



Department
of Health &
Social Care

Maria Caulfield MP
Parliamentary Under-Secretary of
State for Patient Safety and
Primary Care

Rt Hon Jeremy Hunt MP
Chair of the Health and Social Care Committee

28 March 2022

Dear Jeremy,

On 1st February 2022 I gave evidence to the Health and Social Care Select Committee's inquiry on NHS litigation reform. During that evidence session I said on two occasions that the current main driver of clinical negligence costs is rising legal costs. However, although rising legal costs have been an important driver of costs over the last 15 years, the main driver has for the last few years been rising compensation payments, as set out in our written evidence to the Committee. I would therefore like to correct the record.

Between 2006-07 and 2016-17, claimant legal costs relating to clinical negligence claims rose five-fold from £98million to £496million per year. However, since 2016-17, these legal costs have levelled out. In 2020/21 they reduced slightly to £433million in 2020/21, although they remained at a level substantially higher than in 2006/07.

More recently the increase in costs has been primarily driven by rising compensation payments which increased four-fold between 2006-07 and 2019-20 and accounted for 73% of annual payments for claims by 2020-21. Higher-value awards, mainly for maternity claims, make up a large proportion of payments for compensation. These compensation awards are growing at rates significantly higher than inflation; they have risen at an average rate of 7-8% per year over the last decade and are now the largest driver of cost.

The relevant sections of the transcript are set out below, and in full in an Annex to this letter:

- Answer to Q132: "There is something in our system that means the cost is much higher. Being honest with the Committee, we are not quite sure what those factors are. We are improving safety and that does not seem to be reducing the cost. *The compensation levels that patients are getting are pretty even; they are going up a little bit, but not significantly. It is the legal costs that are the significant piece of why they are rising.*"

- Answer to Q156: “That was part of my response when you asked me to respond in a month. It is that sort of detail that we are trying to work through at the moment. *There is a range of factors that are increasing the legal costs, which I think are the main driver of overall costs.*”

I would like to apologise to you and the Committee for this error.

Maria Caulfield

Parliamentary Under-Secretary of State for Patient Safety and Primary Care

Annex – Extracts from the transcript of the HSCC evidence session on 1st February 2022

First extract (relevant statement highlighted)

Q132 Chair: Thank you. We are going to ask you some questions about that fixed recoverable costs announcement, although I have to say that it would have been much more helpful if we had known that at the start of our inquiry rather than in the final week before the final evidence session. We will come to that.

I want to ask you a question about this table. You actually revised the data in the table and resubmitted it. The resubmitted table shows that New Zealand, which has a no-fault scheme, actually ends up spending half the proportion of total healthcare cost that we spend. We spend about 2% of our health spend on this and they spend about 1%. When you considered alternatives to our current system, were you looking at the new data that you just submitted or the old data that turned out to be incorrect?

Maria Caulfield: We are looking at the new data. When we launch a consultation, it will be based on the current data. We are open to all options. One of the concerns I have, if you look at the table, is that even in countries that use similar systems to us right now—Scotland, Canada and Australia, who use a tort-based system—their costs per capita are significantly lower. There is something in our system that means the cost is much higher. Being honest with the Committee, we are not quite sure what those factors are. We are improving safety and that does not seem to be reducing the cost. **The compensation levels that patients are getting are pretty even; they are going up a little bit, but not significantly. It is the legal costs that are the significant piece of why they are rising.**

Other schemes, like the avoidable harm schemes or no-fault schemes, have significantly more claims. The whole purpose of them is that it makes it easier for people to claim, but they are often capped at a limit. I think the upper limit for a number of the schemes is £1 million, which would be less than some of our patients get. They get full compensation.

I am not against any scheme; we want to look at every single option. The concern that I would have is that until we get to the nub of the problem as to why our cost per capita is so much higher, if we move to an avoidable harm or a no-fault scheme and if those rates of cases went significantly higher, we might end up paying significantly more in clinical negligence and taking even more money away from frontline services. We are really keen to deep dive into this and find the nub of the problem. That is why inquiries such as this are helpful in looking at all the aspects

Second extract (relevant statement highlighted)

Q153 Lucy Allan: The legal costs are what I meant. If you have a no win, no fee, are you going to end up paying more legal costs than if we had had better access to justice through legal aid?

Helen Vernon: I do not have the analysis that would demonstrate that. I think it would probably need a more thorough impact analysis than I am able to provide here. What I can say—

Q154 Barbara Keeley: I think we need that though. I very much think we need that.

Chair: Let's request it, if we could.

Helen Vernon: I can certainly provide some numbers on the split between legal aid and no win, no fee, and the costs that apply to both of those. I do not think that I would be the right person to comment on the extent to which they would be driven—

Q155 Chair: Who would have those numbers? Very simply, we are trying to understand whether the move to no win, no fee has driven an increase in the legal costs we pay.

Barbara Keeley: Or is it just the numbers? You mentioned an increase.

Chair: The numbers and the cost per case. Who could give us that information?

Helen Vernon: I think the Ministry of Justice would have some information on how the legal market has responded. There are obviously costs on both sides of the fence.

Q156 Chair: Let's ask the Ministry, and if you could help us on that, we would really appreciate it. It is useful for you to know as well.

Maria Caulfield: That was part of my response when you asked me to respond in a month. It is that sort of detail that we are trying to work through at the moment. **There is a range of factors that are increasing the legal costs, which I think are the main driver of overall costs.** We need to get to the nub of that. I am very happy to respond within a month, but they are the sorts of deep dives that we need to be doing.