SUBMISSION OF THE BAR COUNCIL OF IRELAND TO THE JOINT COMMITTEE ON HEALTH AND CHILDREN ON THE CHALLENGE OF RISING COSTS IN PROFESSIONAL MEDICAL INDEMNITY INSURANCE

1. INTRODUCTION

(a) General Remarks

1. The Bar Council welcomes the opportunity to make a submission to and to address the Joint Committee on Health and Children (the "Joint Committee") on issues relating to the rising costs of professional medical indemnity insurance and thanks the Chairman of the Joint Committee for his invitation.

2. This document contains a summary of the Bar Council's views on some of the relevant issues and is intended to assist the Joint Committee in its deliberations. The Bar Council's representatives present at the meeting of the Joint Committee on 27 January 2015 will be happy to elaborate on these issues and to respond to any questions which the members of the Joint Committee may have either at or subsequent to the meeting.

(b) Bar Council

3. The Bar Council is the governing body for the barristers' profession in Ireland. Its role is to promote and improve the services which members of the Bar give to clients, to ensure that barristers uphold the highest standards of conduct, ethics and independence in their practice and to provide for appropriate independent complaints and disciplinary procedures to deal with complaints against barristers. The Bar Council is elected by members of the Bar.

(c) The Barrister's Profession In Ireland

4. There are currently 2,250 practising barristers in Ireland. More than half of the membership of the Bar are in practice for less than 10 years with around 35% being in practice for less than 7 years. Approximately 26% are in practice for less than 5 years.

5. The Bar of Ireland is an independent referral Bar. This means that at present each barrister is self employed and operates as a sole practitioner. The vast majority of barristers practise from the Law Library, a collective structure which facilitates the sharing of knowledge, experience and administrative resources.

6. In the area of medical negligence (as in most other areas of work), barristers are

instructed by solicitors. This applies both on the plaintiff and defendant sides. On the plaintiff side, solicitors instruct barristers to advise on and act for plaintiffs. On the defendant side, barristers are instructed by solicitors representing the indemnifying bodies such as the State Claims Agency ("SCA") and the Medical Protection Society ("MPS"). Barristers do not seek out clients for these cases but act on a referral basis from solicitors. Barristers are also bound by a critically important provision in the code of Conduct for the Bar of Ireland, namely, the "cab-rank rule". This means essentially that barristers are generally bound to accept instructions in any case in the field in which they profess to practise (having regard to their experience and seniority) subject to the payment of a proper professional fee. Barristers may not pick and choose clients for whom they act.

7. The area of medical negligence is a particularly complex and specialised field of work for barristers. While some barristers act for both plaintiffs and defendants, there are those who have become particularly skilful and specialised at acting for plaintiffs and others who have developed particular expertise in acting on the defendant side. The Irish Bar is fortunate to have barristers (both senior and junior) who have earned tremendous reputations in acting in complex medical negligence cases, much of the time without any guarantee of payment.

2. AREAS COVERED IN SUBMISSION

8. We propose in this submission to address a number of issues which have featured in the deliberations of the Joint Committee to date. We will first consider and comment on suggested improvements in the manner in which medical negligence cases are dealt with in the Irish legal system. We will then consider the question of a suggested cap on general and special damages. Finally, we will address the issue of professional fees before concluding with some general suggestions and observations.

3. MEDICAL NEGLIGENCE CLAIMS

(a) Delays

9. A common theme and a regular cause for concern in relation to the manner in which medical negligence cases are dealt with in Ireland is that of delay. Delays are bad for the injured patient and for the defendant doctor or other clinician

involved. Delays are also bad for the system which should enable an injured patient to be properly and fairly compensated, and a doctor or other clinician to have the case against him or her disposed of, within a reasonable period of time. Delays are also bad for the solicitors and barristers representing both sides in these cases but most obviously so on the plaintiffs' side. In the absence of a proper system of legal aid for such cases, those barristers (and solicitors) acting for plaintiffs do so (with very few exceptions) on the basis that they will only be paid if the case succeeds and costs are awarded against and paid by the doctor's indemnifier. In some cases, therefore, they will only be paid many years after undertaking the work and after the case has been concluded.

(b) <u>Measures to address delays</u>

10. The Bar Council and members of the Bar who practise in the area have long supported and advocated the need for pre action protocols and case management of clinical negligence cases with a view to streamlining and expediting the conduct of those cases. Lawyers working in the area have called for the introduction of such protocols and other case management tools which would narrow the issues and shorten the time spent preparing for and appearing in a case. Barristers were represented on and played an important part in the *Working Group on Medical Negligence and Periodic Payments* established in 2010 which published an important report calling for reform in the area in November 2010. The recommendations of that Group require legislation which has yet to be enacted. It is in the public interest that it should be enacted.

