

Proposed NHS Redress (Wales) Measure Committee

Legal Services Commission Submissions to the Committee

The Legal Services Commission (LSC) makes the following submissions in response to the letter from the Committee dated 20th July 2007, inviting comments on the proposed Assembly Measure.

1. *Why is a Redress Scheme required?*

The LSC supports the introduction of such a Scheme for two reasons:

A. Access to Justice

The proposed scheme should help to promote access to justice by making it easier for individuals to pursue relatively low value claims, as well as, or in addition to, obtaining an apology, explanation etc following an unsatisfactory clinical outcome.

Traditionally, claimants have sought damages as compensation for adverse clinical outcomes. Clinical negligence damages claims are costly because such cases depend on expensive expert evidence and can require in-depth investigation of clinical treatment. Court proceedings can also be lengthy, so cases take years in total to be resolved. That adds to the costs, while placing claimants under a strain as they engage in the litigation process. Some decide to give up cases because of the stress and delay.

In lower value claims, the prospective costs of action can often be greater than the value of the claim. That is unsatisfactory for the organisations that finance pursuit and defence of claims, particularly where all the costs are paid out of public funds (the LSC in the case of unsuccessful publicly funded claimants; in Wales, in the case of defendants, mainly the Welsh NHS Trusts).

Accordingly, the LSC has adopted measures to try and ensure that cases are only publicly funded where the prospects of success, costs and damages are proportionate. Litigated clinical negligence damages cases have to comply with the following costs/benefit criteria (see criterion 5.7.3 of the Funding Code):

- If the prospects of success are very good (80% or more), likely damages must exceed likely costs;
- If the prospects of success are good (60% - 80%), likely damages must exceed likely costs by a ratio of 2:1
- If the prospects of success are moderate (50% - 60%), likely damages must exceed costs by a ratio of 4:1

Early in a case, whilst the merits are being investigated and it is not possible to estimate prospects of success with accuracy, there is flexibility in the application of these rules. However, cases with poor prospects i.e. clearly less than 50% are not eligible for funding (under criterion 5.7.2 (iii) of the LSC's Funding Code)

Consequently, cases with relatively modest damages may not be eligible for public funding, thus making it difficult for claimants to pursue them.

The proposed scheme should make it easier for such claims to be pursued as it will not require recourse to litigation, thus avoiding the costs (for both claimants and defendants), delay and uncertainty that arise from litigation.

B Wider range of outcomes

The proposed scheme should also make it easier for claimants to obtain an apology or explanation as to what took place. The litigation process (with its focus on compensation in the form of damages) has not been ideally suited to providing other remedies, although the LSC understands that claimants would often like welcome an apology and obtain reassurance that what happened to them will not happen to others – particularly in lower value claims. From a public funding perspective, the LSC would be unlikely to fund a claim where the primary purpose is to obtain an explanation etc unless damages were also sought and the case otherwise met the funding criteria. Such cases are usually referred to the NHS Complaints system.

The LSC is pleased to see that a “lessons learned” process will form part of the redress scheme. Whilst civil litigation can be viewed as holding the NHS to account when it fails to prevent negligent behaviour, it is by no means the most effective or efficient way by which improvements in practice could be identified. The LSC would like to see Wales NHS bodies take a similar “lessons learned” approach to cases that exceed the redress scheme threshold.

2. Does the proposed Measure achieve the policy objective?

The LSC does not feel able to comment in detail on this question, as the detail of the scheme will depend on Regulations. However, as indicated above, the LSC welcomes the provision for a wider range of outcomes than just financial compensation, the typical remedy sought in clinical negligence litigation.

3. What are the views of stakeholders who will have to work with the scheme?

The LSC has two observations:

A. Scheme Parameters

The LSC is concerned to ensure that the maximum level of compensation that may be obtained under it is consistent with enabling as many claimants as

possible to either pursue redress under the scheme or with the benefit of public funding (assuming they are financially eligible and do not have any alternative means of funding litigation, such as legal expenses insurance). The LSC would propose that the level be set at £30,000. The average costs of a publicly funded clinical negligence claimant are c£14,500. As explained above, cases with “good” prospects must meet a damages/costs ratio of 2:1. If the maximum level of compensation under the scheme is set below £30,000, there is a risk that some claims with “good” prospects may fall between the scheme and public funding.

B. Funding

The LSC notes that the Measure in sections 7 and 8 enables regulations to provide for claimants to be represented in connection with advice, and for that advice to be funded as part of the scheme.

