

The Recovery of National Health Service Costs in Cases Involving Personal Injury Compensation

Consultation

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Chapter 1: Introduction

1.1 In the 1930s, with growing car ownership, the Road Traffic Act provided that where, under the terms of compulsory motor vehicle insurance, personal injury compensation was paid to the victim of a road traffic accident, then the insurer paying compensation would also be liable to meet the costs of any hospital treatment the accident victim may have needed.

1.2 Today, National Health Service hospitals still recover the costs of treatment given to road traffic accident victims in cases where the accident victim has successfully claimed personal injury compensation. The insurers and not the accident victim meet the NHS costs. Insurance companies meet the NHS costs under a scheme that is administered by the Compensation Recovery Unit, a part of the Department for Work and Pensions, on behalf of the Secretary of State for Health and Scottish and Welsh Ministers.

1.3 This consultation paper concerns a proposal, made by the Law Commission for England and Wales, that the road traffic accident cost recovery process should be extended to all cases where people claim and receive personal injury compensation for accidents or illnesses that require treatment by the NHS. (Personal injury compensation payments are payments made to the person suffering the injury and exclude awards made to families after death.)

1.4 The Law Commission has already conducted a public consultation on the legal merits of such a scheme and, therefore, this document does not go over ground that has already been covered¹.

1.5 The Report of the Law Commission covers England and Wales only. Nevertheless, the legal issues raised have a direct comparator in the law of delict in Scotland. In summary, where, through the fault of one party another suffers injuries and loss as a result of those injuries, including loss resulting from the costs of health care, the person(s) at fault should make reparation. On this basis, and given that the current road traffic accident NHS cost recovery scheme operates on a UK basis, Scottish Ministers have decided to run a parallel consultation exercise.

¹ The Law Commission proposal was contained in Consultation Paper 144 and Report number 262, both available from the Law Commission's website at www.lawcom.gov.uk.

Chapter 2: Issues to consider

2.1 Whilst the legal principle that the NHS should have the right to recover its costs, a number of issues need to be considered before deciding whether or not to proceed with a practical scheme to undertake such recoveries.

An existing template for the scheme?

2.2 Since April 1999 the Compensation Recovery Unit, a part of the Department for Work and Pensions, has acted to recover costs following road traffic accidents on behalf of the Secretary of State for Health and Scottish and Welsh Ministers. The Unit is based in Washington, Tyne and Wear, and has extensive links with all authorised insurers in the UK as a result of its primary business, which is to recover state benefits also in cases involving personal injury compensation. It is currently developing electronic communication facilities with some of the larger insurers and also with all relevant NHS trust hospitals.

2.3 The Road Traffic (NHS Charges) Act 1999 included provision for NHS costs to be recovered according to a very simple tariff of charges. Currently the NHS recovers £354 for every person who is treated without admission to hospital and £435 per day for anyone who is admitted to hospital. There is a ceiling of charges in any one case that is currently set at £10,000². The tariff was based on treatment profiles for road traffic accident victims and as charges do not have to be individually calculated in each case it reduces the administrative cost of the system. It also provides insurers with an estimate of what the costs in any one case will be.

2.4 There is a right of appeal against NHS charges. The Appeals Service, an executive agency of the Department for Work and Pensions, hears appeals in England and Wales. There are separate arrangements in Scotland.

2.5 It would, therefore, be relatively easy to extend the current scheme to include recovery of costs in all cases of personal injury compensation.

² A consultation process took place from May 2002 to July 2002 regarding the future uprating of these charges. A copy of the consultation document is at www.show.scot.nhs.uk.

