Further supplementary written evidence from the Department of Health and Social Care, Qs 5 and 6 (NLR0074)

Contents

Introduction

1. This is the second of two evidence submissions responding to further requests for evidence from the Committee, and includes contributions from NHS England and Improvement, the Ministry of Justice and NHS Resolution. It covers the following requests:

   a) Numbers of bereavement midwives and plans for future training.

   b) Analysis of impact of reduction of legal aid and introduction of Conditional Fee Agreements (CFAs) on legal costs.

2. The data presented on claims funded by CFAs and legal aid has been provided by NHS Resolution based on the average costs of settled or closed claims under the Clinical Negligence Scheme for Trusts. The funding type reported by claimants for notified claims is also presented. We have explained the limitations in the data and how we have drawn conclusions. As with our previous evidence, long-term trends back to 2006 have been presented, this being the earliest year for which consistent data can be easily accessed.

Responses to the Committee's requests for information

Q5. Numbers of bereavement midwives and plans for future training

3. One of the Government's top priorities is ensuring that grieving families and friends who have lost loved ones have access to the support they need, when they need it.

National Bereavement Care Pathway

4. The Government has funded SANDs, the Stillbirth and Neonatal Death charity to work with other baby loss charities and Royal Colleges to produce and support the roll-out of a National Bereavement Care Pathway (NBCP) to reduce the variation in the quality of bereavement care provided by the NHS.

5. The NBCP advocates that labour wards have dedicated, soundproofed bereavement rooms or suites where parents can have complete privacy and comfort. It is also best practice to have a lead midwife for bereavement who can provide more specialist support to parents[i].

6. We have now reached the milestone of every NHS trust in England having expressed an interest with Sands in joining the national bereavement care pathway programme, and 65% of trusts are now members. We will continue to take a cross-Government approach to assessing what more needs to be done to support bereaved families.

7. However, the Committee is asked to note that there is no national data collection to gather overall for numbers for such posts.

Maternal Mental Health Services

8. The NHS Long Term Plan committed to establishing new Maternal Mental Health Services (MMHS). These new services will integrate maternity, reproductive health and psychological therapy for women experiencing moderate to severe or complex mental health needs, arising from trauma or loss in the maternity, perinatal or neonatal context.

9. The establishment of MMHS is part of a wider expansion of perinatal mental health (PMH) services. By 2023/24, at least 66,000 women with moderate to severe or complex PMH needs will have access to specialist community care. Specialist care will also be available from preconception to 24 months after birth, which will provide an extra year of support.

[i] See National Bereavement Care Pathway bereavement care standards. Accessed here: https://nbcpathway.org.uk/nbcp-standards

Q6. Numbers of claims funded by Conditional Fee Agreements and by legal aid; and data to show whether the shift to CFAs from legal aid has increased legal costs

Summary of response

10. **The Committee asked whether claimant legal costs for new-style CFAs are lower than for old-style CFAs.** Since the reforms in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), we would expect claimant legal costs for claims funded by old-style CFAs to be higher than new-style CFAs for claims of similar value. **From the evidence we have this looks likely, as explained below, but it is too early to confirm this or to draw conclusions as to how much. It may also depend on the value of the claim.**

    - On current data for claims with damages up to £250,000 (as shown in Chart 2), this appears to be the case. However, as set out below, lags in settling higher-value claims (those above £3.25m) will mean that the full effect of LASPO on average claimant legal costs through CFAs will take time to realise and therefore may not be reflected in current costs.

    - For higher-value claims (those above £3.25million), legal aid and new-style CFAs have broadly similar average costs, and this isn't substantially different to 2012-2014 data on old-style CFAs and legal aid. However, there are far fewer of these claims number so the average costs presented in Chart 3 are much more volatile.

    - **The biggest driver of total legal costs will have been the significant rise in claims volumes presented in Chart 1.**

11. **The Committee asked whether claimant legal costs are lower in claims funded through new-style CFAs or through Legal Aid.**

    - The only clinical negligence claims where legal aid is still usually available are those in relation to a baby who has suffered a severe brain injury in pregnancy or during or shortly after birth, subject to means and merits tests. These claims typically relate to the most serious injuries, are of highest value, and take longer to settle.

