FACULTY OF ADVOCATES

RESPONSE

by

FACULTY OF ADVOCATES

to

SCOTTISH GOVERNMENT

on

NO-FAULT COMPENSATION IN SCOTLAND FOR INJURIES RESULTING FROM CLINICAL TREATMENT

Overview

Contributors

- **Impartiality**

  The Faculty has a number of advocates who have experience of acting on behalf of both pursuers and defenders in clinical negligence claims. It is intended to provide informed comments in an objective and impartial manner.

Support for Reform

- **Redress Without Lengthy Court Process**

  The Faculty supports steps which will improve the justice system in Scotland. It shares the Review Group's desire to ensure that persons

injured as a result of medical treatment receive appropriate redress without the need to go through a lengthy court process.

- **Success of Personal Injury Reform**

  Recent reform of procedure in personal injury cases in the Court of Session has been extremely successful. Further reforms are planned to replicate this success in clinical negligence and catastrophic injury cases. These reforms include the Civil Justice Review and changes to the Rules of Court.

Reforms for Clinical Negligence and Catastrophic Injury Cases

- **Aims**

  The Faculty shares the Review Group's desire to ensure that persons injured as a result of medical treatment receive appropriate redress without the need to go through a lengthy court process.

- **Personal Injury Users Group**

  The Court-appointed Personal Injury Users Group (on which the Scottish Government has membership) has reviewed the issues raised by the Review Group in relation to the problems with clinical negligence actions. These issues were specifically addressed by a sub-group whose membership included a QC specialising in this area, representatives from the CLO and the medical defence unions, and specialist practitioners who act regularly for pursuers in such claims.

  The outcome of this review was unanimous: Reform of the court process was regarded as essential and a series of proposals to improve the procedure in clinical negligence cases (and other cases which do not fall within the personal injury procedure) was made.

- **The Proposals**

  The draft proposals of the PIUG include provision for, and the power for the Court to order or take steps to ensure:

  - early access to individuals to facilitate precognition (the taking of statements from key personnel);

- early exchange of essential information and expert evidence;
- early focussing of the issues between the parties and a narrowing of those issues;
- candour;
- meetings between the parties to resolve issues;
- the avoidance of delay; and
- proof only as deemed necessary on remaining issues that cannot otherwise be resolved.

- **Likely Outcomes**

  The Faculty believes that implementation of these proposals will lead to greater openness, reduced delay, and a higher level of satisfaction with the litigation process, while compensating persons injured by errors in the medical treatment they have received.

  The Faculty is of the view that these changes will meet the criticisms made by the Review Group[1] and that they will lead to considerable cost savings.

- **Timetable**

  It is understood that these proposals are at the drafting stage and that they will be placed before the Court of Session Rules Council in January 2013.

Other Potential Reforms

- **Problems Estimating Life Expectancy**

  One of the major disputes in high value clinical negligence cases is the provision of lifelong care. The life expectancy of neurologically impaired children is an issue upon which there is frequently a disparity between the views of eminent experts. This can result in a huge gulf between the parties' respective valuations of the claim and makes resolution on a lump

[1] Report Volume 1, paragraph 2.10

sum basis difficult to achieve. It is often the barrier to resolution of a claim where all other matters are agreed.

- **Periodic Payment Orders**

  The courts in Scotland do not have the power to make an award of periodical payments unless the parties consent to such an order being made.[2]

  Following judicial criticism of the lack of such a power in England[3], the corresponding legislative provision in England was amended by the Courts Act 2003 (c. 39). The Faculty considers that in clinical negligence cases there is a clear need for the Court to be given the power to make an award of periodical payments in any case. The use of such a power is likely to save court time and legal costs.

[2] Damages Act 1996 (c.48), section 2; *D's Guardian v Greater Glasgow Health Board* 2011 SLT 1137; see also *Simon v Helmot* [2012] UKPC 5

[3] Wells v. Wells [1999] 1 AC 345, per Lord Steyn at page 384

Cost Benefit Analysis

- **Basis for Assumptions**

  The Faculty is concerned about the assumptions made about the number of claims that would be brought under a no-fault system and questions the basis for these assumptions.

  Furthermore, as the Ministerial Foreword to the Consultation document notes, the estimates produced are not predictions of what a no-fault scheme would cost in the future, and acknowledges that the volume and level of cases handled by the medical defence unions and private healthcare providers is not properly understood.