The link to insurance

2.6 Motor vehicle insurance (or the holding of a security or deposit) is compulsory in the UK and the NHS' statutory right to recover its costs following road traffic accidents is therefore inextricably linked to compulsory insurance. If the recovery of NHS costs was to be extended beyond road traffic accidents, there is no logical reason why it should continue to be linked only to compensation payments that result from compulsory insurance. The Government already recovers state benefits paid to accident victims or people with industrial illnesses, in most cases where payments of personal injury compensation are made and there is no link to insurance, as such, at all³. The state recovery is said to be "parasitic" on the payment of compensation. That is, when and if a payment of compensation is made then it triggers potential recovery of state benefits. If no payment of compensation is made then there is no recovery of state benefits.

2.7 Payments of personal injury compensation can be made in many different circumstances. More than half are made following involvement in a road traffic accident, around one quarter involve accidents or illnesses at work, around one fifth involve accidents in public places and a very small proportion involve clinical negligence or other types of liability including product liability⁴. Although many of these claims will involve compulsory insurance, such as third party motor vehicle insurance and employer's liability insurance, many will be met through voluntary insurance policies and some, a very small minority, by direct payment from the liable party. Those paying compensation will therefore include private citizens (overwhelmingly through motor vehicle insurance policies), employers, holders of public responsibilities, such as local and central government departments, schools, colleges etc, and manufacturers.

2.8 There can be no recovery or attempted recovery in cases where the liable party either cannot or will not pay compensation. Whilst the problem of people failing to meet their liabilities is one of general social concern it should not prevent the recovery of appropriate costs in the vast majority of relevant cases. We therefore support the Law Commission's proposal that any new scheme should not be restricted to compulsory insurance.

Contributory Negligence

2.9 The Law Commission suggestion is that where responsibility for causing an accident has been apportioned between more than one party, then each party should only be responsible for that same proportion of any NHS costs. Currently, there are two Government schemes to recover costs in cases of personal injury compensation. Neither The Social Security (Recovery of Benefits) Act 1997 nor The Road Traffic (NHS Charges) Act 1999 take into account findings of negligence and to do so, as suggested by the Law Commission, would be a new departure and out of line with existing recovery procedures. Both schemes have a limit on the recovery that can be made in individual cases. Therefore, compensators are not always required to meet the full cost, even where there is 100% liability.

³ The Social Security (Recovery of Benefits) Act 1997

⁴ Source: The Compensation Recovery Unit

2.10 The Commission reported that there was no general consensus following consultation on this issue. Some people thought not taking contributory negligence into account was a form of “rough justice” as many potential claims are never brought. Others, however, thought it unfair that someone who was only partly liable for the victim’s injuries could be made to meet the treatment costs in full.

2.11 The Law Commission suggested that any new scheme should take findings of negligence, or bona fide agreements thereon, into account. There will only be an official finding of negligence where a case has gone before the courts and the vast majority of insurance claims are settled privately without court intervention. Therefore, the calculation of personal injury awards does not always, and in the majority of cases, include an agreed proportionment of liability. There is also no definition of what would constitute a “bona fide agreement” made outside a court.

2.12 To insist that the apportionment of liability is taken into account in all cases would therefore impose a new requirement in the settlement of claims for personal injury compensation. This would not only increase the administrative burden and therefore cost of processing such claims but would also delay the payment of compensation to the injured party whilst liability was calculated and agreed. If the new scheme took account only of liability that had been decided by the courts, then it could possibly lead to increased pressure on the courts as people sought official findings and, again, payments to individuals would be delayed. It has been government experience that taking no account of negligence simplifies recovery to the advantage of all parties.

2.13 We do not therefore agree with the Law Commission observation on contributory negligence. If, however, recovery of NHS costs were to be restricted in proportion to findings of negligence, then there would be an argument in favour of the removal of the ceiling of charges in any one case. Currently this is set at £10,000 (although it may rise following the current consultation exercise on the tariff of charges) and prevents insurers from having to meet full costs in very expensive cases.

The administrative costs

2.14 When, in 1996, the Law Commission first proposed an extended scheme of NHS recovery there was concern that the administrative costs of collection could outweigh any arguments in favour of the principle. Since then a revised scheme for the recovery of NHS costs following road traffic accidents has been introduced⁵ and we have a much better appreciation of the dynamics of centralised recovery and its costs.