    - **The data currently available for high value claims only (see Chart 3) suggests that claimant legal costs in claims funded by legal aid are more expensive than new-style CFAs.**

    - **However, lag factors discussed below may also have affected the average claimant legal cost per claim, meaning it will be some years before we can state this with certainty.**

<u>Background: legal framework</u>

12. Given the increased costs to the taxpayer of the legal aid scheme, successive governments have reduced the scope of legal aid in England and Wales since the 1980s, both in terms of the types of claim covered and financial eligibility.

13. Following concerns about access to justice for people without significant financial means, 'no win, no fee' agreements – known as Conditional Fee Agreements (CFAs) – were allowed in personal injury (PI) claims from 1995. This allowed claimants who were not eligible for legal aid to bring claims, including for clinical negligence, with their lawyer bearing the financial risk of bringing the claim, rather than the taxpayer-funded legal aid scheme. If the claim failed, the lawyer would not get paid (hence 'no win, no fee'), but if the claim succeeded, then the lawyer could recover their costs from the defendant in the usual way and recover an uplift on those costs (a 'success fee') to reflect the risks to the lawyer. This success fee was recoverable initially from the defendant and, following the reforms in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), from the claimant's damages.

14. Most PI claims (except clinical negligence) were removed from the scope of legal aid by the Access to Justice Act 1999 ('AJA'). That Act made changes to the CFA regime to make it more attractive to claimants, with additional costs falling on unsuccessful defendants (see 'old style CFAs', para 10 below). As a result of concerns about increasing claims and costs following the AJA reforms, Sir Rupert Jackson, a judge of the Court of Appeal, was commissioned to review the costs of civil litigation. He reported in January 2010, and recommended significant changes to the CFA regime. His reforms were largely taken forward in Part 2 of LASPO. In particular, the additional costs of CFAs that the AJA had transferred to losing defendants were returned to the CFA-funded claimant. The overall intention of the Part 2 reforms were, in Sir Rupert's words, to deliver 'access to justice at proportionate cost'[ii].

15. Given the then pressures on the public purse, the LASPO also reduced the scope of civil legal aid such that a number of claims, including most clinical negligence cases, are no longer covered by legal aid[iii]. Legal aid remains available for clinical negligence claims in relation to a baby who has suffered a severe brain injury in pregnancy or during or shortly after birth, (these are typically the most serious and highest-value claims), subject to means and merits tests. However, it is rarely taken up by those eligible: see for example para 231 on page 50 of the LASPO Part 1 Post-Implementation Review[iv]. For all other clinical negligence matters, legal aid funding is only available via the Exceptional Case Funding (ECF) scheme if there is a risk of an individual's ECHR rights being breached.

16. The numbers of clinical negligence claims doubled over the decade following 2006, following the AJA reforms. The National Audit Office (NAO), in their 2017 report[v] found that an underlying factor of the increase in claimant legal costs was a rise in the numbers of lower and medium-value claims funded by 'no-win-no-fee' agreements. This volume increase has been a key driver behind claimant legal costs increasing substantially and remaining high: between 2006-07 and 2016-17,

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[ii] See Sir Rupert Jackson's 2010 review of civil costs, at p. xvi: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.
[iii] The reduction in legal aid was not part of Sir Rupert's recommendations.
[iv] See LASPO Part 1 PIR.
[v] NAO (2017) Managing the costs of clinical negligence in trusts. Accessed here: https://www.nao.org.uk/report/managing-the-costs-of-clinical-negligence-in-trusts/

claimant legal costs rose fivefold from £98million to £496million. Since 2016-17, claimant legal costs have levelled out, reducing slightly to £433million in 2020/21, but nonetheless remaining at a high level relative to 2006/07 and now account for 20% of annual cash payments for claims[vi]. That said, the main driver of the rising costs of clinical negligence to the NHS is now compensation costs, particularly in the highest-value cases (usually relating to the most serious injuries).

17. A further mechanism to control legal costs – fixed recoverable costs (FRC) – has since been rolled out by MoJ since 2009 for various types of PI claim: first for road traffic accident (RTA) claims up to £10,000, and since 2013 for RTA, public and employer liability claims up to £25,000. Clinical negligence claims have not yet been covered by FRC. On 31st January 2022, DHSC published a consultation proposing FRC and a streamlined claims process for clinical negligence claims up to £25,000 damages.

