Scottish Government

A public consultation on draft proposals for a “no-blame” redress scheme in Scotland for harm resulting from clinical treatment

A response by the Association of Personal Injury Lawyers
June 2016

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers with a view to representing the interests of personal injury victims. It is a not-for-profit organisation with over 20 years history working to help injured people gain access to justice they need and deserve. APIL currently has over 3,000 members. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured pursuers.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members

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Introduction

APIL believes that the proposals set out within the Scottish Government's consultation document are not reflective of the scheme envisaged by the No Fault Review Group, or the working party put together by the Scottish Government to build on the Review Group's proposals. It is clear that decisions have been made in the background, without stakeholder consultation.

A "no-blame" scheme would be lacking in several of the necessary components of a compensation scheme, and would not adequately deal with the issues of causation. It is vital that any person injured through negligence continues to be entitled to litigate if he wishes to receive full compensation. The No Fault working group initially agreed that any new scheme would not take away the right of the litigant to use the courts - yet the proposal to protect against "double dipping" in this consultation would do just that if implemented. The proposal would mean that if a patient accepts an award offered under the new "no-blame" scheme they would not then be able to use that to raise a legal claim for negligence - even the right to appeal would not be through the court but to an "independent panel". Any new scheme that is introduced must be on the basis that it is an addition to existing rights, an extra option for seeking redress - it is imperative that pursuers are not forced to choose one out of two mutually exclusive options.

The consultation document is silent on the provision of legal advice for users of the scheme. There must be provision for the patient to access independent legal advice at the outset, to enable them to make an informed decision on the most suitable choice for their case. A scheme which requires the claimant to prove "causally connected avoidable harm" must have provision for the claimant to seek independent legal advice throughout the claim process. A scheme which captures claims up to £100,000, based on vague and unfamiliar principles such as "causally connected avoidable harm" where the person does not have any access to independent legal advice and is left to navigate the system alone, should not be permitted. This would create a system where the unrepresented pursuer uses the scheme against a knowledgeable and experienced defender, leading to severe restrictions to access to justice. These restrictions will be further exacerbated if the person is then denied the right to appeal the no blame scheme's decision through the courts.

Executive summary

- It is inappropriate that the "no blame" scheme is to be introduced before major reforms to the court system – including a pre-action protocol for clinical negligence claims - have had a chance to "bed in", and before other reforms aimed at improving the claims process and resolving claims more efficiently, have even been introduced.
- A "no blame" scheme will be expensive to administer and will not achieve the objective of reducing litigation, because issues of causation will remain.
- If it is to go ahead, the scheme should be piloted on a smaller scale, and the results of the pilot scrutinised closely, before the scheme is implemented properly.
- Should a scheme be introduced, it is vital that it is fully voluntary, and the person retains the right to choose to go to court at any time. There should be provision in place to prevent double compensation.
- The scheme proposed at present is based on vague concepts, and is silent on provision of legal advice. The patient should firstly have access to independent legal advice at the outset, to help them to determine whether the no blame scheme is the right choice for seeking redress in their particular case. The scheme cannot operate without the provision of independent legal advice for the patient throughout the claim process. Without specialist lawyers' input in relation to issues of causation and

quantum, there is a grave danger of persons being undercompensated, or not being compensated at all. This raises major concerns of access to justice.

- We have grave concerns in relation to the proposal that such a scheme would be administered through the NHS Central Legal Office.
- It will not be possible to have a scheme with predictability on damages, as the resources are simply not available to do so. Even case law in this area is not fully developed and solicitors use rough parallels with personal injury case law to indicate how much their client is likely to get. It is essential to have specialist lawyers' input on damages awards on a case by case basis, with every case assessed on its merits.

General comments on a no fault scheme

We remain concerned about the cost of implementing a no-fault scheme, and it is far from certain that any such scheme will have a significant impact in reducing litigation. There are still issues of causation and quantum that will need to be resolved, so legal advice for the patient throughout the scheme will be necessary. Much has changed since the No Fault Group was first commissioned, and the reforms that have been and are soon to be put in place will go much further than this proposed scheme in ensuring that cases are resolved efficiently and that access to justice is maintained.

Q1) Do you agree that it is appropriate to integrate the process for the redress scheme with the incident investigation, duty of candour and complaints processes to ensure consistency, improvement and shared learning?