2.15 In 2001/2002, the NHS in England, Scotland and Wales recovered just over £98 million following road traffic accidents with the money being passed directly to the hospitals that provided the treatment. Scotland’s share of this sum was £6 million (6%). Early indications are that these sums will rise further in 2002/2003. The three UK Health Departments meet the administrative cost of the centralised scheme on a proportional basis. The costs have fallen since the first year, as start-up funding has diminished, and are further expected to fall further with the introduction of electronic communication arrangements within the next year. At present the cost is around £1m per year (£100,000 for Scotland) or just over 1% of the amounts being recovered but this is currently subject to review.

⁵ The Road Traffic (NHS Charges) Act 1999

2.16 If the new extended scheme was administered in the same way as the road traffic scheme, i.e. with direct links to insurers and trusts and costs calculated using a simple tariff of charges, it is safe to assume that the cost of collection will be very favourable in relation to the amounts recovered.

Chapter 3: Outline proposal for a new scheme

3.1 The Law Commission suggested that the administrative arrangements for the new scheme could easily be based on an extension of the existing schemes to recover social security benefits and NHS recoveries following road traffic accidents. Using those schemes as a template, the proposal for a new scheme is as follows:

- It should apply to all payments of personal injury compensation where the injured person received NHS treatment in respect of the same injury or disease giving rise to compensation
- The recovery should be limited to the cost of any hospital treatment and associated ambulance costs, i.e. there would be no recovery of primary care (family doctor) costs
- The payment of NHS costs should be made by the person or organisation paying compensation and not the person receiving treatment
- The payment of NHS costs is additional to the payment of compensation, i.e. the amount of personal injury compensation would not be reduced to take account of the NHS costs
- It should be administered by the Compensation Recovery Unit on behalf of the Secretary of State for Health and Scottish and Welsh Ministers
- It should follow the general pattern of the Social Security (Recovery of State Benefits) legislation on which the Road Traffic (NHS Charges) legislation was based. This would involve:
 - compensators including details of any NHS hospital at which treatment was given when notifying the Compensation Recovery Unit (CRU) when a payment of compensation is claimed;
 - CRU checking the treatment details (i.e. out patient/inpatient and, the latter, length of stay) with the relevant NHS trust;
 - CRU calculating the charges due according to a simple tariff and issuing a certificate of charges to the compensator;
 - the compensator either paying the charges to CRU when the claim was settled, or notifying CRU if the claim was withdrawn;
 - CRU passing recovered charges to trusts on a monthly basis.
- There would be a right of appeal against the recovery in any one case.

Chapter 4: Partial Regulatory Impact Assessment

The recovery of National Health Service costs in cases involving personal injury compensation

Purpose and intended effect of the proposal

The Issue

4.1 At present, where a person agrees to pay compensation for personal injury suffered by another person, except for cases involving compulsory motor vehicle insurance, the compensator does not meet the cost of any associated NHS hospital treatment, including any ambulance transport, which has been necessary. Based on the road traffic accident tariff (see 2.8), the estimated cost to the taxpayer of meeting these costs in Great Britain is approximately £100 million to £120 million⁶ of which an estimated £8 million relates to Scotland.

The Objective

4.2 For people to be more aware of their responsibilities and to take active steps to reduce the risk of causing injury to third parties, and reduce the cost to the taxpayer of subsidising the wrongdoer by meeting part of the costs of his or her wrongdoing.