18. The Government fully supports patients' entitlement to compensation if negligence is established and recognises the importance of access to justice. We have been clear in our consultation on FRC that proposals to streamline the process for lower value claims and achieve faster resolution for more claimants would not reduce people's ability to access justice. To achieve this, the proposals in the consultation seek to ensure the fixed cost levels reasonably reflect the work required to progress claims, suggest a 'light track' for claims where liability is not in dispute, provide for extra costs for claims involving protected parties, and exclude certain claims from the scheme on grounds of complexity.

Overview of old- and new-style Conditional Fee Agreements

19. The data presented below compares volumes and average costs for legal aid and Conditional Fee Arrangements (CFAs, or 'no win no fee'), the two main routes through which claimants may fund clinical negligence claims against the NHS. This data is from NHS Resolution and reflects claims within the Clinical Negligence Scheme for Trusts (CNST) in England only. The analysis draws a distinction between two types of CFA:

    - **Old-style CFAs, Pre-1st April 2013**: For CFAs entered into before 1st April 2013, the claimant lawyer's success fees and 'After the Event' (ATE) insurance premiums were both recoverable from the defendant, so these elements are included in the average costs. Under this agreement, claimant lawyers could claim from the defendants an additional fee, known as a success fee, of up to 100% of their base costs for cases they won.

    - **New- style CFAs, Post-1st April 2013:** For CFAs entered into after 1st April 2013, success fees and ATE insurance premiums are no longer able to be recovered from the defendant, except the portion of ATE premium to cover the cost of expert reports (in clinical negligence cases only). Claimant lawyers could instead claim from the winning claimant themselves success fees of up to 25% of qualifying damages (including Pain, Suffering and Loss of Amenity, or PSLA).

[vi] NHS Resolution (2021). *Annual Statistics (Supplementary Annual Statistics, Table 5.A).* London, NHSR. Available online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx.

- Qualified One-Way Cost Shifting (QOCS) was introduced at the same time in PI cases as a replacement for recoverable ATE insurance premiums. QOCS means that, for unsuccessful claims, the NHS cannot generally recover their costs from the claimant. The previous position was that the NHS could recover their costs in CFA funded claims that failed, but these costs were usually recovered from ATE insurers and the NHS had to pay the costs of the ATE insurance premiums in (the more numerous) claims that succeeded. The costs of unsuccessful legal aid claims have never been recoverable by the NHS.

Claims volumes by funding type – data issues

20. The following **data issues** relevant to funding type should be noted:

    - **Legal aid has only ever been available to individuals who met the claimant income financial eligibility criteria** and legally aided cases were only ever taken on by firms holding legal aid franchises or contracts (overseen by a variety of bodies, but by the Legal Aid Agency since 2013). This means the cohort of legal aid claims has not, for many years, reflected the entire legal market or breadth of types of claims likely to be made.

    - **While legal aid funded claims have to be notified to NHSR as such, this is not true of other types of funding which do not have differing financial implications for NHSR**. As a result, NHSR data on more recently-notified claims does not show all the claims that are likely to be funded by new-style CFAs.

    - **Further funding types do exist,** such as Before The Event (BTE) insurance, Damages-Based Agreements (DBAs) and self/privately funded, but these represent much smaller numbers than CFAs so are not included in this analysis.

Claims volumes by funding type – findings

21. In 2006, the volume of claims funded by legal aid and old-style CFAs was relatively evenly split. The move away from legal aid funding started before 1st April 2013. By 2020, a very small number of claims managed by NHSR were funded by legal aid (less than 1%). For the 5 years to 2020, more than 70% of claims are recorded as being funded by new-style CFAs.