The LSC welcomes that provision as far as it goes. The LSC has provided support for eligible clients with cases in the Speedy Resolution Scheme pilot, but would not expect to make public funding under the CLS available for advice/representation under the proposed redress scheme, given the intended provisions. In our view, any appropriate legal advice and representation needed within the scheme or by a client who has received an offer under the scheme, should be provided for as an integrated part of the scheme itself. Such support may well be essential for all clients within the scheme, not just those that fall within the current means and merits criteria for legal aid funding. As funding of advice is an important element of the redress scheme, the LSC would welcome greater clarity on the role of independent advice under the scheme. This could be achieved by setting out in the Measure rather than in the regulations a commitment to provide funding, or even the structure of funding arrangements.

4. What will be the practicalities of making the system work and does the proposed Measure make provision for these?

The LSC has a number of observations in relation to the specific provisions in the Measure:

- 3 (2) (a) Is it proposed that unlike the Speedy Resolution Scheme, this scheme should be open to minors/patients under a disability?;
- 5 (2) (a) There ought to be provision for time limits in respect of the conduct of the investigation;
- 5 (2) (a) It is not clear to the LSC whom it is intended should oversee the investigation;
- 7 (3) The LSC is concerned to ensure that claimants have access to quality assured legal advice. The LSC would propose that provision of advice pursuant to clauses 7 (1) & (2) of the Measure be restricted to

firms that have solicitors on the Law Society and/or AVMA clinical negligence panels. That would replicate the position under the pilot Speedy Resolution Scheme. Given the specialist nature of these cases and that investigations are unlikely to be as extensive as those in litigation, the LSC considers it very important that specialists advise claimants. Membership of the above panels is a requirement for firms undertaking publicly funded clinical negligence work and the LSC's experience is that panel members deliver significantly better outcomes for clients.

The LSC would be concerned if it were proposed that all advice etc could be given by or on behalf of NHS Wales. The LSC notes clause 9 (2) (d) of the Measure whereby regulation may provide for "persons or bodies" to provide advice without charge. That could permit NHS Wales itself (e.g. through a restructured Welsh Health Legal Services) to provide the advice. The LSC would prefer the Measure to state that there will be a facility for legal advice in connection with the scheme to be provided independently of NHS Wales.

Appeals

The LSC notes that the Measure does not appear to provide for any appeal/review process.

The LSC considers that there ought to be provision for appeals/reviews of any outcome and that it would be appropriate for the general framework to be set out in the Measure rather than be left to Regulation.

The Speedy Resolution Scheme does not have an appeals procedure. However given that the redress scheme is intended to be permanent, the amount of damages that may be at stake and the consequent impact on claimants' lives, for claimants to have confidence in it they should be able to challenge an outcome, if appropriate.

As with the provision of advice (above), the LSC considers that any appeal/review decision ought to be made by an independent body.

5. Is it appropriate that so much be done by regulations i.e. the details of any scheme or schemes will be decided by Welsh Ministers?

The LSC's preferred approach would be for more detail to be set out in the Measure rather than to be left to regulations. Whilst some details of the scheme may regularly need to be revised, and may usefully be dealt with by regulation, the structure of the scheme (e.g. with regard to funding, independence of advice, availability of an appeals process, existence of time limits) should be defined in the Measure. This would facilitate debate on the terms of the scheme and enable informed comment to be made in advance of

the proposals, important in a specialist area with the ability to impact significantly on peoples' lives in such a politically sensitive area as health care.

6. *Would it be better for the Assembly to seek the power from Westminster to introduce a 'no fault' scheme?*

The LSC does not have a strong opinion on this question. However, as an observation, the LSC doubts that a 'no fault' scheme would reduce the number of claims, the time taken to investigate them or the overall costs of the scheme. A no fault scheme would mean that clients whose health declined because of the treatment they received would be eligible for compensation, regardless of whether the treatment was negligently given, widening considerably the range of outcomes that might lead to a successful claim.

Whilst no fault schemes do exist in other jurisdictions (such as New Zealand), each has to define the circumstances under which an individual is entitled to compensation. In a clinical or medical context this can be problematic, often effectively re-introducing tests similar to fault/negligence. We note that the Chief Medical Officer's recommendations on a no fault scheme regarding severely neurologically impaired babies are not proceeding, presumably in the light of the financial burden such a scheme might create.