IRISH MEDICAL ORGANISATION
Ceardchumann Dochtúirí na hÉireann

IMO Submission to the Expert Group to review the law of Torts and the current system for the management of clinical negligence claims.

7th August 2018

Thank-you very much for your letter dated 6th July 2018 seeking the views of the Irish Medical Organisation on the law of torts and the current system for the management of clinical negligence claims . The IMO is concerned about the culture of adversarial litigation following an adverse event and welcomes the opportunity to provide input into the work of the Expert Group on this matter. Please find attached our comments on the Broad areas to be considered by the Group.

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 current system of litigation following an adverse event is not in the interests of patients, healthcare professionals or the State.

Patients can often experience significant trauma or injury as a result of an adverse event. For many patients lengthy and expensive court proceedings are often the only recourse available to them in order to receive an explanation and compensation for what happened and to ensure appropriate long-term care and support. Further, this process can subject the patient to a considerable amount of emotional stress and serve to aggravate the patient's condition.

Doctors are often the second victims of an adverse event. In addition to the trauma of causing injury to a patient, the majority of doctors undergo a significant amount of emotional stress as a result of litigation and fitness to practice procedures that accompany litigation. Fear of damage to their reputation and loss of livelihood can impact on a doctor's psychological and physical health resulting in anxiety, depression and exacerbation of existing health problems.

In addition to the growing cost of claims experienced by the State Claims Agency, the consequences of an adversarial litigious system is that doctors will often practice defensively ordering more diagnostics or treatment than necessary or doctors may avoid treating certain

high-risk patients. For some it may lead to early retirement or they may discourage others from entering the profession. In addition with increasing cost of medical indemnity, it may become impossible for certain specialties such as Obstetrics, Orthopaedics or spinal surgery to practice privately in Ireland, placing greater pressure on the public system.

In 2015, the IMO made a number of recommendations to the Oireachtas Committee on Health to improve the current system. Some legislative reform has begun, albeit in a piecemeal fashion, with many of those legislative changes yet to be commenced.

- legislation to support Open Disclosure - Court proceedings can often be avoided if there is full and open disclosure including an apology following an adverse even, however fear of litigation is a major barrier to apologising and communicating with patients following an adverse event. Part 4 of the Civil Liability amendment Act (2017) provides protection to healthcare professionals when making a voluntary open disclosure in accordance with the Act and is due to be commenced in September 2018;
- changes to Tort Law and the litigation process to speed up the process and reduce the cost of litigation including the introduction of periodic payment orders, pre action protocols and case management rules as recommended by the Working Group on Medical negligence. The Civil Liability (Amendment) Act 2017 provides for the award of damages by way of a periodic payments order in certain circumstances where a plaintiff has suffered catastrophic injuries and courts have begun awarding interim payments;
- The Minister for Justice and Equality is due to publish regulations in relation to Pre-Action Protocols in Clinical Negligence Actions as provided for in the Legal Services Regulation Act 2015.

The IMO also recommends

- greater use of alternative dispute resolution mechanisms including arbitration, mediation and collaborative practice;
- consideration of a no faults claims system for certain cases where liability is clear;
- automatic entitlement to Health and Social Services for People with Disabilities;
- safe staffing and resourcing of the healthcare services – under-resourcing and understaffing are regularly cited as factors contributing to adverse events while our bed occupancy rates in Irish Hospitals have risen to an average of 97%, and sit even higher, at an average of 104% in Model 4 hospitals well above internationally recognised safe levels of occupancy of 85% and above a 92.5% tipping point whereby clinical staff become more prone to error due to rationing of resources and elevate stress levels.

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;

Recourse to the courts to resolve clinical negligence claims should be a last resort after all other avenues have been explored. There is a need to promote alternative dispute resolution mechanisms to the courts such as mediation, arbitration or collaborative practice. For example, collaborative practice requires the patient and their family, healthcare professionals, solicitors and insurers to commit to an open and transparent resolution of their dispute without going to court.

Where there is no dispute about liability, consideration should be given to the introduction of a no faults claim system for certain cases. No faults claims mechanisms can provide timely and efficient access to compensation for injured parties without recourse to the courts. While the UK rejected a No Faults Claims systems for fear it would increase the number of claims, other countries such as New Zealand and the Scandinavian countries have had no-fault systems in place since the 1980s. Following the introduction of no-faults claims system in France in 2004, court proceedings for clinical negligence fell by a third.

Under no faults claims systems it is no longer necessary to prove clinical negligence but patients do have to prove that the treatment or medical process caused them harm. There is generally some guidance on compensation payments and in some countries the system is limited to certain types of injury, for example in US States of Florida and Virginia a no-faults system applies to birth injuries only.

While some reform of the Personal Injuries Assessment Board (PIAB) processes and awards is needed, there is no reason that certain clinical negligence cases could not be assessed by the PIAB or a similar entity.

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;

The HSE can address some of the problems encountered by persons involved in clinical negligence claims by:

1) Providing Supports for Open Disclosure

Successful Open Disclosure policies ensure that both patients and healthcare staff alike are supported throughout the disclosure process and the patient safety investigation. Open disclosure is stressful and time consuming for all involved. Often it can take some time to establish the facts, there may be differences in opinion or a breakdown in communication. Open Disclosure policies can fail without an organisational culture that supports open disclosure. The HSE must ensure that all the supportive structures and resources are in place to support Open Disclosure not only in hospitals but also in general practice and community settings including comprehensive guidance material, counselling services, risk management teams, education and training programmes, support from colleagues and line managers.

2) Assuring automatic entitlement to Health and Social Services for People with Disabilities

People with disabilities, including those that arise from an adverse clinical event, should have automatic entitlement to health care and social supports, including access to community therapy services afforded by a Medical Card, so that patients and their carers are not required to take legal action in order to ensure appropriate long-term care and support.

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.

There has been some criticism of the role of the State Claims Agency in the management of clinical negligence claims. A "no fault liability" approach seems to be lost in very clear cases of clinical negligence, with cases are often settled on the steps of the courts with a perceived lack of accountability and inconsistency.

Management of claims can be improved through early dialogue with injured parties and representatives, pre-action protocols and timely availability of records, as well as greater use of alternative dispute resolution mechanisms.

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

Fear of litigation, fitness to practise procedures and damage to reputation have been identified as major barriers to open disclosure and improving the overall patient safety culture. The IMO supports Open Disclosure not only as a measure to prevent litigation but more importantly because patients have the right to an apology and explanation when things go wrong. The practice of medicine is increasingly complex and while the majority of healthcare professionals aim to provide the best care for their patients, incidents do occur. Rarely harm is due to wilful misconduct - most often harm is due to systems failure or unintentional human error. Doctors have a duty to be open, honest and transparent with patients, to reflect on adverse events and to take steps to ensure that such incidents are not repeated. Open Disclosure is not about apportioning blame but rather about keeping patients informed about investigations and preventing future patient safety incidents.

The IMO has been calling for a number of years for legislation to support Open Disclosure and made a number of the representations to the Oireachtas Health Committee on the Civil Liability (Amendment) Act 2017 which protects medical practitioners from admitting liability, fitness to practise procedures when voluntarily making an open disclosure to patients following an adverse event. Legislative proposals to introduce mandatory reporting of serious adverse events must ensure that medical practitioners are afforded the same protections as under the Civil Liability (Amendment) Act 2017. Doctors should also be protected from inappropriate criminal proceedings when acting in good faith and disclosing adverse events to patients in line with the legislation.