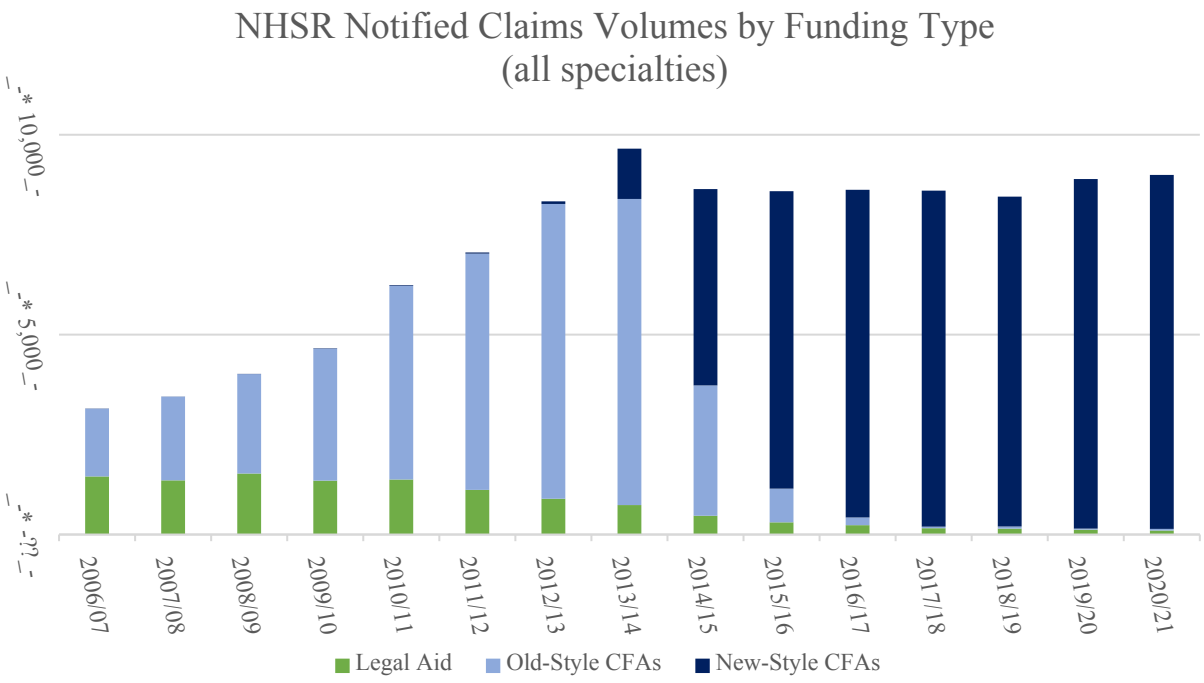
22. In 2020/21, of 12,629 notified claims, 8,854 claims were funded by new-style CFAs, whilst only 100 claims were funded by legal aid.

23. A significant driver of overall total legal costs is the significant rise in claims volumes seen in chart 1. This is particularly the case between 2006 and 2013 (the period before the LASPO reforms came into force). Legal aid and old-style CFA average claimant costs were relatively consistent during this period (for claims with damages up to £250,000, see Chart 2).

24. Chart 1, below, considers the claims *notified* within that year, by funding type. The number of *settled* or *closed* claims each year lags behind these figures due to the time it takes for a claim to be investigated and settled. Higher-cost claims typically take longer to settle (over 7 years on

average[vii]), and, for new-style CFAs, this issue would skew the average legal cost figures downwards until settlement of a sufficiently representative number of higher cost claims funded by this route are reflected in the data. The average costs presented in Charts 2 and 3 below are based on settled or closed claims, as these reflect the actual costs incurred.

Chart 1: Notified claims volumes by funding type (all specialties), 2006/07 to 2020/21. Covering legal aid, old-style CFA and new-style CFA funded claims in the Clinical Negligence Scheme for Trusts (CNST) only.



Average claimant legal fee cost, by funding type – data issues

25. **The following data issues relevant to claimant legal costs should be noted:**

- Due to eligibility changes in 2013**, legal aid for clinical negligence claims remains available only in relation to a baby who has suffered a severe brain injury in pregnancy or during or shortly after birth.** These are typically the most serious injuries and the highest-value claims, and take longer to settle. This means the average costs for legal aid claims are likely to be higher because they do not capture the same breadth of cases that new-style CFAs do.

- **Claims funded through old-style CFAs have also gradually become only the most complex and large claims remaining in the system**. This is because old-style CFAs had to

[vii] NHS Resolution (2021) Annual Statistics (Supplementary Annual Statistics, Table 17). London, NHSR. Available online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx.

be entered into prior to 2013 and those that are still open are likely to be complex and take longer to resolve, which increases their average costs compared to new-style CFAs which also include less-severe cases.