  The Faculty also notes that analysis of this issue in England led to an assumption four times greater than that assumed by the Scottish research team.

- **Lack of Detail**

  Even if these assumptions were well-founded, it is difficult to measure the impact of any no-fault scheme that might be introduced without greater detail about the criteria for eligibility and how causation is to be established. For example, is it intended that claimants satisfy a suitably qualified assessor or is causation to be determined independently?

  Currently the majority of time and expense in clinical negligence claims is spent addressing issues of causation. These are often complex and require considerable expert evidence. If a claimant is to prove causation, the need for suitably qualified expert opinion will remain. The difficulties in identifying and instructing such an expert, and the cost of doing so, are likely to be the same as they are at present. The same issues arise in relation to expert opinion on life expectancy.

The Necessity For Any New Scheme In The Light Of Current Reforms

- **Opportunity**

  The Faculty is of the view that the need for reform in clinical negligence cases has already been considered in detail and reforms are soon to be introduced to meet the concerns raised. The Faculty believes that these reforms represent a real opportunity to improve the current system without incurring significant expense or losing sight of the principles of restorative justice.

- **Restorative Justice**

  The Faculty believes that restorative justice is best achieved by improvements to the current system rather than a move towards distributive justice under a no-fault scheme.

- **Cost**

  The Faculty believes that the aims of the Review Group can be achieved by "cost-neutral" changes to the existing system. The Faculty is concerned that introducing a no-fault scheme alongside a right to litigate will add another very expensive layer of cost to the current system, a cost disproportionate to the benefit any such scheme is likely to provide.

  What is proposed by the Review Group is not in fact close to the Swedish model, the key components of which are adequate social provision, a cap on damages, and strict eligibility criteria. None of these features are being proposed by the Review Group at the moment.

  The Faculty notes that some 50% of claims made under the Swedish scheme are ineligible. To adopt the scheme proposed by the Review Group, which does not use the Swedish eligibility criteria to filter claims, is likely to result in a substantial increase in the cost of dealing with such claims. The absence of a cap on awards will further increase this cost.

  The Faculty also notes with concern that following the introduction of a no-fault scheme in New Zealand the outstanding claims liability rose dramatically – from $644 million to $2.167 billion in the 4 year period between 2005 and 2009.

  Under the existing fault based system in England just under 0.1% of births in the decade from 2000 resulted in injuries which led to the NHS paying

out for damages[4]. In total, compensation claims linked to maternity care alone led to £3.1 billion in payouts, with 40% being paid out for cerebral palsy.

In Scotland[5], more than £70 million was paid out by NHS Health Scotland between January 2009 and June 2011 in clinical negligence cases relating to stillbirths and babies born with disabilities.

Question 1: What, if any, steps do you feel are necessary or appropriate to ensure that when an error has occurred, patients receive a meaningful apology?

The Faculty is conscious that Margret Mitchell MSP has already launched a consultation on this issue. She has proposed a Bill to provide that an expression of apology falling short of an admission of liability is inadmissible as evidence in civil proceedings. The Review Group is referred to the Faculty's response to that consultation.

Question 2. Do you agree that the principles and criteria set out above are essential in a compensation system?

No □

2.1 Are there any to which you would attach particular priority or importance? Are there any others you would add?

The Faculty is of the view that of the criteria set out by the Review Group the following are essential:

- The scheme is compatible with the European Convention on Human Rights;
- Decisions about compensation are made through a robust and independent process;
- The scheme has an independent appeal system;

[4] BMJ 2012; 325:e7290.

[5] http://www.scotsman.com/news/health/70m-paid-out-by-nhs-health-scotland-due-to-birth-related-negligence-1-2413788

- Decisions about compensation are timely;
- A reasonable time limit is set for compensation claims;
- The scheme does not prevent patients from seeking other forms of non-financial redress, including through the NHS Complaints system;
- The scheme does not put barriers in place for referral to regulators of any cases which raise grounds for concern about professional misconduct or fitness to practise;
- The scheme provides an appropriate level of compensation to the patient, their family or carers; and
- The scheme is affordable.

Question 3: Do you agree that these criteria are desirable in a compensation system?