Ideally, any redress scheme should sit alongside the duty of candour, the complaints process, and incident investigation in a culture of openness. We are concerned, however, that this would simply be unworkable in practice – the culture surrounding redress/complaints/investigation must change first. There are issues with the current complaints system, as at present, it automatically comes to an end when a person mentions seeking compensation or would like to seek advice from a lawyer. A first step towards integrating the redress scheme alongside incident investigation/the complaints process, would be to review and reform the complaints process to ensure that it no longer automatically comes to an end in these circumstances. The system must allow for patients to raise their concerns with the Health Board, and this should lead to a thorough, transparent investigation.

The investigation process is also in need of reform - at present, investigations are vague and inconclusive. The injured person needs to be able to play a role in this process, provide a statement themselves as to how they have been affected - and they need to be able to seek advice without the complaints process automatically coming to an end if an intention to seek compensation is indicated. Once reform of these areas has taken place, it may be possible to integrate those different aspects. It will undoubtedly be a challenge, however, to bring all of these conflicting interests into one process - identifying learning points and being open and honest with the patient about what has gone wrong, without apportioning blame, for example. Careful thought is required to ensure that all of the aims are achieved, if the process is integrated.

Q2) Do you agree with the broad principles for the scheme?

We do not object to the broad principles for the scheme, but are concerned that the principles are vague, and leave much open to speculation. For example, what is the definition of "reasonable care", or "avoidable harm"? There will be a large proportion of cases where it is just not clear whether the case falls within the scheme or not, which will create an additional hurdle for the claimant to overcome in order to obtain the compensation

that they require. This problem would be further exacerbated if the patient/pursuer has to decide for themselves whether or not they could pursue a claim under the redress scheme without the benefit of legal advice. It is vital that there is independent legal advice available to the pursuer at the outset, so that they can decide whether the scheme is suitable for their case.

We feel that an additional important principle should be "active" participation by the pursuer - a pursuer should be able to become more involved in the complaints and redress process should they wish to. Being able to contribute and get their version of events across will help them to achieve a more satisfactory outcome.

Q3) Do you agree that eligibility should be structured around the notion of "avoidability"?

As currently drafted the proposed scheme will still require issues of causation to be resolved, as it requires that the harm must be causally connected and avoidable. Independent legal advice will be necessary, as the claimant will be required to gather evidence and prove complex elements of causation and whether the injury was "avoidable". They would be unable to do so without the help of an independent solicitor with knowledge of how clinical negligence claims, and the scheme, operate.

Q4) Do you support the proposal that the non-retrospective scheme should be restricted to harm which has been or is likely to be, experienced by the person for a continuous period of at least 6 months?

We believe that there should be a threshold for cases to fall within a redress scheme, otherwise the sheer volume of claims would mean that it would become backlogged. It is important that the harm is not just classed as physical harm, however, and that it encompasses psychological harm as well. We are concerned that six months is too high a threshold – a three month threshold would be more suitable.

Cases involving harm for a continuous period of at least six months tend to be much more complex than those where harm lasts for up to three months, and a stripped back "no blame" scheme geared towards a "faster and simpler approach" to handling compensation claims would not be a suitable environment to deal with these complex issues. For example, one member reports of a client falling between the three and six month threshold, with a diagnosis of rectal adenocarcinoma, who underwent surgery for a rectal tumour. Following the operation, the client became unwell and X-ray and CT investigations undertaken indicated that a swab had been left behind. The client then underwent a further operation to remove the swab. This second operation made the client's convalescence more difficult and longer as a result. Unrelated to the swab, the client had on-going risk factors for further episodes of acute kidney injury and chronic kidney disease. The client was self-employed with his own business and therefore assessing his loss arising from the retained swab was extremely complex.

Q5) Do you support the proposal that the proposed non-retrospective scheme should in the first instance be restricted to clinical treatment provided by directly employed NHS staff in Scotland?

We support the proposal that the non-retrospective scheme should be restricted to clinical treatment provided by directly employed NHS staff in Scotland, both in the first instance and for as long as the scheme is in place. Any cases where it is unclear who the negligent party was, or where there are allegations of both a GP and hospital clinician having been negligent, should not fall within the scope of a scheme which will be geared towards

simplicity and speed in settlement. If cases where it was unclear whether the GP or hospital was negligent fell within the scheme, it is likely that there would not be proper consideration or investigation of the issues at play which would potentially lead to under-compensation. Additionally, allowing overly complex cases to enter the scheme would mean backlogs and delays as these cases take up more time to resolve.

