



Law Society
of Scotland

Written Evidence

Health, Social Care and Sport Committee of the
Scottish Parliament

Transvaginal Mesh Removal (Cost Reimbursement)
(Scotland) Bill

October 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Health and Medical Law Sub-Committee welcomes the opportunity to consider and respond to the Health, Social Care and Sport Committee of the Scottish Parliament's call for views: *Transvaginal Mesh Removal (Cost Reimbursement) (Scotland) Bill*.¹ We have the following comments to put forward for consideration.

Q1. Do you support the aims of the Bill?

We note that the purpose of the Bill² is to give power to the Scottish Ministers to reimburse persons who sought transvaginal mesh removal surgery privately.³ These persons should be on an equal footing with those who will be entitled to access state-funded comparable mesh removal surgery from NHS England and through independent providers commissioned by NHS Scotland (NHSS) in the USA. We therefore support the aims of the Bill.

Q2. Would you like to see any changes to the Bill? If so, what?

The Bill is vague or silent on several crucial points, for example, limitation period for the reimbursement scheme, timescales for delivery of treatment, assessment of reasonable expenses, level of reimbursement and method of reviewing decisions. Such ambiguity may encourage a lack of trust, which is unhelpful when dealing with persons already negatively impacted by transvaginal mesh and their dealings with NHSS.

We would like to see greater clarity on the following:

- Eligibility criteria and the method of challenging or reviewing decisions on eligibility

¹ <https://yourviews.parliament.scot/health/mesh-removal-bill/>

² <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/transvaginal-mesh-removal-cost-reimbursement-scotland-bill/introduced/bill-as-introduced.pdf>

³ Policy Memorandum, <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/transvaginal-mesh-removal-cost-reimbursement-scotland-bill/introduced/policy-memorandum-accessible-version.pdf> at para 4

- The deadline for eligibility under the reimbursement scheme
- Whether an executor can apply for reimbursement under the scheme
- Whether Scottish Ministers will reimburse ongoing treatment costs under the scheme for persons requiring multiple corrective procedures
- The method for applicants to request a review of a reimbursement decision

Q3. Can you see any issues with the implementation of the Bill or the way the costs will be reimbursed? Does it take account of how finance to pay for treatment was raised (for example, via 'crowdfunding')?

Caps applied to the cost of travel and other reasonable expenses could become contentious. Eligible applicants reported losing faith and trust in the NHS. A scheme administered by NHSS, which challenges costs that would be "reasonable" in clinical negligence litigation, may ultimately lead to legal challenges from applicants.

Given the relatively small numbers of eligible persons expected to receive reimbursement through the scheme (estimated at as few as 20), the intention to reimburse only partially for some applicants may encourage eligible applicants to litigate for full reimbursement of their costs.

The Financial Memorandum⁴ para 8 states that "it is likely that the amount reimbursed will be based on actual costs incurred, evidenced by receipts etc. provided by applicants." It goes on to say that "Expensive travel and accommodation options are not expected to be reimbursed in full."

According to the Financial Memorandum, the "reasonable estimate" approach uses the Scottish Government's subsistence rates. These rates apply to healthy Government employees going about their daily working lives. Arguably, the same rates may be inappropriate for an unwell person undergoing surgery abroad for painful, debilitating and, in some cases, life-changing side effects arising from trans vaginal mesh.

The Bill does not address the additional costs incurred for persons accessing funding for mesh removal surgery. Applicants may have re-mortgaged their homes, taken bank loans, used credit cards with high interest rates, or borrowed from friends and families. The Bill does not refer to payment of such additional costs, which would be recoverable if the applicant succeeded in a claim.

An applicant may have benefited from crowdfunding to cover some or all their costs for private remedial surgery. It would be difficult to confirm why individual crowd-funders gifted money to the applicant. In such circumstances, refusal to reimburse an applicant in receipt of crowdfunding may be deemed unreasonable

⁴ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/transvaginal-mesh-removal-cost-reimbursement-scotland-bill/introduced/financial-memorandum-accessible-version.pdf>

when financial gifts from friends and family would have the same effect, albeit a public platform does not collect the funds.

Q4. Do you think that the costs as set in the Financial Memorandum are a reasonable estimate?

Using average prices for flights and accommodation could lead to unfair, partial reimbursements, as flights can be expensive during peak season and applicants may be offered limited dates for surgical intervention.

Age and past medical history play a significant role in recovery and fitness to travel after surgery and a general anaesthetic. Costs associated with surgical intervention have been estimated using “anecdotal evidence”, “informal inquiries and press reports”⁵ and these costs may be wholly inadequate. For example, the estimate for post-operative recovery time is dependent on complexity of surgery, age, condition, and fitness to travel. This would more appropriately be determined by the patient’s healthcare provider.

Q5. Do you have any other comments on the provisions set out in the Bill?

No.

For further information, please contact:

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⁵ Policy Memorandum, <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/transvaginal-mesh-removal-cost-reimbursement-scotland-bill/introduced/policy-memorandum-accessible-version.pdf> at paras 9 and 20