11. Barristers who represent both plaintiffs and defendants in clinical negligence litigation have played a very active role in advocating changes to increase the pace of litigation for the benefit of litigants. Many improvements can be made to the present system within the courts in the management of claims for damages arising out of alleged medical negligence. Measures, touched on above, such as the introduction of a pre-action protocol (the full exchange of information at an early stage) similar to that in the UK, the requirement of a duty of candour, the early admission of liability in appropriate cases and the creation of a specialised medical negligence list in the courts would assist in expediting the resolution of claims and reduce legal costs. Some of these measures would require greater resources for the courts. The introduction of these measures would be a welcome development for both litigants and the lawyers representing them. So too would a greater use of alternative dispute resolution techniques, such as

mediation. Mediation is availed of in medical negligence cases but there is scope for its greater use.

(c) <u>Unmeritorious claims</u>

12. It has been suggested that the "*Irish legal system does not do enough to discourage unmeritorious claims*" and that "*a small number of plaintiff lawyers may be prepared to run cases without strong expert support until the last moment*". These suggestions were recently made by the MPS in its Report. Speaking on behalf of barristers, the Bar Council disagrees with these assertions. The Rules of Court and established case law provide for the dismissal of unmeritorious claims at an early stage. The implied suggestion that judges do not dismiss unmeritorious claims is an unfair criticism of the Irish judiciary. A party disappointed with any decision of an Irish court can appeal that decision to a higher court (such as the newly established Court of Appeal).

13. The Bar Council's Code of Conduct prohibits barristers from putting their names to proceedings in respect of which there is no supporting medical expert evidence. That provision in the Code is also supported by case law from the Supreme Court. Strict sanctions apply for non-compliance with the Code of Conduct. Moreover there would be no incentive to bring such claims given that it is only in the event of a successful (i.e. meritorious) claim that the plaintiff's lawyers (including his or her barristers) will be paid. It would be quite wrong to suggest that the number of unmeritorious claims has a material impact in terms of number of claims in this area of law having regard to the strict rules currently applicable. No evidence whatsoever has been put forward to support such a suggestion.

14. It has been further suggested that certain lawyers may have turned to medical negligence cases when other areas of work (such as conveyancing) collapsed during the economic downturn. The Bar Council is not aware of any evidence to support such a suggestion. This very specialised and complex area of work is not readily interchangeable with other areas of work carried out by barristers. Furthermore, as indicated above, as a referral bar, barristers deal with cases in which they are instructed by solicitors and do not actively seek out clients for whom to act.

(d) Suggested reform of the Law

15. It has also been recently suggested (in the Report published by the MPS) that the Irish legal system lacks transparency and that there is a need for tort law reform. The basis for the suggestion is the apparent belief that the "*Irish courts sometimes appear reluctant to scrutinise causation arguments*". The point they appear to be making is that in cases where a doctor has been admittedly negligent or has been found by a court to have been negligent in the treatment of a patient who is suffering from an injury or disease, the courts do not properly scrutinise whether the injury or disease has actually been caused or contributed to by the doctor's negligence.

16. The Bar Council does not agree with this criticism and sees it as an unwarranted criticism of the Irish judiciary. Causation has long been an essential element in the law of medical (and all) negligence in this jurisdiction. Any suggestion that it is otherwise demonstrates a fundamental lack of understanding of the Irish legal system. In fact, several cases are conducted and have to be decided by courts solely on the issue of causation. The necessary requirements of causation in the law of negligence are already firmly embedded in the common law in Ireland and a statutory definition of medical negligence or clinical negligence in legislation or an Act of the Oireachtas is not required in this regard.

17. Nor does the Bar Council believe that a good case has been made to reduce further the limitation period within which such claims must be brought.

(e) Further observations

18. While, as noted above, delays in the disposal of medical negligence claims are bad for all concerned, it is necessary to observe that while it is desirable that in appropriate cases liability is admitted and claims settled at an early stage, it is the case that investigations into causation and liability in complex medical negligence cases can take time. In drafting a defence, positive denials of liability or alternative causes for a plaintiff's injuries are not included in the absence of an expert report which supports the standard of care provided by a defendant. While it may arise that liability is admitted late in the day, that can occur in some cases due to the provision of an additional expert reports, or due to some new factual information coming to light. Sometimes even with the best will in the world on all sides, it may not be possible to avoid this happening.

4. PROFESSIONAL FEES

19. Turning now to the question of barristers' fees which it has been suggested in some quarters contributes to medical indemnity costs, it is worth noting that it is open to any litigant, be it the SCA, the MPS, another insurer or an individual, to select a barrister on the basis of price. Barristers operate as sole traders in a highly competitive environment and are required to provide fee estimates when asked to provide services. Frequently, several barristers are asked to estimate their professional fees and the client selects whichever barrister represents the best value, taking into account the experience and speciality of the barrister in question. It is, at all times, open to any litigant to negotiate on price.