Q6) Do you support a cap of £100,000 on the level of award under the proposed scheme?

This cap is far too high. Cases up to £100,000 are often incredibly complex, and there will be many factors involved in those cases that a "no-blame" scheme will simply be unable to cope with. This is not a "no causation" scheme - and the case is often much more complicated than just a question of whether the practitioner has been negligent. If there is limited legal input, as appears to be envisaged here, then lay people would be left to gather evidence regarding this complex area of the law without much, if any, legal knowledge or guidance. The injured person will not know what evidence they need to gather, and will be up against the Central Legal Office or a defence union such as MPS, who will have experience of dealing with these types of claims, and will know exactly what kinds of evidence they will need to produce. This will lead to unjust outcomes. There must be legal advice available to the patient throughout the claim process.

In terms of recent court reforms, all clinical negligence actions for under £100,000 must now be raised in the Sheriff Court. The logic of the proposed scheme threshold of £100,000 would seem to be, therefore, to encompass <u>all</u> clinical negligence cases currently being raised in the Sheriff Court relating to clinical treatment by directly employed NHS staff within the scheme. Many actions currently being raised in the Sheriff Court would be wholly inappropriate for the scheme. Cases up to £100,000 involve cerebral palsy, for example, which requires very specialist input and forensic analysis. Cases up to £100,000 are also likely to involve factors such as wage loss, on-going care and the need for interim payments. One member reports of a case involving still birth at term. The mother's solatium claim was disputed, and expert evidence was required on causation from an obstetrician, neonatologist and pathologist. The mother obtained £42,000 in damages, and would have been unable to run the claim herself under the procedure envisaged. A further claim which would fall under the scheme as proposed arose from the negligent failure to admit to hospital a person complaining of chest pains. The pursuer had a heart attack at home, and suffered brain damage but because there was no loss of earnings claim, the value of the claim was under £100,000. Expert evidence was required on causation, and the case was hotly defended as the extent of the cognitive defect was in dispute. If using a redress scheme without legal advice, the pursuer would not have been able to navigate the systems or know how to gather the necessary evidence; and neither would any of the Patients Associations that might be suggested to help the claimant.

The fact that the patient would retain the residual right to litigate is a crucial safeguard but it is not enough. If a patient does not obtain specialist legal input at the outset, that person's claim could be dealt with under a completely inappropriate procedure. The residual right to litigate becomes academic if a patient does not obtain specialist advice in the first place, to enable an informed choice to be made.

There should also be an exception for cases involving fatalities, multi-party claims, claims involving a breach of the Human Rights Act, and any claim involving multiple defendants.

If it is to go ahead, the scheme should be piloted on a smaller scale, and the results of the pilot scrutinised closely, before the scheme is implemented properly.

Q7) Do you agree that levels of award should be based on the Judicial College Guidelines with patrimonial loss assessed on an individual basis?

Firstly, we are pleased that a tariff system is not being put forward. Tariff systems, as demonstrated by the Criminal Injuries Compensation Scheme, leave people under-compensated or in some cases not compensated at all, because their injuries do not fall within the right boundary. Having a one-size fits all tariff based approach leads to unjust results.

The quantification and assessment of damages should be based on all available guidelines and the common law. Basing the levels of award on the Judicial College Guidelines only, is likely to lead to under-compensation, as these guidelines do not extend to clinical negligence cases. Medical negligence cases differ from personal injury cases, as they almost always have pre-existing factors.

It will simply not be possible to have a scheme with predictability on damages, as the resources are simply not available to do so. Even case law in this area is not fully developed and solicitors use rough parallels to indicate how much their client is likely to get. It is essential, therefore, to have lawyers' input on damages awards on a case by case basis. Those deciding quantum need to be legally trained and experienced in the clinical negligence field. Without representation and without input from the persons' specialist lawyer, claimants are unlikely to receive fair and appropriate compensation."

Q8) Do you agree that the primary legislation should be flexible enough to allow the eligibility criteria and scope of the scheme to be extended at a later date?