- **Success fees and ATE insurance premiums are no longer recoverable under new-style CFAs.** This is with the exception of the costs of premiums associated with the costs of expert reports which can still be recovered. Success fees and ATE insurance premiums were recoverable from the defendant under old-style CFAs, so this shift will account for some of the difference in average costs between the two CFA types. The success fee (limited to 25% of qualifying damages) can be recovered directly from the successful claimant; this data source reflects the costs to the defendant and not the overall costs recovered by the claimant lawyer.

- **This data only covers costs to NHSR.** There will be costs to the public purse of legal aid clinical negligence claims which do not succeed, where the claimant's legal costs are paid from the legal aid fund. The data on settled/closed cases only includes cases where the claimant has been successful so the average costs will only reflect successful claims. Any costs to the claimant, such as success fees, on which there is no data, are also not covered.

- **Figures for claimant legal costs include additional fees** such as expert fees, court fees etc.

- **High-value claims are typically more complex and take longer to settle**, on average over 7 years[viii].

Average claimant legal fee cost, by funding type – findings

26. The effects of general inflation have been removed from the charts presented, which means increases in average claimant legal costs shown in the charts are where they are rising faster than the rate of inflation.

27. In 2006, average claimant legal costs for claims with damages up to £250,000 were roughly similar whether funded by legal aid or CFA (Chart 2). These average costs were then relatively consistent, growing only slightly faster than inflation, until around 2014/15. Since then, the rise in average costs for old-style CFAs and legal aid claims for claims with damages up to £250,000 will mostly be driven by the case-mix issue, as these are largely now the most complex claims.

28. The picture is much more volatile in Chart 3 because the number of claims with damages of £3.25 million or more is much lower, however legal aid average costs paid by NHSR have broadly remained consistent between 2006 and 2020 (rising only with inflation).

29. Generally, smaller claims settle more quickly and so it is unlikely the likely plateau in new-style CFA average costs has been reached yet; only small increases in average costs have been occurring. It will be a few years post-plateau before we know that we have reached that point, where the case-mix of new-style CFAs can be safely regarded as comparable to old-style CFAs.

[viii] NHS Resolution (2021) Annual Statistics (Supplementary Annual Statistics, Table 17). London, NHSR. Available online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx.

30. Notwithstanding the limitations, in both Charts 2 and 3, comparing the 2012-2014 period for old-style CFAs (purple boxes) to the 2018-2020 period (red boxes) for new-style CFAs provides the most reasonable comparison as the cohorts will be the most similar.

31. When considering these two time periods, for claims with damages up to £250,000, new-style CFAs appear to have lower average costs than old-style CFAs and legal aid claims. This was the intention of the structural changes to CFAs in 2013. An early indication of this expected trend was provided by a study by independent researchers that compared cohorts of similar, of necessity lower-value clinical negligence claims (under £250,000 damages) funded by old-style and new-style CFAs that had already settled [ix]. This research was discussed further in the MoJ's Post Implementation Review (PIR) of Part 2 of LASPO, published in February 2019[x]. However, as explained above, future data will be needed to confirm whether the case-mix and hence the average claimant legal cost per claim has plateaued.

32. In the last few years for claims with damages of £3.25million or more, legal aid and new-style CFAs average costs appear to be broadly similar. This may change as more significant cases feed into the average costs for new-style CFAs. Old-style CFAs appear slightly more expensive for these size claims, which is likely due to the case-mix and success fee differences mentioned previously.

33. There are further difficulties in attempting to compare claimant legal costs on a like-for-like basis. The LASPO reforms made various shifts in financial liability between the claimant and defendant side and then between the claimant and the law firm representing them. As stated in the Data Limitations section, under new-style CFAs, claimants themselves now pay the success fee to their own lawyers, not defendants; no data is available on the financial flows between claimants and their legal representatives.

34. The introduction of QOCS in personal injury claims (including clinical negligence) in 2013 will also have affected what defendants can recover from claimants for losing claims (which is about 41% of them[xi]). For old-style CFAs, defendants could recover their costs from unsuccessful CFA-funded claims, but this was typically paid for by ATE insurance, for which defendants would have to pay the premiums in successful claims against them.

35. The costs of unsuccessful legal aid claims have never been generally recoverable by winning defendants. In addition to any differences in overall cost, the funding route used would affect which part of the public sector – the NHS or the legal aid budget – bears the claimant legal costs. The data above also excludes costs to the taxpayer of legal aid claims which failed.