Background

4.3 An internal scoping study by Health Department economists assessed the potential for the NHS to recover the costs of accidents/diseases other than those involving motor vehicles. This found:

- employer liability for accidents and diseases, and public liability for accidents, are the most common types of personal injury claim;
- employer and public liability are therefore the areas where the taxpayer is currently providing the most significant subsidy for the costs of any necessary medical treatment;
- the estimated amount that could be recovered by hospitals each year for employers' liability accidents is £42 million for in-patient treatment; £12 million for out-patient treatment and £4 million for the cost of emergency ambulance transport; it is estimated that Scotland would account for approximately 10% of these figures;

⁶ This estimate is based on the number of claims for all types of compensation recorded by the Compensation Recovery Unit. It assumes treatment costs for road traffic victims apply to all types of accident and that a similar pattern of severity will apply, i.e. the proportion of patients who are treated as either in-patients or outpatients.

- potential recoveries for public liability accidents is likely to be on a similar scale, however more information would be required on the type of accidents to give a more accurate estimate;
- it is difficult to quantify the cost of diseases (as opposed to accidents) to the NHS due to the complexity of the treatment path and the period of time over which a patient with an occupational disease would need treatment. If diseases were included in the scheme then much more work would be required to assess the patterns of treatment and the practicalities of running a scheme that includes more chronic conditions.
- further work is required on the type of accidents, cost to the NHS and the appropriate tariff.

Who is affected?

4.4 The person or body paying compensation is affected. The proposal is not restricted to payments made as the result of compulsory insurance but even so the majority of payments are likely to come through insurance companies which means additional administration for them, although the associated costs may be passed on to those buying insurance.

Options

4.5 This is not a regulatory measure in the sense that is intended to adjust a system to work correctly through the imposition of rules. It has more in common with a non-regulatory economic instrument but does bring with it a responsibility for business. Those responsibilities are meeting the cost of the NHS treatment plus the administrative costs associated with payment. Four options have been identified:

Option 1:

Do nothing. Doing nothing does not address the issue raised by the Law Commission that, by providing healthcare free of charge, the NHS in effect discharges part of a wrongdoer's liability.

Option 2:

Withdraw NHS services where liability accepted. Withdrawing NHS services once a person or institution had accepted liability would not reduce the costs of immediate/short term care to the NHS, as the liability would be unknown at that stage. At a later stage, whilst it would remove the cost from the NHS, it would place an equal or, more likely, greater burden on the compensator of having to pay for private sector treatment. It is not known if there would be sufficient capacity available outside the NHS to provide the needed treatment or whether people entitled to use the NHS would be willing to be transferred to the private sector.

Option 3:

Improve health and safety regulation. Health and safety regulation is already comprehensive in the UK and whilst continuous efforts are made to improve that regulation it is unlikely to reduce the burden to the NHS in either the short or medium term.

Option 4:

Introduce, through primary legislation, the recovery of charges parasitic on the payment of compensation based on a simple tariff system of NHS charges with central collection by the Department for Work and Pensions' Compensation Recovery Unit.

This option meets concern that those who are liable should not be subsidised by the taxpayer. It also reinforces the duty to prevent accidents happening. Accident victims are not being required to pay for their own treatment - those responsible for the accidents are being asked to refund the NHS and the taxpayer for the cost of the treatment of people injured as a result of their actions. There is a risk that insurers would simply pass the costs onto those buying relevant insurances indiscriminately, leading some to opt not to have insurance at all. Employers and others with poor safety records may however make an attempt to improve health and safety to reduce premiums.

Issues of equity and fairness

4.6 This measure is based on the legal arguments advanced by the Law Commission of avoiding 'unjust enrichment' (comparable to the law of delict in Scotland) of those liable for causing accidents if they do not have to repay all the costs associated with their actions. It could be argued, as the Law Commission has done, that the liable party should only pay NHS costs in proportion to their liability. In the vast majority of cases however no exact apportionment of liability takes place. If one were required, it would add to the bureaucracy of claims by adding the need to verify and agree the apportionment in each case. The additional cost and delaying factor across all claims might outweigh any perceived gains in respect of fairness.

The Benefits

4.7 The benefits are the relief to the taxpayer of the costs of providing treatment and the added impetus to potential compensators to prevent accidents happening. The money raised is returned directly to the hospitals providing treatment and can therefore be used to provide better hospital services for all UK residents.

