Written evidence submitted by Wake Smith Solicitors Ltd (NLR0034)

- ***What is the impact of the current cost of litigation on the financial sustainability of the NHS and the provision of patient care?***

The costs of current litigation (damages and Claimant legal costs) are in fact reducing, despite Defendant costs increasing. The costs of litigation against the NHS budget as a percentage is in fact far below the level of indemnity required in other professional sectors.

Further, litigation is a significant driver for patient safety and it is of fundamental importance for the NHS to learn from its mistakes. This has been highlighted in previous research from the CQC and the NAO, which has shown that the organisation is continuing to fail to identify and remedy the underlying causes of errors in medical treatment.

- ***What are the key changes the Government should consider as part of its review of clinical negligence litigation? In particular:***
    - ***What changes should be made to the way that compensation is awarded in clinical negligence claims in order to promote learning and avoid the same problem being repeated elsewhere in the system?***

Our system based on the principle that the wrongdoer pays compensation to put the victim in the same position, so far as money can, that they would have been in but for the negligence is fair and works well. Any legislative reform would require major alterations which go against long-established principals. Better to look at improved training, education and safety within the NHS to prevent the problems happening in the first place. If there is to be tort reform, it would have to be across the whole of the civil justice system requiring primary legislation. Clinical negligence cannot and should not be dealt in isolation.

Further, tort reform is unlikely to produce any overall cost saving. For example, if injured patients are undercompensated, there would be an increased burden on the NHS to make up the difference; and their recovery and return to work would be delayed, so that the Government's tax income would reduce and spending on State benefits payments increased.

    - ***How can clinical negligence processes be simplified so that patients can receive redress more quickly?***

Collaboration is key and we have found that when we can work together (ie as claimant and defendant lawyers have achieved during the covid crisis) then it is a quicker, simpler and more cost effective process for all involved.

    - ***How can collaboration between legal advisors be strengthened to encourage early and constructive engagement between parties?***

Most claimant lawyers are specialists accredited by the AvMA or Law Society panels and work well together under the auspices of SCIL, thus enabling a collaborative approach with NHSR, MDU and MPS and their panel firms. Working together well to ensure continuity is key and this does happen. It also helps the resolution of claims without the need for Court proceedings.

- ***What role could an expanded Early Notification scheme play in improving transparency and efficiency system-wide?***

It could provide a crucial role for both sides with more resources ploughed in. Greater independence and transparency would mean clinicians would not fear reprisals from their employer or regulator and families would be better educated on their position. Many Trusts currently have poor engagement with the system due to lack of training, hence the scheme's credibility is low at present. This also results in families involved not being aware of the scheme or failing to be supported or to gain independent advice.

- ***The Government has reiterated its intention to extend fixed recoverable costs, which limit the amount that can be paid out to meet legal costs, to clinical negligence cases with settlements of less than £25,000. At what level should these fixed recoverable costs be set, and are there any circumstances in which they should not apply to low value clinical negligence cases?***

Patient safety and learning should be the key focus to reduce costs with the patient properly compensated when any harm is caused. The introduction of fixed costs would not achieve this. Research has in any event shown that costs and damages are reducing. We are also aware that SCIL has already responded the Government's FRC proposals and provided the Government with an alternative scheme, offering a solution to lower value claims, without the associated fixing of costs. We believe that a pilot of the SCIL scheme should be implemented over a trial period.

- ***To what extent does the adversarial nature of the current clinical negligence system create a "blame culture" which affects medical advice and decision making?***

Supposition and anecdotal information only says litigation has adversely changed how the NHS is run. It is important that the causes of errors are analysed to improve patient safety, offer chances to improve, resolve claims and compensate patients and reduce the cost of litigation. Patient safety remains key and there is simply no evidence of a compensation culture in the UK. The learning culture does need to change but only to help NHS employees benefit in their roles and maintain and improve patient safety.

Specialist claimant solicitors have a rigorous vetting procedure, so that only a very small percentage of enquiries (about 10% or fewer) become actual clinical negligence claims, after careful investigation, to ensure so far as possible that only meritorious claims are pursued.

- ***How important is it that any clinical negligence system encourages lesson learning and commitment to change as the result of any action?***

Absolutely essential. Clinical negligence continues to play a key part in showing problems in the NHS. Any opportunity to highlight, prevent and learn from mistakes must not be underestimated

or ignored, but, rather, encouraged. Clinicians should feel they can learn from the experience without fear of reprisals or recrimination. The importance of the role of litigation will be apparent from the various recent health scandals, including ***Telford, Patterson and Shipman.***

- ***What changes should be made to clinical negligence claims to enable a move away from a blame culture and towards a learning culture in the NHS?***

  The changes should come from within the NHS, so clinicians do not fear reprisals from their employer or regulator and learn from their mistakes.

- ***How can the Healthcare Safety Investigation Branch work to improve short term responses to patient safety incidences and therefore reduce the number of those who are forced to pursue litigation as a means of obtaining non-financial remedies?***

  If more money was invested in the system, the speed and depth of investigations would improve, allowing greater education about what has happened leading to improved/favourable patient responses.

  From our experience, many patients only litigate as a last resort and much litigation could be avoided, if patients were to receive a full and honest explanation for what went wrong, confirmation of the steps being taken to prevent the same thing from happening to another patient and, where appropriate, a meaningful apology.

- ***What legislative changes would be required to support these changes?***

  What is in place does work adequately and any legislative reform would require major alterations which go against long established principals. Better to look at improved training, education and safety within the NHS to prevent the problems happening in the first place. A safer NHS would obviate the need of further reform.

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