36. Further, it should be noted that shortly before implementation of the LASPO reforms, a number of cases switched from legal aid to an old-style CFA. In contrast, NHSR's experience is that very few cases transfer from a CFA to legal aid. This allowed for the claimants' solicitors to recover success

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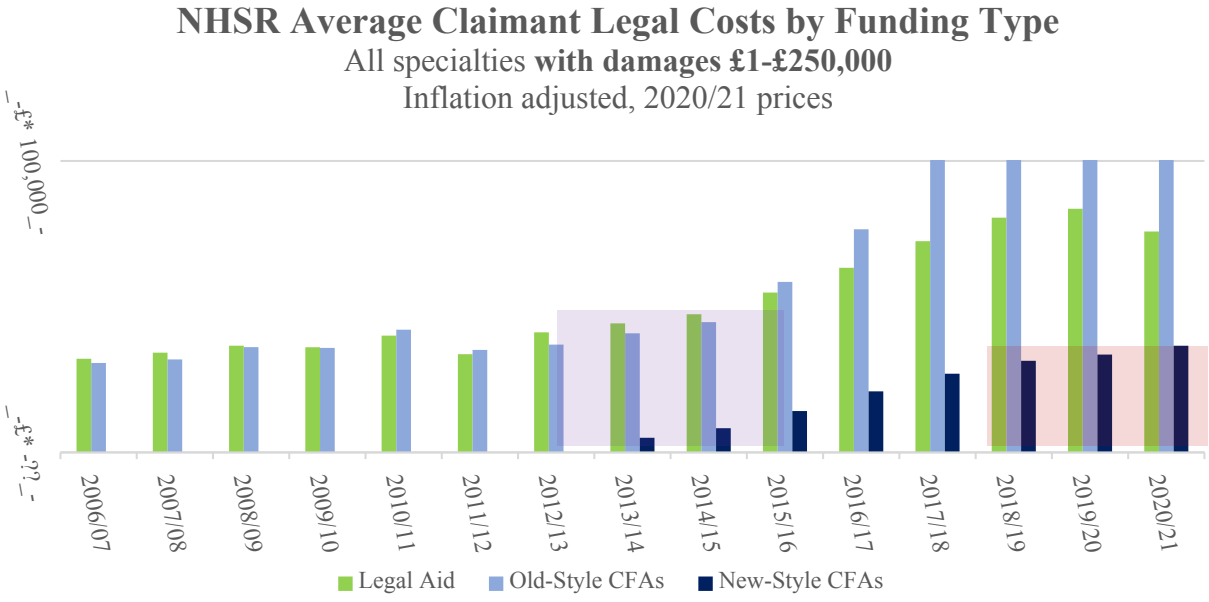
[ix] Fenn and Rickman, 'The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012', SSRN (2019).
[x] The Government's PIR of Part 2 of LASPO: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf.
[xi] NHS Resolution Annual Report Statistics, Table C.1, accessed here: https://resolution.nhs.uk/resources/annual-report-statistics/#:~:text=the%20Annual%20Report%20Statistics%20are%20based%20on%20a,settled%20claims%3B%20and%20the%20provision%20for%20financial%20liabilities.

fees from the defendant. Where the NHS considers the switch in funding was inappropriate it has challenged and continues to challenge such decisions. In some instances, claimants have also switched from legal aid to a new-style CFA. Accordingly figures for both the old and new CFAs will include cases which were originally funded by legal aid.

37. When considering obstetrics claims that are eligible for legal aid (cerebral palsy and brain damage claims), 78 of the 112 claims in this specialty were funded by legal aid in 2020/21, compared to 12 funded by old-style CFAs and 17 by new-style CFAs. In recent years, legal aid appears to be more expensive than new-style CFAs. As alluded to above, this is likely due to the impact of the most severe cases not yet being settled under new-style CFAs, given the time it takes to reach that point, as well as the fact that some costs are now met by claimants out of their damages.

Chart 2: Average claimant legal costs by funding type, all specialties with damages between £1 and £250,000. Presented in 2020/21 prices after adjusting for inflation.[xii]



[xii] Note: the costs of unsuccessful legal aid claims are not included within these figures.