Quantifying and valuing the benefits

Option 1: would have no benefit to the taxpayer or the NHS user but would relieve the liable party of the full costs of his or her actions.

Option 2: would have some benefit to the taxpayer and the NHS but only where the accident victim was still receiving care after liability had been accepted.

Option 3: would have a benefit for the taxpayer and the NHS only if it could result in tangible and identifiable falls in the rate of accidents.

Option 4: would see liable parties meeting NHS costs probably in excess of £100 million per year (including approximately £8 million for Scotland), over and above the current recoveries made following road traffic accidents. These estimates are made using the tariff of charges developed for road traffic accident recovery. Whilst that tariff was based on the treatment profile of road traffic accident victims it acts as a useful proxy for trauma treatment in general.

Compliance costs for business

4.8 Of the options explored Option 1 has no associated costs for those who cause accidents or insurers. The cost of NHS care would however continue to be met by the taxpayer including businesses.

4.9 Option 2 would have minimal benefit and the administrative costs are likely to be positive. It is also questionable whether the accident victim could be deprived of his or her right to opt for NHS treatment. The benefits of Option 3 are uncertain. Additional regulation would be required and result in variable costs across the business sector. There would be additional compliance costs for the public sector that would have to be met through the public purse. This leaves Option 4 as the only option open to worthwhile compliance cost assessment.

Business sectors affected

4.10 Any business with potential liabilities for personal injury compensation as either an employer, a producer of goods or transacting business in a public place may be affected. Insurance companies providing cover in these areas would also be affected by the administrative costs and by the need to apportion costs amongst holders of policies.

Compliance costs for a typical business

4.11 For businesses in general the costs would either be the direct costs of paying any NHS charges or the increases in any insurance premiums taken out to cover against these costs. These costs would be similar for any organisation paying personal injury compensation.

4.12 For insurance companies, as well as exposure to claims made against them in their own right, there will be additional costs of processing recoveries for those purchasing insurance. However, as all claims for personal injury compensation currently have to be notified to the Compensation Recovery Unit, and all motor claims already attract additional questions about NHS treatment, the additional administration to extend the NHS scheme to all claims will be relatively small. The inclusion of ambulance costs are expected to have no implication for insurers, other than meeting the costs, as all information required to administer these costs is available through the NHS.

4.13 The additional costs for insurers will comprise:

- i. the need to identify the hospital providing treatment in all cases when notifying claims to CRU;
- ii. alterations to IT and any forms to capture the additional data;
- iii. any retraining of staff required.

Of these (i) is a recurring cost, whereas (ii) and (iii) should be one-off costs.

Total compliance costs for insurers

4.14 The charges payable to the NHS will account for the overwhelming majority of compliance costs for insurers. These charges have been estimated, using the current tariff of charges used to recover costs following road traffic accidents, to be in the region of £100m - £120m (inclusive of approximately £8m - £10m for Scotland). Work done in 1998, as part of the regulatory appraisal accompanying the Road Traffic (NHS Charges) Act 1999, suggested that the work involved in identifying an NHS hospital added approximately 30 minutes to the handling time of an insurance claim. This is equivalent to a financial increase of 7 - 8% on then current processing costs.

4.15 Again, based on experience gained in the implementation of the Road Traffic (NHS Charges) Act, the one-off costs for IT and staff training are not expected to be significant.

Impact on businesses other than insurers

4.16 Any business, large or small, which could be the subject of a claim against it for personal injury compensation - through, for example, its liability as an employer, producer of goods or organiser of public events - may be affected by these proposals. Some, but not all, business liabilities are subject to compulsory insurance. Where insurance is not compulsory most responsible businesses will have obtained adequate cover through the voluntary purchase of insurance. Many combined insurance packages also include an element of public liability cover, e.g. contractor's all risk insurance.