No. If the eligibility criteria and scope of the scheme were extended later on, this would be a case of mission creep. A scheme which has (in theory) been created through stakeholder engagement, and examined by Parliament and stakeholders alike, could then be extended to wholly unsuitable cases, without close scrutiny.

Q9) Do you agree that the legislation should protect against "double dipping"?

We believe that the legislation should protect against double compensation but not so-called "double dipping". A person having the right to litigate if they fail under the no-fault scheme (or vice-versa) is not a problem. On the contrary, it will promote better access to justice. People will not be disadvantaged if they choose to go down one route but are unsuccessful, because they can always try the alternative route – people will not be forced into making the wrong choice (particularly if they are forced to make this initial choice without the benefit of legal advice). Further, there will be many reasons why a person may use the scheme in the first instance, but may then later on decide to pursue a claim in the court, and they should not be prohibited from doing so. For example, if a person makes an initial claim under the redress scheme but then later on discovers that their injury is much more serious, they should then be able to pursue the claim in court.

Legislation should instead protect against double compensation, so if compensation is awarded under the redress scheme, and the pursuer is then successful in court, the compensation awarded under the redress scheme is taken into account when making the final award at court. This is how the current Criminal Injuries Compensation Scheme operates - a person can apply for compensation under the scheme, and then can make a separate claim to the court, as this will factor in other elements such as wage loss. If the claim at court is successful, the CICA scheme award is deducted from the pursuer's

damages. This ensures that the person is not over compensated - whilst protecting the individual's right to access the courts.

Q10) Would you support the repeal of Section 2(4) of the Law Reform (Personal Injuries) Act 1948 in relation to continuing care costs providing, as proposed, the care package is independently assessed and quality care guaranteed in each case?

We are strongly against the repeal of section 2(4) of the Law Reform (Personal Injuries) Act 1948. People should be entitled to the care that they need and should not be restricted to public funding – as public funds would simply be unable to cope with the requirements. Being forced to rely on NHS care, which cannot be guaranteed to be delivered quickly, can serious impede successful early rehabilitation, and return to work and normal life. Further, the treatment a patient requires may not always be available through the NHS, and this would inevitably be a cause of great anxiety to the pursuer. In addition, a pursuer may be able to plan his return to work earlier and with more reliability if he relies on private treatment, and this can have an impact on any loss of earnings claim. The injured pursuer should also not be required to leave their home and families because the NHS is not able to provide treatment for them in their own home. If the person had not been negligently injured, they would have been able to benefit from a home and family life, and it is wrong that they should be moved away from this simply to cut costs.

Repeal of Section 2(4) would cause uncertainty and anxiety for the pursuer, yet it would be unlikely to achieve the desired effect of reducing care costs or boosting NHS funds. The court would still compare the quality of proposed private and state provision of treatment, and would also still need to consider to what extent future provision could be guaranteed. The court would need to be satisfied that, if the pursuer requires 24 hour care within their own home, that the NHS could provide it and that it could be guaranteed for the duration of the pursuer's life.

NHS provision of 24 hour care is also not a cost free solution. Instead, it would cost the state a huge amount of money. There is even an argument that the private sector may be able to provide the necessary care at a lower cost than the NHS, and the court would take this into account.

If, despite our concerns, s 2(4) were to be repealed, it would be essential for the pursuer to have the right to enforce the provision of any treatment offered through the NHS and to be able to return to the court at any time if the treatment is not provided as promised.

11) Would you support the development of a "fast track" element of CNORIS, utilising existing expertise with independent medical expert input?

The Central Legal Office is not independent, and should not be involved in any aspect of the running of the redress scheme, as seems to be proposed here. The possibility of the NHS CLO administering the scheme was never envisaged, let alone discussed, by the No Fault Compensation Working Party. No detail has been provided as to how this would be set up or administered, and we have grave reservations about the independence and impartiality of the scheme should it be administered by the NHS CLO.

On a practical level, the opinion of any medical expert is dependent on the information given to the expert, and what may be relevant to the expert will frequently be information which is <u>not</u> to be found within the medical records, or information from the patient which contradicts an inaccurate entry in the records. This is proven by the frequency with which experts for each side under the present system reach opposite conclusions on causation (and liability)

even although each expert is basing his or her report on the same set of medical records. For similar reasons, experts frequently reach opposite or at least significantly different conclusions on condition and prognosis. Without specialist legal representation and input, there is a grave danger that relevant evidence will be overlooked or disregarded. There is a grave danger that deserving claims will fail on causation (regardless of what criteria is employed re avoidability etc) or that deserving claimants will not receive the fair compensation to which he or she is entitled."