Chart 3: Average claimant legal costs by funding type, all specialties with damages of £3.25million or more. Presented in 2020/21 prices after adjusting for inflation.[xiii]

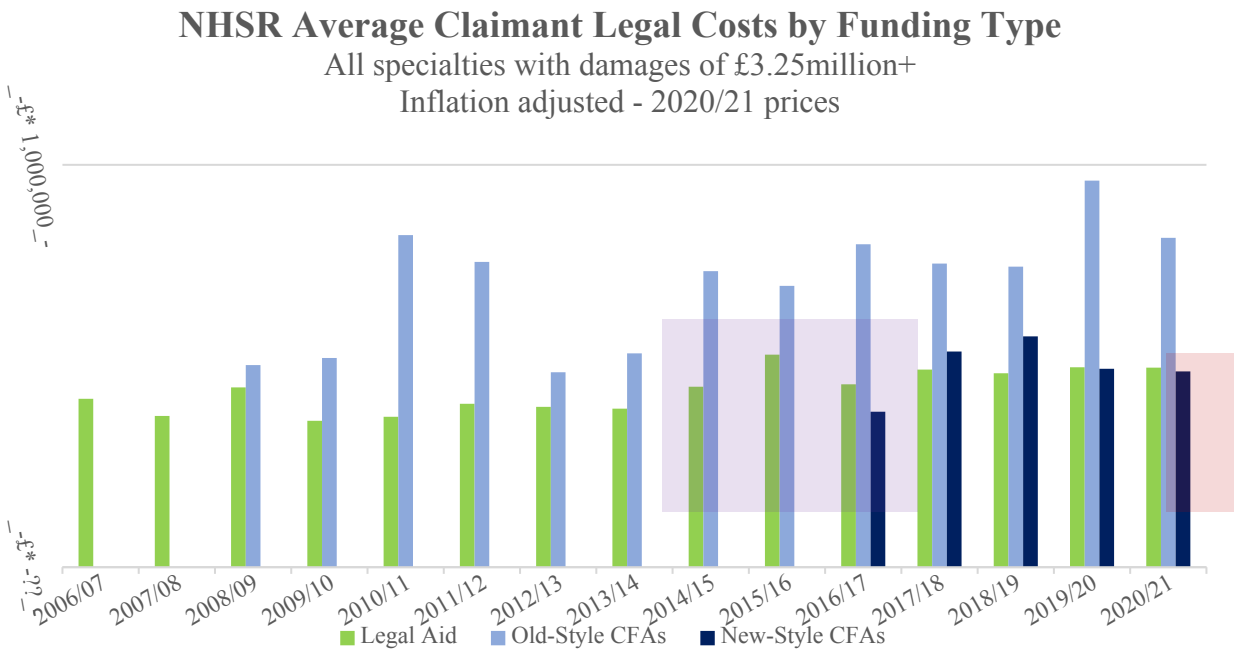
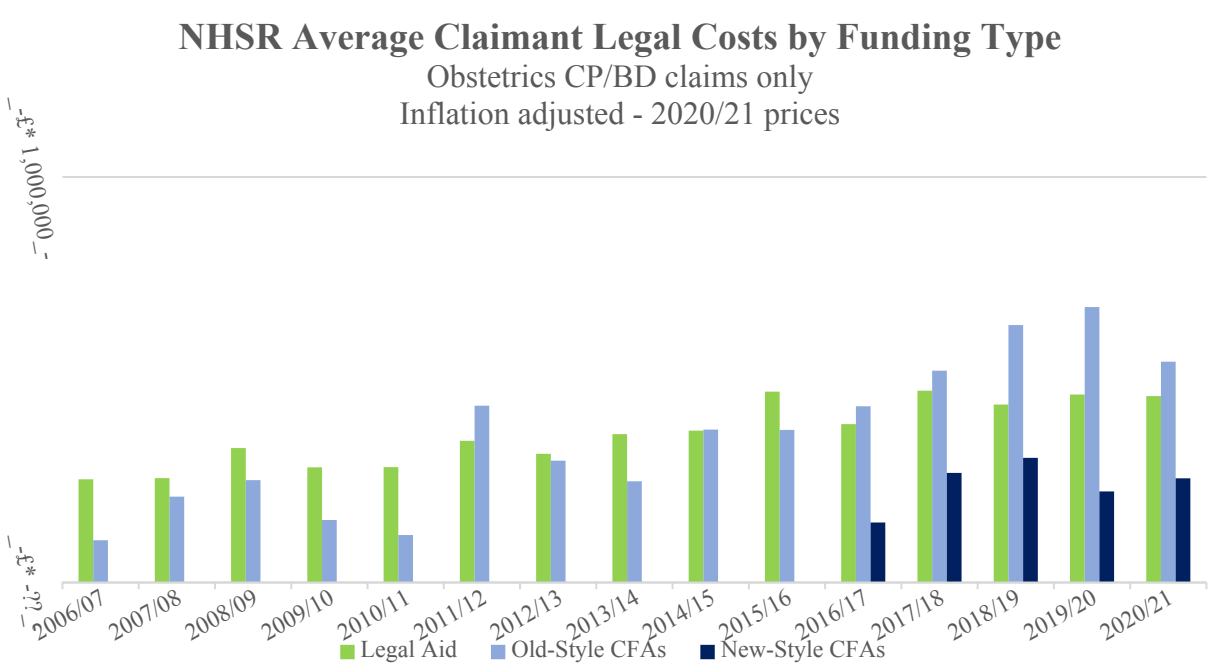