No □

3.1 Are there any others you think are desirable and should be included?

The Faculty is of the view that of the criteria set out by the Review Group the following are desirable:

- The scheme contributes to rehabilitation, recovery, and the restoration of trust;
- The scheme encourages transparency in clinical decision-making;
- The scheme is easy to access and use, without unnecessary barriers, for example created by cost or the difficulty of getting advice or support;
- People are able to get the relevant specialist advice in using the scheme;
- The public in general trusts the scheme to deliver a fair outcome;
- People who have used the scheme feel that they have been treated equitably;

- The scheme makes proportionate use of time and resources;

- The scheme has an appropriate balance between costs of administration (e.g. financial or time) and the level of compensation awarded; and

- The scheme treats staff and patients fairly/equitably.

Question 4: Do you have views or ideas on how a compensation scheme could more effectively contribute to the wider issues identified above?

The Faculty is of the view that the wider issues identified by the Review Group are matters for professional bodies and regulators.

Question 5: Based on the background information on the system in operation in Sweden given in Annex A would you support the approach suggested in Recommendation 1?

No □

If not, why not and what alternative system would you suggest?

- **Room for Improvement**

  The Faculty is in agreement with the Review Group that there are areas in which improvements can and should be made to the existing rules of procedure applicable to claims of clinical negligence.

  The Faculty is unhappy with the length of time it takes for claims arising from medical treatment to be resolved.

- **Why Claims Take Time To Resolve**

  There are many reasons for this including the time taken by pursuers to raise court proceedings[6], the number of experts whose opinions are required, and the availability of court time to accommodate often lengthy hearings on evidence.

[6] It should be remembered that section 17 (3) of the Prescription and Limitation (Scotland) Act 1973 (c. 52) suspends the limitation period for persons lacking capacity, in practice most commonly neurologically impaired children where claims are often made many years later when a more accurate prognosis is possible.

The main reason for the time taken to resolve clinical negligence cases in the courts is their inherent complexity, particularly in relation to causation. The Faculty is of the view that changing the threshold for possible recovery by abandoning the need for proof of common law fault in favour of a statutory "gatekeeper" test, whatever that might be, will not necessarily render cases simple and easier, and thus quicker, to process.

- **Forthcoming Reforms**

The Faculty is of the view that many of the concerns voiced by the Review Group (such as early disclosure of information including expert reports, fair notice of factual allegations, and focusing the issues between parties) will be addressed by implementation of the Civil Justice Review, and introduction of the proposals for changes in the Rules of Court applicable to clinical negligence and catastrophic injury cases referred to in the overview above. It is anticipated that implementation of these reforms, and the recommendations of Sheriff Principal Taylor's Review of Expenses and Funding of Civil Litigation in Scotland will secure considerable improvements on current arrangements.

The Faculty is of the view that these reforms ought to be given the opportunity to work and their effectiveness measured before considering whether a fundamental change such as Recommendation 1 is needed.

Ultimately, the Faculty remains of the view that the current system, with improvements soon to be introduced, is a better means for compensating persons injured as a result of errors in diagnosis and treatment.

- **Social Care Provision**

The Review Group recommends that a modified version of the Swedish model be established. As Recommendation 1 acknowledges, the Swedish model operates within the wider context of comprehensive social care provision. The Faculty notes that, in an interview with Gary Gibbens on Channel Four News broadcast on 15th October 2012, the First Minister stated:

First Minister: "We're going to defend the social structure of Scotland..."

Gary Gibbens: "But people will scratch their heads and say how come Alec Salmond can do it in an independent Scotland and no one else in the world can be more generous at the moment?"

First Minister: "Well, I don't agree that nobody else in the world – Let's go to a few Scandinavian countries and you'll see social provision far in advance of what we are able to provide in a devolved Scotland at the present moment."

The Faculty questions whether, in the context of the less generous social provision available in Scotland, the proposed no-fault scheme will achieve the aims of financial compensation, rehabilitation, recovery, care, and the restoration of trust.

The Faculty notes that under the Swedish scheme disability compensation is paid as a lump sum in line with published tables. The Faculty does not support the use of such a tariff scheme. Instead, the Faculty believes that any system of compensation for injuries arising out of medical treatment should recognise the individual circumstances of victims.

- **Insurance**

The Faculty notes that under the Swedish scheme, awards for pecuniary losses are not made where the loss is covered by other insurance. This contrasts with the current position in Scotland where in general the fact that an injured person has a contract of insurance covering any or all of his loss does not affect the quantification of his claim in a question with the wrongdoer.[7]

- **Law Reform (Personal Injuries) Act 1948 (11 & 12 Geo. 6 c. 41)**

The Faculty also notes that under section 2(4) of the 1948 Act, in an action for damages for personal injuries, there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the NHS. This may lead to a different measure of damages than the Review Group expected under a no-fault scheme.