Q12) Do you agree that the creation of an independent appeal panel combined with independent medical input in consideration of the claim and award would provide the appropriate level of independence?

The appeal system should mirror that of the Criminal Injuries Compensation Scheme. There should be an initial right to review the decision by an appeal panel. There should also be a subsequent right of appeal to the court, if the pursuer remains unsatisfied with the result. The current proposed system would, we believe, be incompatible with the European Convention on Human Rights. The original report by the No Fault Compensation Review Group recommended that an appeal from the adjudication of the no fault scheme should be available to a court of law on a point of law or fact. At paragraph 4.8 of volume 1 of the report, the group stated that "A right to appeal to a tribunal style adjudication agency enjoying an adequate level of independence and impartiality and with sufficient "equality of arms" between the parties would certainly satisfy Article 6 requires *particularly if* any defects in fair hearings could be cured upon appeal (or review) on matters of law to ordinary courts (as long as the ordinary courts have "full jurisdiction" – the possibility of the reviewing court not only to consider the complaint but having the ability to quash the impugned decision and remit the case of a new decision by an impartial body if the review court does not itself take the decision)".

The Scottish Government, in its 2012 consultation on the review group's recommendations, added that "The Review Group was satisfied that a no-fault scheme established as they describe would be fully compatible with the requirements under the European Convention of Human Rights. This is because they proposed – as in Sweden and New Zealand – to build in appropriate appeals mechanisms, *with an ultimate right to appeal to the courts on a point of fact or law*. They also thought that the retention of the right to litigate will ensure that those who feel the no-fault system is not appropriate will still be able to raise claims using this route."

There is no ultimate right of appeal to the courts mentioned in this new scheme, and no justification from the Government as to why this recommendation has not been carried across.

Q12.1) Do you agree that the independent appeal panel will meet the patient's right to appeal?

As above, we do not think that an appeal panel will meet the patient's right to appeal. There must be an initial right to review the decision as a whole, and then an opportunity for an appeal to the court.

Q13) We would welcome any further general comments you may wish to offer here

No-fault scheme is premature, and unnecessary
We remain concerned about the cost of implementing a no-fault scheme, and it is far from certain that it will have a significant impact in reducing litigation – there are still issues of

causation and quantum that will need to be resolved. We have not seen any evidence to suggest that the planned scheme has been properly costed. Much has changed since the No Fault Group was first commissioned, and the reforms that have been and are soon to be put in place will go much further than this proposed scheme in ensuring that cases are resolved efficiently and that access to justice is maintained.

Recent reforms towards improving the court process include the Sheriff Court procedure which will allow lower value claims to be determined more quickly. Specialist sheriffs now also deal with clinical negligence cases with case management, often resulting in early disclosure and settlement. Reforms have also taken place towards improving the culture of openness and transparency - there has been an improvement in adverse events reporting as per the Healthcare Improvement Scotland framework; and the statutory duty of candour has been introduced. These reforms all need time to bed in, and the full effects analysed before any further major changes are made.

There are other reforms to be implemented imminently, including a clinical negligence protocol, which should lead to further improvements in disclosure and early settlement; QOCS is also to be introduced next year, removing one of the known hurdles for potential claimants. It is unfortunate that this scheme is being proposed before these changes have even been introduced.

Proposed definitions
We are concerned about the status of the definitions on page 20 – are these intended as aids to understanding the consultation, or will they form part of any proposed legislation? If they are to become enshrined in any proposed legislation, several of the definitions must be revised. The definition of harm is too restrictive, and should be amended as follows (amendments in red):

"…this may include flawed or inadequate consent; affront/outrage; breach of confidentiality; pain and suffering, or death caused through unnecessary treatment or lack of treatment; loss of a probability of a cure/successful treatment; reduced life expectancy; increased likelihood of recurrence."

We are also concerned that should the redress scheme go ahead, people should be able to access legal aid in the form of advice and assistance to help with the scheme. The definition of "Other proceedings" in the legal aid scheme needs to be extended to ensure that the redress scheme falls within its remit.

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