4.17 If the costs of NHS treatment do reach £120m per year across the UK then, if insurers simply divided that cost amongst all holders of relevant insurance, an increase of around 7% in public liability and employer insurance premiums might result⁷. However, we understand that premiums for liability insurance are likely to rise steeply in the immediate future, possibly by more than 40%, for reasons unconnected to the possible recovery of NHS costs. Therefore, the percentage increase directly attributable to the recovery of NHS charges will fall and become comparatively small to overall premium costs. On either basis we would not anticipate any adverse effect on employment.

4.18 As any additional premium cost would relate directly to the provision of NHS treatment, where liability has been accepted by the payment of compensation, an

⁷ Based on total recovery of £120 million and gross written premiums for employer and public liability of £1,677 million. (Source: ABI Insurance Statistics Yearbook 1990-2000)

organisation with a good record of no, or few, claims might expect its insurer to reduce the increase accordingly.

Impact on small businesses

4.19 The vast majority of UK businesses employ fewer than 50 people and are therefore classed as small businesses. More than two thirds of these are sole proprietorships or partnerships comprising only the self employed owner manager(s), and companies comprising only an employee director. In Scotland, the total share of employers with less than 50 employees is smaller relative to the UK as a whole.

4.20 On this basis, Scotland should be less adversely exposed than the rest of the UK in terms of any potential impact on small business. However, despite a decline over recent years, the rate of fatal and non-fatal injuries per 100 thousand employees in Scotland is marginally higher than in Britain as a whole. Overall, this suggests that the cost of insurance may be proportionally higher for small businesses in Scotland than in other UK countries.

4.21 However, as noted above the premiums associated with employer and public liability appear to be relatively low in relation to the cover they provide. One information service aimed at people earning a living as artists⁸ produces a cost guide to employer and public liability insurance that suggests £1 million public liability cover would cost from £75, and employer liability insurance for an employee earning less than £10,000 around £20 per year.

4.22 If insurance companies shared the total cost of potential NHS charges indiscriminately across all policy holders then these costs could be expected to rise by around 7% to £80.25 for £1m of public liability insurance and £21.40 for an employee earning less than £10,000 pa.

4.23 The type of risk to which such small companies are exposed is not changed by the proposed extension of NHS recovery and there should be no question of additional costs for revised risk assessments or other financial services.

Impact on charities and voluntary organisations

4.24 The impact of the proposals on charities and voluntary organisations would be exactly the same as for businesses and small businesses. If a charity or voluntary organisation made a personal injury compensation payment then they would also be required to repay (either directly or through an insurance policy) the costs of any associated NHS hospital treatment.

⁸ www.anweb.co.uk

Other costs

Costs to local and national government

4.25 The intention is that all compensators will be required to repay NHS costs so that the body/organisation responsible for the injury meets the full costs of reparation. The only exception will be the National Health Service itself where it is both the compensator and provider of healthcare services. Local and national government bodies will therefore be subject to the same provisions as other businesses and will be required to repay NHS costs in relevant cases. Although there is an element of financial circularity in such an arrangement, repayment by all local and central government organisations ensures that money allocated to the NHS to provide a health service for everyone is not diverted to subsidise other parts of Government.

4.26 There would be additional administrative costs for the Department of Health in extending the recovery beyond the road traffic accident scheme to all injury compensation cases. Currently, although subject to review, the Departments of Health in England, Scotland and Wales pay the Department for Work and Pensions just over £1m per year (Scotland's share is 10%) to recover traffic accident charges, currently around £100m per year. Assuming a similar cost rate to recovery this could rise to around £2m for an extended scheme. NHS trusts would also see the number of claims they must verify rise with a consequent impact on staff time. This, however, could be offset by a scheme to introduce electronic communication between the Compensation Recovery Unit (CRU) and all relevant NHS trusts, which will be fully operational in the summer of 2002. This will produce efficiency savings within CRU and within all NHS Trusts.