[7] Parry v. Cleaver [1970] 1 AC 1 (HL); Smoker v. London Fire and Civil Defence Authority [1991] 2 AC 502 (HL); Longden v British Coal Corporation [1997] 3 WLR 1336; and section 10 (a) of the Administration of Justice Act 1982 (c. 53).

- **Failure to Achieve Aims**

  The Faculty notes the valid concerns raised in the Review Group's own research that, due to a variety of factors, the introduction of a no-fault system would not necessarily achieve their aims:

  - Under-utilisation of the scheme, particularly by disadvantaged or vulnerable groups such as the elderly and ethnic minorities;
  - Rehabilitation remains problematic;
  - Low rate of entitlements/compensation available under the scheme when compared to settlements/awards;
  - No increased effectiveness in dealing with preventable adverse events within the health system;
  - No improvement in learning from medical error with a view to improving patient safety;
  - Failure to develop appropriate institutional and other mechanisms for facilitating professional accountability;
  - Marked disparity between the no-fault schemes and the public health system; and
  - Difficulties posed by historical, socio-cultural, institutional and legal trajectories in determining eligibility criteria.

- **Experience of Other No-Fault Clinical Injury Schemes**

  Under the Vaccine Damage Payments Act 1979 (c. 17) (as amended), anyone suffering at least 60 per cent disablement who can establish that it was caused by vaccination against specified diseases is entitled to no-fault compensation, up to a maximum of £100,000.

  Experience under this limited no-fault compensation scheme (of a higher rate of claims than predicted, difficulties with proof of causation, inconsistent decision-making, a low success rate, a high appeal rate, and a

low success rate at appeal[8]) would suggest that there is unlikely to be individual claimant (or public) satisfaction and trust in the proposed no-fault scheme.

Question 6: Would you support the approach in Recommendation 2? This would mean for example that where treatment carries a known risk and the patient has given consent to that treatment it would not be eligible.
No □

If not, why not?

- **Certainty**

  The Faculty is of the view that identifying those injuries that would not be eligible under a no-fault scheme has the advantage of certainty and is likely to lead to a greater number of "successful" claims under a no-fault scheme.

- **Problems With Consent**

  However, consent to treatment as the means of determining whether a claim is eligible is arbitrary. If it is assumed that most patients are properly advised of the risks of treatment, the use of consent as the criterion for eligibility is likely to bar the majority of claims arising from surgical treatment. The exclusion of large numbers of claims is difficult to reconcile with reforms which seek to be more inclusive.

  The Review Group do not adopt the Swedish "avoidability" test and the Faculty is of the view that it is difficult to identify any other workable criteria for eligibility under a no-fault scheme. Consequently, we foresee the following problems:

  - It is unclear how the adequacy of the advice in relation to the risks of a proposed treatment would be determined;

  - Consent is unlikely to be a feature of claims based on a failure to diagnose a condition that has resulted in injury;

  - The use of consent to treatment as the criterion of eligibility seems to reintroduce the concept of fault and to place the responsibility for the outcome on patients;

[8] Vaccine Damage Payments (2004) Consumer Law Today 4 (5) (1); Kennedy & Grubb, Medical Law, 3rd edition (2003), page 1664.

- No account is taken of those patients who misunderstand the risk;
- No account is taken of those patients who are unable to provide consent in advance due to the emergency nature of certain treatment;
- No account is taken of patients who are unable to give consent due to their age; and
- Difficulties dealing with cases involving joint wrongdoers.

If yes, what other injuries would you consider should not be eligible?

Question 7: Do you support the view that, if introduced, a no-fault scheme should cover all clinical treatment injuries (e.g. private healthcare and independent contractors) and all registered healthcare professionals and not just those directly employed by NHS Scotland?

No □

If not, why not?

7.1 What, if any, difficulties do you foresee in including independent contractors (such as GPs, dentist etc) and private practice?

7.2 What are your views on how a scheme could be designed to address these issues?

In view of the fact that the research which has informed the Review Group's recommendations is incomplete, serious questions arise as to whether the assumptions made as to the number of claims and the cost of the proposed no-fault scheme are justified.

If the proposed scheme is to extend to cover claims arising from diagnosis and treatment by private healthcare providers and independent contractors (such as GP's, dentists, orthodontists, pharmacists, and a potentially wide range of therapists) the number of claims, and therefore the cost of the scheme is likely to increase substantially.

