

Terms of the CervicalCheck non-disclosure ex-gratia Scheme

1. Introduction

This scheme implements the decision of the Government dated 18/12/2018 to set up a scheme *'to ensure that the 221 women affected can have the impact of non-disclosure addressed without recourse to court, through the establishment of a non-statutory scheme to provide ex-gratia payments.'*

2. Overview of Scheme

The Scheme is intended to address expeditiously the issue of non-disclosure. The Scheme is designed to provide an alternative, non-adversarial and person centred option for women affected by the CervicalCheck non-disclosure issue. On that basis, the following is a high-level outline of the Scheme.

Purpose – an ex-gratia payment is intended to recognise that appropriate and timely disclosure did not take place in some cases and to make a payment to those women for the impact of non-disclosure. The non-disclosure did not delay or affect the treatment given and the amount to be paid will reflect this. While nothing in the Scheme will preclude an applicant from making a claim for compensation outside the scheme and possibly receiving an award, in those circumstances the amount already received under the ex-gratia Scheme should be taken into account by the Court or the Tribunal.

Eligibility for Payment

Eligibility for payment under the Scheme is limited to the cohort of 221 women identified from the clinical audit as having discordance in their smear test, and where the finding was not disclosed in an appropriate or timely fashion.

Independent Assessment Panel - The Minister will establish an Independent Assessment Panel, comprising a retired High Court Judge (who will act as Chair), an independent clinician and a person of good standing.

In summary, the role of the Independent Assessment Panel will be to:

- **Upon establishment**, undertake an exercise to make a determination as to the appropriate quantum of the ex- gratia payment, taking into account both the fact of, and impact of, the non-disclosure. This should be considered in the light of the typical general damages level which applies to settlement of cases involving nervous infliction of emotional suffering/psychiatric injury. The same amount will be paid in each successful case.
- **Thereafter**, assess each application against pre-defined criteria (set out in Appendix 1) to establish whether or not appropriate and timely disclosure took place.
- Where the Independent Assessment Panel has determined that appropriate and timely disclosure did not take place, the Chair of the Panel, i.e. the Judge, will instruct the Facilitator to issue the payment to the applicant.

All offers made and payments under this Scheme shall be made on an ex gratia basis. The Independent Assessment Panel's determination to award, or otherwise, a payment is final.

DETAIL OF SCHEME

3. Scope & Principles

- The overall scope of the scheme is limited to the cohort of 221 women identified from the clinical audit as having discordance in their smear test.
- Payment of the ex-gratia sum is confined to those women, where disclosure of the findings of the CervicalCheck audit is determined, against pre-defined criteria, not to have taken place in an appropriate and timely manner.
- Women will be offered the choice to participate in the Scheme, i.e. participation is voluntary.
- The Scheme is created on a non-statutory basis and is an ex-gratia scheme.
- Participation in the Scheme does not preclude the women from continuing (or indeed commencing) a claim in respect of Cervical Check. However, any award for non-disclosure against the State should take account of the amount paid under the ex-gratia scheme.
- The State had, at the time, no legal or statutory obligation to disclose the results of the audit process, which was carried out with the objective of ensuring the quality of the CervicalCheck programme. The payment to be offered will reflect that, in certain cases, disclosure of the findings of the CervicalCheck audit did not take place in an appropriate or timely manner and this impacted the individual. The non-disclosure did not delay or affect the treatment given and the amount to be paid will reflect this.
- Each applicant who is deemed not to have had appropriate and timely disclosure will receive the same amount.
- A payment under this Scheme will not attract income tax and will be disregarded in the assessment of means for the purposes of medical card, GP visit card, weekly social assistance payments, increases for qualified adults, Working Family Payment and the Supplementary Welfare Allowance Scheme. It will also be exempt from assessment for the purpose of the Nursing Home Support Scheme.

4. Roles

The Minister will establish an “**Independent Assessment Panel**”, comprising a retired High Court Judge (who will act as Chair), an independent clinician and a person of good standing.

“**The Judge**” is a retired High Court Judge, who will chair the Independent Assessment Panel.

“**The Facilitator**” of the scheme is the Department of Health.

5. Name

The Scheme will be titled “*the CervicalCheck non-disclosure ex-gratia Scheme*” established by the Minister for Health and facilitated by the Department of Health.

6. Persons who are eligible for payment under the Scheme

Eligibility for payment under the Scheme is limited to the cohort of 221 women identified from the clinical audit as having discordance in their smear test and where the finding was not disclosed in an appropriate or timely fashion.

In the circumstance where the woman is deceased, her estate will be invited to participate in the Scheme.

Women who have already been awarded damages, or settled a claim, for any claim arising from the non-disclosure of their audit results will be entitled, subject to meeting the eligibility criteria, to the difference between the ex-gratia amount, if higher, and the original settlement.

7. Legal rights of the Applicant

Participation in the Scheme would not preclude any woman from continuing (or indeed commencing) a claim in respect of CervicalCheck (either for negligence in respect of the reading of the smear, non-disclosure, or both) but any award for non-disclosure against the State should be taken into account by the Court or the Tribunal.

8. Support available

As applications to the Scheme are not intended to be adversarial, it is not envisaged that the Applicant will require legal representation. Nevertheless, an applicant may wish to consult a solicitor and take legal advice and assistance in applying for payment under the Scheme. Accordingly, each individual invited to participate will be advised of an allowance, to be paid on a vouched basis, for legal advice, both in connection with the decision to participate, and for on-going engagement. The allowance will be limited to €1,500 plus VAT.