20. Similar to many other sectors of the economy, there has been severe downward pressure on barristers' fees in the past number of years. For example, since 2008, the State has implemented cuts of close to 50% in professional fees paid for State work to barristers. In 2012 the SCA established a competitive tendering process for barristers with a view to seeking to reduce and control barristers fees further.

21. In the case of barristers acting for plaintiffs in medical negligence cases, the fundamental point is that in the vast majority of such cases, the barristers (and their solicitors) will be acting without any guarantee of payment and on the basis that they will only be paid if the case succeeds and if costs are awarded and paid by the defendant doctor's indemnifier very often many years later. Even where successful and where their fees are to be paid, the fees are often negotiated downwards and agreed between the parties. In the event that fees cannot be agreed, legal costs charged are scrutinised closely by an independent arbiter, known as the 'Taxing Master' and confirmed or reduced where appropriate having regard to the professional services provided. Provision is made for reviewing or appealing determinations of the "Taxing Master" in the High Court. Significant changes to the system for the taxation of costs are provided for in the Legal Services Regulation Bill. The Bar Council fully supports those changes and has made submissions to the Minister for Justice and Equality in that regard. Changes which improve the efficiency of the system for the taxation of costs and for the greater transparency of that system are fully supported by the Bar Council.

22. Counsel on the defence side in medical negligence actions regularly agree to work for professional fees that are fixed by their client, often an insurance company or similar type body underwriting professional indemnity for health professionals. Barristers are price takers in this scenario. By far, the largest insurer for clinical negligence claims in the State is the SCA. In an initiative designed to reduce costs, barristers were invited to tender competitively to provide services for the State that has given rise to the formation of a panel from which they are then appointed and paid on the basis of the competitive fee tendered.

23. There is no empirical evidence to support the suggestion that fees paid to barristers for work carried out by them in the preparation and presentation of medical negligence cases are excessive or more than they are entitled to. The work is typically complicated and complex and the fees paid are commensurate with the time and expertise involved.

5. CAPS OR LIMITS ON DAMAGES

24. It has also been recently suggested that consideration should be given to introducing a cap or limit on the level of general damages (that is damages paid to compensate the injured party for pain and suffering) and on the level of special damages (that is damages for out of pocket expenses or the costs of future care).

25. In the first place it should be said that there already exists a judicially determined cap on general damages in this jurisidiction. A call for a reduction in the level of compensation to be paid to catastrophically injured patients following a negligently inflicted adverse event would be grossly unfair to injured patients.

26. The Bar Council fundamentally disagrees with the suggestion that there should be a cap on special damages. This too would be grossly unfair on injuried patients. Any claim for special damages must be proved by the plaintiff but once it is proved that the plaintiff is at a financial loss or will be at a financial loss as a result of the negligenct act of a doctor/hospital why should his or her claim be capped? No reason other than the reduction in cost to the insurance company representing the defendant has been advanced. As regards future care costs, it is only those plaintiffs with very serious on-going injuries who receive on-going future care awards.

6. FURTHER OBSERVATIONS

27. Ongoing discussion on managing the cost of clinical negligence is important. However, any suggestion that the primary driver of legal costs is the professional fee paid to barristers is not an accurate representation of the true position. What must not be forgotten in this debate, and which is of paramount importance, is the right of patients who may have been harmed through medical negligence to secure accountability and justice in the event of wrongdoing (and that includes proper and fair compensation). It is critical that such individuals who have been injured by reason of negligence on the part of a doctor/hospital have access to specialist lawyers and that such access is not impaired by a lack of ability to pay for the services of a lawyer. It is also worth noting that medical negligence cases can often lead to an improvement in patient safety in our healthcare system, which is of equal importance to those who have suffered harm as a result of medical negligence.

7. SUMMARY AND RECOMMENDATIONS

28. In summary, the Bar Council:

- supports:

  (a) "open disclosure" and a "duty of candour" on the part of medical professions;

  (b) the requirement for pre-action protocols in medical negligence cases;

  (c) active case management of cases in the courts, subject to the necessary resources being available to the courts;

  (d) the enactment of legislation to give effect to the recommendations of the *Working Group on Medical Negligence and Periodic Payments*;

  (e) the enactment of the costs provisions in the Legal Services Regulation Bill to provide for legal costs adjudicators and a more

efficient and transparent system for the review and adjudication of legal costs.

- does not believe:

  (a) that there is any basis for the suggestion that unmeritorious claims are not discouraged or that plaintiff lawyers run cases without expert support until the last moment;

  (b) there should be reform of Irish tort law specifically to define the tort of clinical negligence or to include a specific requirement of causation since causation is an essential element of the law of negligence as it stands;

  (c) that there is any requirement for a reduction in the limitation period for medical negligence cases;

  (d) that a cap on special damages would be appropriate.

29. The Bar Council, as representing barristers who do work for both plaintiffs and defendants in medical negligence cases, would be very happy to assist the Joint Committee further in its deliberations on these issues.

Dated: 26 January 2015