Difficulties are likely to arise in determining the financial contribution individual healthcare providers will be required to make to the funding of the scheme so that they are covered by it. This additional cost will inevitably be borne by the patients of these healthcare professionals.

Question 8: The intention is that if introduced the no-fault system will not be retrospective. However, consideration will need to be given to when and how we could transfer to a new system and how outstanding claims could be handled if/when a no-fault system was introduced. What are your views on how outstanding claims might be handled?

The Faculty agrees that any no-fault scheme which may be introduced should not be retrospective in effect.

Once a date is fixed for the commencement of such a scheme, claims can be admitted by reference to that date.

If claims are admitted to the scheme by reference to when they are made, the scheme is likely to have some retrospective effect. If, however, claims are admitted to the scheme under reference to the date when an injury arises, retrospective effect can be avoided.

Question 9: Do you support the approach in Recommendation 5?
No □

If not, why not?

It is not clear what is meant by "need". The purpose of any system seeking to compensate persons injured as a result of medical treatment should be exactly that – compensation (to restore the injured person, so far as an award of money can, to the position he would have been in but for the negligence/medical treatment).

9.1 What are your views on the assumption that the level of payments will be similar to those settled under the current system?

At present, almost all claims settled extra-judicially are settled at a discount from their full value. This is because pursuers are concerned that they will not win their cases, as highlighted by the Review Group by reference to the "battle of the experts".

Under a scheme where there is no requirement to establish fault on the basis of the test in *Hunter v Hanley 1955 SC 200*, and where the Faculty presumes that the process will not be adversarial as at present, the Faculty anticipates that discounted settlements will no longer be achieved. If so, it is likely that the overall level of payments made to claimants will increase substantially even if the number of claims remains the same.

To estimate the costs of the proposed scheme based on data supplied by the CLO for closed cases, where liability could have been in dispute, is flawed. In determining the level of an award the administrators of the scheme will be in the position of a judge determining the quantum of damages in a case where liability has been admitted. The possibility of a discount will not arise. Thus, the overall cost of the scheme is likely to be greater than estimated.

Question 10: Do you support recommendations 6 – 9 as proposed by the Review Group?

No

If no, why not?

The Faculty notes that Recommendation 6 confines itself to cases where a claim under the no-fault scheme has failed. If so, Recommendation 8 cannot arise.

We assume that the intention is to retain the right to litigate in all cases and that any financial award made (whether under the no-fault scheme or in litigation) be deducted in any subsequent proceedings (whether litigation or a claim under the scheme).

The Faculty supports retention of the right to litigate, provided that this does not extend the limitation periods in sections 17, 18 and 19A of the Prescription and Limitation (Scotland) Act 1973 (c. 52).

The Faculty suggests that claims under the no-fault scheme should be made within a shorter period shorter than the (usual 3 year) limitation period which applies to court actions. A recurrent criticism of litigation is the time taken to resolve claims. The Faculty does not support a residual right to claim under the no-fault scheme where a person has chosen to litigate.

The retention of a residual right to litigate is likely to increase the time taken to resolve claims and to increase the cost of doing so.

The Faculty agrees that any financial award made (whether under the no-fault scheme or in litigation) be deducted in any subsequent proceedings (whether litigation or a claim under the scheme) in order to avoid double recovery.

Various arrangements to avoid double recovery exist in other schemes, for example criminal injuries compensation claims and miscarriage of justice claims. It is not clear if it is intended that a claimant who has made a successful claim under the no-fault scheme, and who subsequently litigates, will be required to give the defender in the litigation credit for the sums received by him under the scheme, or if it is intended that the claimant will be entitled to claim "full" damages from the defender in the litigation with an obligation to reimburse the scheme. Further analysis of these arrangements is required.

The Faculty agrees that appeal from the adjudication of the no-fault scheme should be available to a court of law on a point of fact or law.

10.1 Do you have any concerns that the Review Group's recommendations may not be fully compatible with the European Convention of Human Rights?
Yes □

If yes, what are your concerns?

The Faculty notes that this question is posed in connection with the retention of the right to litigate and/or to appeal from an adjudication under the proposed no-fault scheme. It therefore considers only issues arising under Article 6 of the ECHR ('the right to a fair trial'). The Faculty considers, for the reasons set out below, that there are other aspects of the proposed no-fault scheme which may raise issues under the ECHR.