9. Amount of Ex Gratia payment

The Independent Assessment Panel will determine the appropriate amount for payment, which will be the same amount to be paid to each successful applicant who is deemed not to have had appropriate and timely disclosure.

10. Persons who are not eligible to receive any payment under the Scheme

- Women who fall outside of the cohort of the 221 will not be eligible to participate in to the Scheme.
- An applicant who, following assessment based on the pre-defined criteria (set out in Appendix 1), is deemed to have had appropriate and timely disclosure.
- An applicant who, in the opinion of the Independent Assessment Panel, fails to cooperate in any material respect with the reasonable requirements of the Independent Assessment Panel in processing the Application.

11. Procedure

11.1 Invitation to participate

The women eligible to participate (all 221 in the cohort or their estate) will be advised in writing of the Scheme, and their option to participate, by HSE Liaison Officers. The individual will be requested to confirm their decision to participate in the Scheme. The notification will explain the scope and purpose of the Scheme and the eligibility criteria. A consent form will be enclosed, along with any other necessary documentation. In addition to information on the Scheme, the consent form will pose three questions:

1. Whether the individual wishes to participate in the scheme.
2. In her opinion, whether the results of her audit were disclosed to her, and if so, whether they were disclosed in an acceptable way. The documentation will clarify the criteria for proper disclosure. (Note : a positive statement as to disclosure by an individual does not preclude eligibility for payment – the panel will assess whether the disclosure was appropriate and timely)
3. Whether the individual consents to personal information (such as name, address, bank details, disclosure records or other records relevant to the non-disclosure issue) being provided to the Independent Assessment Panel for the purposes of both the determination for eligibility for payment and administration.

The notification will also contain information on the available supports and will provide assurances as to the individual's confidentiality. A stamped addressed envelope will be provided, although consent via email will be supported. Individuals will be encouraged to respond in a timely manner, to allow the scheme to progress, but a deadline will not be imposed.

The HSE will forward, to the Independent Assessment Panel, the details of those who have indicated their willingness to participate in the Scheme and who have signed the consent form, along with the participant's disclosure records.

11.2 Independent Assessment Panel

The Independent Assessment Panel will acknowledge receipt of the application along with the supporting documentation to the applicant.

Determination of Amount:

The Independent Assessment Panel will:

- Review relevant information pertinent to the disclosure issue (to include: The Final Report of Dr Gabriel Scally's Scoping Inquiry into CervicalCheck and the HSE Open Disclosure Policy). The facilitator of the Scheme will ensure that all relevant information is available to the Independent Assessment Panel.
- Make a determination as to the appropriate quantum of the ex- gratia payment, taking into account both the fact of, and impact of, the non-disclosure. This should be considered in the light of the typical general damages level which applies to settlement of cases involving nervous infliction of emotional suffering/psychiatric injury.

Determination of non-disclosure:

Having satisfied itself that the applicant belongs to the cohort of 221, the Independent Assessment Panel will examine each application against the Scheme's criteria (as set out in Appendix 1) to establish whether or not appropriate and timely disclosure took place. The criteria form part of the scheme, as approved.

Instructions to issue payment and notification of results

- In cases where the Independent Assessment Panel has determined that appropriate and timely disclosure did not take place, the Chair of the panel, i.e. the Judge will instruct the Facilitator to issue the payment to the applicant.
- In all cases, the Independent Assessment Panel will notify applicants of the results and in the case of unsuccessful applicants with the reasons for the decision.
- The Independent Assessment Panel will arrange for the return to the Applicant or her solicitor of all documents submitted by her or her solicitor to the Independent Assessment Panel.
- The Independent Assessment Panel will submit a Report on the Scheme to the Minister after 6 months, and at its conclusion.

The Facilitator will make payments directly to the applicant's bank account and a letter will be sent to the applicant notifying them that the payment has been made.

Should an Applicant be deceased following an application, but before payment, the funds will transfer to their estate.

12. Facilitator of the Scheme:

The Scheme will be facilitated by the Department of Health. This role carries no decision making powers.

The main tasks of the Facilitator will be:

- To publicise the Scheme.
- At the request of the Minister, request HSE Liaison Officers to invite women, or their estates, to participate in the Scheme.
- To arrange administrative and secretarial support to the Independent Assessment Panel as required by the Chair.
- To assure supports are available, through the HSE Liaison Officers
- To ensure payments are made to applicants in a timely manner, on the instruction of the Chair of the Independent Assessment Panel
- To maintain records of payments made for auditing purposes.

APPENDIX 1

Process to establish whether appropriate and timely disclosure took place:

- **Self – certification by Applicant** - applicants will be asked to self-certify whether disclosure took place or not, and, whether, in the applicant’s opinion, disclosure took place in an acceptable way.
- **Examination of patient’s files** - to determine whether a clinician reported disclosure taking place. Where disclosure did in fact take place, this should be reflected in contemporaneous notes on the patient’s medical file. It would therefore be necessary for the Independent Assessment Panel to request the relevant extracts from the files of patients applying to the Scheme, to ensure that any decision is informed by all available information.
- **Determination whether disclosure took place** in an appropriate and timely manner, i.e. where the clinician has documented:
 - the date on which disclosure took place
 - the information communicated to the patient, in particular, that their previous smear tests had been reviewed as part of a broader audit process and the conclusion had been reached that one or more previous smears had been incorrectly classified
 - any questions that the patient may have had, and the answers provided by the clinician
- **Where no such notes exist**, or where the assessor is unable to conclude from them that disclosure took place in an appropriate and timely manner, then it would be deemed correct to determine an entitlement to payment, assuming that all other relevant criteria had been met.