Costs to citizens

4.27 There is a possibility that businesses will seek to pass on any increase in insurance premiums through higher service/supply costs to consumers. However, on the cost assumptions outlined above any such increase should be marginal at most. More specifically, private citizens are involved in payments of personal injury compensation most often as a result of private use of a motor vehicle. In these cases insurance cover is compulsory and the recovery of NHS costs already takes place under the provisions of the Road Traffic (NHS Charges) Act 1999. In the much rarer event of a private citizen making some other form of payment of personal injury compensation to a third party it is possible that they will have insurance cover under their domestic or travel policies. However, as the recovery of costs is parasitic on the payment of personal injury compensation, where a private citizen fails to make a payment of compensation then there will be no recovery of NHS costs.

Competition assessment

4.28 We consider that options 1,2 and 3 have no (or no appreciable) effects for competition. Option 4 is a wide-ranging policy proposal which would impact on all undertakings whose operations create a potential liability, to employees or third parties, in the event of disease or accident caused by those operations. The effect of the proposal, if implemented, would be to increase the potential costs of such liability for all relevant undertakings and, where covered by insurances taken out by the relevant undertakings, to increase the actual costs of such insurances. However we were unable

to identify any markets in which this could be anticipated to have any appreciable consequences for competition. Implementation of policy proposal number 4 would have consequences for the insurance market in raising levels of risk for which insurers provide cover, and also in raising administrative costs of handling claims. Such increases are, however, likely to be recouped by insurers through increased insurance premiums. We did not identify any competition concerns arising out of the proposal and consequently we considered it unnecessary to carry out a detailed competition assessment.

Summary and recommendations

4.29 The Law Commission recommended that, subject to a cost/benefit analysis, the NHS should have the right to recover its costs in all cases of personal injury compensation, and that the right should be parasitic on the payment of compensation. It suggested that the cost recovery scheme could be modelled on the existing scheme for recovering state benefits and Road Traffic Act recoveries, i.e. undertaken by the Compensation Recovery Unit, and that it should not be restricted to compulsory insurance. Finally the Commission suggested that contributory negligence should be taken into account when assessing NHS costs.

4.30 As outlined in option 4 above, it is recommended that the Commission's suggestions be accepted in full with the exception of the inclusion of contributory negligence.

Chapter 5: The Questions

What should be recovered?

5.1 The Law Commission proposal referred to NHS costs. We considered whether or not to propose recovery of all NHS costs, i.e. general practitioner, ambulance and hospital costs, but concluded that a system to identify primary care treatment would be more difficult to establish. It would also be difficult to accommodate the number of general practitioners making the scheme bureaucratic and costly to administer. We therefore propose a scheme which, as for the recovery of costs following road traffic accidents, would continue to recover the costs of any treatment given in a hospital and, for the first time, the costs of emergency ambulance transport. We consider that the benefits of a simple system along already established lines outweigh the opportunity to maximise NHS recovery.

Q1: Do consultees agree that restricting recovery to hospital and ambulance costs provides sufficient restitution to the NHS whilst retaining simplicity of administration and therefore reduced costs of recovery?

5.2 Personal injury compensation can be claimed when a person has suffered a trauma, i.e. a wound or bodily injury, or where they have contracted or developed an illness. In terms of total figures, the number of claims following trauma is around double those involving illness. Within employer liability alone, however, there are more claims as a result of illness than accident and this category of claim is therefore significant. There are, however, some difficulties associated with the recovery of costs in cases of illness using a system based on the current arrangements at the Compensation Recovery Unit. For example:

- the profile of NHS costs may be weighted towards the period after compensation has been paid and will, therefore, not be recovered;
- many of the costs are likely to occur within the primary care sector and will, therefore, not be recovered;
- there may be practical difficulties in identifying the treatment received at hospital especially if treatment has been largely out-patient based;
- because of the time period involved there may well be co-morbidity, i.e. the patient may be being treated for more than one illness at the same time;
- the point of diagnosis may not be clear cut and costly investigations may be needed to establish a diagnosis.

