormality.

France has implemented two systems: a no-fault standard for serious and unforeseen medical injuries; and a fault standard. This is the only country where access to the courts remains fully available.

The Nordic countries operate an 'avoidability' standard, compensating patients who have experienced injuries that could have been avoided under optimum conditions, for example, where the injury would not have occurred under the care of the best health practitioner/system. Here it is referred to as the 'experienced specialist' rule. Access to court is available for claimants who wish to appeal against a decision, but is not available at the initial point of claiming.

New Zealand has put in place the broadest eligibility criteria, with a no-fault standard applicable to any unexpected treatment injury

The only scheme to operate without a financial cap is in France and all but the New Zealand schemes aim to cover both economic and non-economic costs.

[19] Dickson and Ors, 'No-fault compensation schemes: A rapid realist review' London: EPPI-Centre, Social Science Research Unit, UCL Institute of Education, University College London (2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595817/RRR_Dickson_et_al_2016_No_Fault_Compensation_Schemes_a.pdf [Accessed 8 Oct. 2018]