<u>Article 6</u>
The Faculty is of the view that in principle the proposed scheme could be compliant with Article 6. It is proposed that claimants, who proceed under the no-fault scheme, would retain the right to litigate (subject to a proviso to avoid double recovery). It is also envisaged that a person who litigated unsuccessfully should have the right to then proceed under the scheme (subject to the same proviso).

The Faculty do not support the latter proposal, and consider that a person who has litigated unsuccessfully should not retain the right to proceed under the scheme (see above). If the Faculty's proposal were to be adopted, the scheme should still be compliant with Convention rights. The Faculty considers that any issue about

difference in treatment which might arise under Article 14 (between those who proceeded under the scheme first and those who litigated first) could probably be justified on the grounds that it was an essential feature of the no-fault scheme that claims be made and disposed of in much stricter time-limits than would apply to civil court actions.

Article 1, Protocol 1

Article 1 of Protocol 1 ("A1, P1") protects the right to property. How the proposed no-fault scheme is to be funded is unclear. It seems likely that a levy would be imposed on all health professionals whose actions could be the subject of claims under the scheme. We presume that private healthcare providers and independent contractors would be required to pay an individual levy.

The Faculty considers that a compulsory levy to fund the scheme imposed on all health professionals who wished to practise might be found to be an "interference with possessions" within A1, P1. However, such a measure might be justified as striking a fair balance between the general interests of the community and the requirements of the protection of the individual's fundamental rights.

It is difficult to be certain without knowing the detail of the scheme. The Faculty is of the view that in any scheme, consideration must be given to the burden imposed on independent contractors (or particular independent contractors) by the scheme and any levy imposed. If they are asked to bear a disproportionate and excessive burden, this may raise issues about the compatibility of the scheme with A1, P1.[9]

The Faculty notes that it is not intended that any scheme would be retrospective. Retrospective effect might raise a further issue under A1, P1.[10]

Question 11: Do you agree with the Review Group's suggestions for improvements to the existing system?

No □

[9] AXA General Insurance Co. Ltd. v. Lord Advocate 2012 SC 122, per Lord Hope at paragraph [36].
[10] AXA General Insurance Co. Ltd. v. Lord Advocate (supra), per Lord Reed at paragraph [121].

11.1 Do you have any comments on the proposed action in relation to these suggestions?

As noted above, the Faculty is in agreement with the Review Group that there are areas in which improvements can and should be made to the existing rules of procedure applicable to claims of clinical negligence. Implementation of the Civil Justice Review and the proposals of the Personal Injury Users Group and the Rules Council will address many if not all of these areas.

The recommendations of Sheriff Principal Taylor's Review of Expenses and Funding of Civil Litigation in Scotland are also likely to bear on these matters. Overall, these changes are likely to lead to a considerable improvement on current arrangements. The Faculty is of the view that the effect of these changes should be measured before any decision is taken to establish a no-fault scheme to replace litigation as the means whereby claims arising from medical treatment are met.

Question 12: Would you support the establishment of a scheme specific to neurologically impaired infants if a general no-fault scheme is not introduced?

No □

12.1 What are your views on the Review Group's suggestion that the future care component of any compensation in such cases could be provided in the form of a guarantee of delivery of services (both medical and social care) to meet the needs of the child, instead of by way of a monetary sum?

- **Fairness**

  The Faculty is of the view that to establish a scheme specific to neurologically impaired infants would be iniquitous. Children who are neurologically impaired after birth and neurologically impaired adults are equally deserving of compensation. The Faculty notes that a similar suggestion was discussed in England and rejected.

- **Dissatisfaction with NHS**

  Health Boards are already obliged to provide treatment. In the experience of those members of Faculty used to dealing with claims brought on behalf of children neurologically injured by events at and around the time of birth, many pursuers have already experienced the care provided by the NHS. Dissatisfaction with both the quality and amount of that care is very

common. It is in part for this reason that the cost of private health care is routinely claimed.

- **Periodic Payment Orders**

  Litigation costs are currently reducing as a result of the increased use of periodic payment orders, which avoid disputes about life expectancy. If the Court were to be given the power to make a periodic payment order in any case, the Faculty believes that further savings in terms of time and cost would be possible.

- **Cost**

  We note that the Review Group considers that economies of scale will lead to savings in respect of the future care component of claims. In the Faculty's experience, the bulk of future care costs comprise private nursing care costs. These are unlikely to be subject to economies of scale.