5.3 These issues revolve around practicality, materiality and whether an additional burden will be placed on the information systems of NHS providers which could potentially and ultimately outweigh the benefits of the scheme. However, these issues make no difference to the legal underpinning of the right to recover NHS costs from those wrongdoers whose actions have resulted in an industrial disease. In terms of incentives it could be argued that this is a more important area for action in terms of aligning incentives.

Q2: Do consultees consider that recovery of costs should include cases involving industrial illness?

5.4 The Law Commission suggested that a new scheme should take account of any findings of, or bona fide agreements on, contributory negligence. The Health Departments consider, for the reasons outlined in Chapter 2, that this would complicate the scheme to everyone's disadvantage.

Q3: Do consultees agree that the costs and practicalities outweigh the principle that the negligent party should have to pay costs in proportion to their liability:

(i) in all cases or

(ii) only in cases where there has not been a finding of contributory negligence by a court? If so, do you think there is a risk that this option could encourage people to pursue cases solely for a finding of clinical negligence?

Who should pay?

5.5 We would not envisage any exemptions from the requirement to reimburse the costs of hospital treatment. Where personal injury compensation is paid then the compensator should also reimburse the costs of NHS treatment. This would include all businesses, large and small, all public bodies, such as local authorities, schools or central government, and all employers. There are arguments that such a requirement would be unfair to small businesses, or simply represent paper transactions between, for example, government departments. One of the main influences in adopting such a scheme is, however, to ensure that bodies which do not ensure the safety of all people who come into contact with their work have to meet the full costs of their shortcomings. Such a message is as relevant to businesses of any size as it is to central and local government, both as employers and providers of services.

Q4: Do consultees agree that all payments of compensation should attract the potential for repayment of NHS costs regardless of the nature or size of the parties involved? If not, should this be for insured cases only?

Summary of issues to be considered:

Q1: Do consultees agree that restricting recovery to hospital and ambulance costs provides sufficient restitution to the NHS whilst retaining simplicity of administration and therefore reduced costs of recovery?

Q2: Do consultees consider that recovery of costs should include cases involving industrial illness?

Q3: Do consultees agree that the costs and practicalities outweigh the principle that the negligent party should have to pay costs in proportion to their liability:

(i) in all cases, or

(ii) only in cases where there has not been a finding of contributory negligence by a court, if so, do you think there is a risk that this option could encourage people to pursue cases solely for a finding of clinical negligence?

Q4: Do consultees agree that all payments of compensation should attract the potential for repayment of NHS costs regardless of the nature or size of the parties involved? If not, should this be for insured cases only?

Chapter 6: List of consultees

List of Scottish Consultees

The Confederation of British Industry (Scotland)

Scottish Chamber of Commerce

Forum of Private Business

Federation of Small Business

Scottish Financial Enterprises

The Confederation of Scottish Local Authorities

The Scottish Law Commission

The Scottish Trades Union Congress

Scottish Health & Safety Executive

Scottish Voluntary Organisations

Other Consultees

The Association of British Insurers

The Confederation of British Industry

The Trades Union Congress

The Bar Council

The Confederation of NHS Trusts

The Local Government Association

Chapter 7: Contact Details

Answers to the questions at Chapter 5, and any other comments consultees wish to make, should be addressed to:

Joanne Campbell
Scottish Executive Health Department
Room BR
St. Andrews House
Regent Road
Edinburgh
EH1 3DG

Tel: 0131 244 1816
Fax: 0131 244 2371

Responses can also be sent by e-mail to: nhscharges@scotland.gsi.gov.uk

All replies must be received by Friday 8 November 2002

Chapter 8: Code of practice on written consultation

This consultation is being carried out in accordance with Scottish Executive Guidance on Practice for Written Consultation. The consultation criteria are:

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.