Supplementary written evidence submitted by the Society of Clinical Injury Lawyers (NLR0076)

Government Fixed Recoverable Costs Consultation

For Clinical Negligence Cases – Wrong Viewpoint: Flawed Approach

The Government has now published their long-awaited consultation upon whether or not to introduce fixed costs in lower value clinical negligence claims.

What this would mean, is that the amount of costs an injured patient could recover in a successful clinical negligence claim would be limited in amount, in all cases worth less than £25,000.

Without going into the detail of the consultation itself, SCIL will respond in detail to the specific questions as posed as per the Government process, it is clear that the consultation itself is wrongly based and flawed as follows:

- Claims are the result of negligence in the NHS – fixing costs and therefore reducing the ability to claim will not reduce negligence in the NHS taxpayer-funded system, and in fact will lose more than it will gain (see below);

- The real issue is lack of patient safety learning across the whole of the NHS and that is where the focus actually needs to be – looking at claims, is to look at matters from the "wrong end of the telescope" and fails to engage with those underlying issues;

- The costs of Claimant, injured patients, will always be higher than those of the Defendant because the Claimant has to discharge the burden of proof – comparing Claimant and Defendant costs is therefore irrelevant;

- The Civil Justice Council (CJC) report upon which the consultation is based was not a broad consensus between the parties involved;

- The costs of clinic negligence claims is not a "significant strain" on NHS resources, relative to the £140+ billion per annum of taxpayer funds spent upon the NHS;

- The level of fixed costs being proposed, does not equate to the level of detail needed to make the proposed reformed process work in reality – we need to separate process reform, from the fixing of costs. We need to reform the process first – and the Society of Clinical Injury Lawyers (SCIL) have proposed better process reform – and see how that works before we then look again at the issues of costs;

- The proposed reforms will disproportionately impact poorer injured patients – wealthier clients can afford to "top up" inadequate levels of fixed costs. Given this would disproportionately impact vulnerable groups and those from poorer socio-economic backgrounds it is questionable therefore how this represents "levelling up" in this area of Government reform.

- The consultation is wrong to say that it has no impact upon damages – clients will have to pay the shortfall in their costs, versus the fixed costs proposed, from their damages and so will end up with less damages as a direct result of the proposed reforms; and as above that will impact poorer Claimants more;

- The Equalities Impact assessment which accompanies the Consultation also fails to address these concerns for example the impact on the elderly, disabled or indeed on women specifically in relation to historically reduced levels of claims including for loss of earnings – ie claims from these areas of society are more likely to fall into the fixed costs proposals and so be adversely impacted by them.

- The reforms will absolutely result in reduced access to justice and no costs savings – as specialist clinical negligence solicitors refuse to take on lower value cases subject to fixed costs, there will only be the following losses for the NHS.

    - The lost patient safety learning opportunity from each and every claim – the value of a claim to patient safety learning is not relative to its value.

    - Members of the public will not be able to secure specialist representation in their claims - a recent 'straw poll' of SCIL members found 70% of member firms would be forced to withdraw from working in the field if these proposals were to be introduced and therefore the quality of claims handling will decrease with associated increased costs for NHSR;

    - Specialist clinical negligence solicitors will then not be filtering out 90% of potential claims against the NHS, approximately 100,000 per year as they do currently – the NHSR budget will therefore need to be increased 900% to deal with those litigants in person.

- These proposals make no reference to fixing the most significant cost in clinical negligence cases, namely expert fees – without that, no fixed costs regime in this area of law can work in practice;

- The FRC consultation has been poorly drafted with little understanding of the arena in which it is seeking views. To publish a consultation without any concept of what defines a 'legal disbursement' (given that such a disbursement such an as expert report is fundamental to the claim and those costs can be as high), let alone what the recommended figure is for the same, demonstrates a complete lack of understanding of how claims are constructed and how costs are therefore not in fact being fixed for the overall claim.

- The proposals take no account of the last NHS Resolution annual report which shows Claimant costs and damages are both reducing, and it also makes no mention of the impact of increased collaboration between the parties to clinical negligence litigation since the CJC report was published, including the COVID 19 Clinical Negligence Claims Protocol introduced as a result of cooperation between AvMA, NHSR and SCIL.

In summary therefore, whilst everyone supports a streamlined process for lower value clinical negligence claims, the lack of detail behind the apparent development of these proposals since the publication of the Civil Justice Council report in October 2019, and the large holes in the logic

underpinning them, including a short-sighted focus upon a relatively small amount of cost savings versus the NHS structural reform which is actually needed to drive patient safety across the whole of the NHS, means that the consultation itself is fatally flawed.

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