Chart 4: Average claimant legal costs by funding type, for obstetrics cerebral palsy and brain damage claims only. Presented in 2020/21 prices after adjusting for inflation[xiv].

[xiii] Internal NHSR analysis.
[xiv] Internal NHSR analysis.


NHSR Average Claimant Legal Costs by Funding Type
Obstetrics CP/BD claims only
Inflation adjusted - 2020/21 prices
£1,000,000
£0
2006/07
2007/08
2008/09
2009/10
2010/11
2011/12
2012/13
2013/14
2014/15
2015/16
2016/17
2017/18
2018/19
2019/20
2020/21
Legal Aid
Old-Style CFAs
New-Style CFAs

Glossary

After the Event Insurance (ATE)	After the Event Insurance (ATE Insurance) is a policy that can be purchased on a claimant's behalf after an accident or incident. If the claimant loses their claim and is required to pay the defendant's legal costs or their own legal disbursements, the After the Event Insurance will pay. Since introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in April 2013, successful claimants can generally no longer recover the ATE insurance premium from the defendant, with the exception of premiums covering certain of their own medical report fees in clinical negligence cases. The claimant is liable to pay the ATE premiums covering the defendant's costs and the claimant's own legal disbursements from their compensation award, although in practice such charges may be waived by insurers. In order to assist claimants with meeting the costs of ATE insurance premiums post-April 2013, damages for PSLA were uplifted by 10%.
AJA	Access to Justice Act 1999
Base costs	The fees that a solicitor will charge the client for work done exclusive of VAT and disbursements. They do not include success fees pursuant to a conditional fee agreement.
Conditional fee agreement (CFA)	A funding arrangement between a claimant and their lawyers where lawyers agree to act on a 'no win, no fee basis'. If the Claimant wins their case, the lawyers are paid their base costs along with a success fee. The claimant will usually recover the legal costs payable from the defendant. If the case is lost, the claimant will generally not have to pay their legal fees. A CFA may be entered into alongside insurance arrangements (ATE – see above) which reduce or eliminate the other costs (such as for medical reports or defendant's costs) for which a claimant may be liable.
Clinical Negligence Scheme for Trusts (CNST)	An indemnity scheme providing cover for NHS bodies including NHS Trusts, Foundation Trusts, and Clinical Commissioning Groups as well as some independent sector providers of NHS services for claims for incidents occurring on or after 1 April 1995.
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
National Audit Office (NAO)	The UK's independent public spending watchdog. They support Parliament in holding the government to account for the way it spends public money. They do this by auditing the finances of public bodies. They do not question the merits of government policies but assess whether resources have been used efficiently and effectively.
Qualified one-way cost shifting (QOCS)	The QOCS regime was introduced for personal injury claims from April 2013. This means that defendants will generally be ordered to pay the costs of successful claimants but, subject to certain exceptions, will not recover their own costs from claimants if they successfully defend the claim. The introduction of QOCs was designed to limit the need for claimants to buy costly After the Event (ATE) insurance in personal injury

	claims to pay for defendant legal costs. QOCS applies to all personal injury cases (including clinical negligence) post April 2013, unless the claimant has / had a pre-April 2013 CFA/ATE in place.