SUMMARY OF OUTCOME ON THE CONSULTATION ON THE RECOVERY OF NHS COSTS IN CASES INVOLVING PERSONAL INJURY COMPENSATION

The Responses

20 responses were received in total. These consisted of:

10 NHS Bodies
3 Trade Unions
2 Legal Bodies
2 Insurance Bodies
2 Miscellaneous
1 Member of the Public

What should be recovered?

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

a) The majority of respondees supported the need for the scheme to be simple to administer, and that restricting recovery to hospital and ambulance costs was the most effective option. However, one respondee noted that this option probably would not provide sufficient restitution to the NHS.

b) Two respondees did not agree; one, a serving NHS doctor specialising in brain injuries, felt that whilst a simple administration is advisable, it would be a serious omission in terms of brain injury as most NHS treatment is conducted on an outpatient basis over a long convalescence, typically two years. He felt that it should be possible to come up with a "ball-park" estimate as an add-on figure for outpatient treatment in such cases, as the NHS consequences of a given injury are not always calculable immediately in the wake of that injury. Therefore, there needed to be some mechanism for NHS Boards to claim monies subsequent to initial settlements.

c) The Medical Protection Society (MPS) had concerns over the legitimacy and value of extending the current scheme to include cases of clinical negligence because of the problems in quantifying cost due to the complexity of the treatment path and the period of treatment as well as the costs of investigating cases in order to make recoveries.

d) Norwich Union (NU) felt that in the case of hospital costs (not immediately post accident) the means of identifying and quantifying those directly associated solely with the specific injury are not so simple. They added that unless the treatment costs could easily be determined the process will add layers of administration and cost to the scheme. Also, NU stated the essentiality that the scheme not be retrospective and that insurers be given a period of warning prior to any changes that may be introduced to ensure that adequate provision is made by underwriters to ensure that they are able to meet any increased cost.
Q2. Do consultees consider that recovery of costs should include cases involving industrial illness?

a) The majority of respondees that expressed an opinion (5) agreed that industrial illness should be included. However, Highland NHS Board remarked that there may be difficulty in recovering amounts due to longer term illness – since time, causation, contributing negligence etc may be difficult and potentially time-consuming to prove. This would lead to additional administrative costs, which may lead to long-term conditions not being pursued.

b) Four respondees were against the inclusion of industrial illness. Amongst their reasons were the complexities of identification of cause, and hence recovery in such cases, which would run contrary to the desire to keep the system simple and the long lasting nature of the illnesses. Whilst disagreeing with the inclusion of industrial illness within the scheme, Shetland NHS Board suggested that the NHS has a right to recover costs from wrongdoers whose actions have resulted in industrial disease and that that is an area that could be explored in the future.

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 negligence?

(The question in the consultation document actually stated “clinical” negligence, but that did not appear to mislead the respondees.)

a) Only 9 respondees stated an opinion. Of those, 3 (Lothian NHS Board, Highland NHS Board & MPS) stated that contributory negligence should be taken into account. Willis also agreed that contributory negligence should be taken into account, but qualified that by adding, in the absence of agreement by the court, it would be difficult to apportion liability and, in those circumstances, the practicalities would outweigh the principle.

b) Three respondees (Faculty of Advocates, Shetland NHS Board & North Glasgow University Hospitals NHS Trust) stated that contributory negligence should not be taken into account in all cases. The primary concern of the Association of Personal Injury Lawyers (APIL) was that injured victims’ damages should not be reduced or affected in any way by the extended recovery of NHS charges; however, as they told the Law Commission for England & Wales, they appreciate it may not be practical to develop a policing mechanism, particularly for settlements, to enable contributory negligence to become a factor in adjusting the amount to be recouped.

c) Norwich Union felt that whilst initially it would appear to be fairer for the tortfeasor or their insurers to pay only a proportion of the benefits received according to any finding of liability, it would likely lead to significant costs and administrative problems. They also mentioned the possibility of artificial agreements being reached i.e. it could be in the
interest of the litigants to agree to an increase in the “value” of the whole claim rather than an increase in the proportion of contributory negligence on the part of the claimant.

d) Lastly, the Association of British Insurers (ABI) felt that, as a matter of principle, the imposition of full cost recovery in contributory negligence cases would be inequitable and, as such, they opposed it. They recognise that current Road Traffic Accident Charges legislation operates in this way but, in the present context, would like to understand better the reasons why the Executive is proposing full cost recovery given the cost implications and the Law Commission's opposition to it.

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?

a) Ten respondees agreed that all payments of compensation should attract the potential for repayment of NHS costs; only the Medical Protection Society (MPS) and Norwich Union were against. The MPS response was in relation to clinical negligence only and related to the need for apportionment in these cases as well as any financial gain for the NHS being outweighed by the damaging effect on doctors’ morale and the cost of investigation & bureaucracy.

b) Norwich Union can see practical problems with the proposal, citing large companies that are self-insured and potential defendants who have neither assets nor insurance cover. They wondered what would happen if the defendant was unable to pay, and felt therefore that it would be advisable for the scheme to include only those areas where insurance is operable.

Other Comments

There were strong concerns about extending the scheme from the Trade Unions. The STUC, UNISON & AMICUS all stated their opposition to the proposals as they stand at present:-

♦ the unions feel that they are becoming increasingly involved in providing income streams for the Government, initially through the recovery of benefits, increased fees, and now if these proposals are to be implemented, through the Executive taking advantage of union legal assistance schemes to recover National Health Service costs;

♦ there is no evidence to suggest that any of the funding generated in this way would be used to develop and improve National Health Service occupational health provision;

♦ they are also concerned that the Executive may use the sums recovered under the proposals to decrease the funds that the Executive would otherwise have made available to the NHS;

♦ they further believe that as major users of the Court service in Scotland, the moves to recover costs will underpin the inequalities faced by unions seeking compensation for members in Scotland in comparison to arrangements in England & Wales, where trade unions can pay a notional premium reflecting the degree of risk in any particular case, which is recoverable at the conclusion of the case. They are facing increased court fees;
potential restrictions on cases allowed to proceed in the Court of Session and are now being asked to accept greater financial risks without the benefit of insuring that risk; and

♦ recovered NHS charges should be used to improve health & safety in the NHS.